THE NATURE OF THE TRUST BENEFICIARY'S INTEREST

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Introduction

The classic theory of the nature of the trust beneficiary's interest is associated in most common law minds with Maitland. "The *cestui que trust*", he said, during one of his famous lectures,[1] "has rights enforceable against any person who has undertaken the trust, against all who claim through or under [that person] as volunteers (heirs, devisees, personal representatives, donees),

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[1] Equity, revised by J. W. Brunyate (1936), p. 115.

against his creditors, and against those who acquire the thing with notice actual or constructive of the trust". This approach Maitland preferred to what he described as the alternative way of putting the matter:[2] "The *cestui que trust* has rights enforceable against all save a *bona fide* purchaser . . . who for value has obtained a legal right in the thing without notice of the trust express or constructive".

Both of these propositions correctly state the law, but in Maitland's view a significant difference lay between them. The first, which he preferred, not only described the persons against whom the *cestui que trust* might hope to succeed in asserting his rights, it also suggested the historical evolution of those rights. For they were all personal, springing into life when any of the enumerated people interfered with the duty of the trustee towards the *cestui que trust*. However, Maitland added, the benefit of that obligation of the trustee "has been so treated that it has come to look rather like a true proprietary right".[3] In other words, the right of the trust beneficiary is to compel the trustee's proper administration of the trust. It is not to be thought of, thought Maitland, as an ownership of the trust property, and to entertain such thoughts is simply to court fallacies of reasoning.

Such stress on the analytical errors that may arise from talking of equitable ownership of the trust property was no doubt valuable, particularly to the student audience which heard Maitland's lectures, but it led Maitland to an attack on Austin[4] from both of whose views common law courts and theory have suffered ever since. It was Austin who highlighted the distinction between the right *in rem* and the right *in personam,* and who drew a parallel between law and equity.[5] While the legal interest does not pass from vendor to purchaser until conveyance, he said, Equity regards the purchaser from the moment of binding contract as having a right *in rem* or ownership of the object sold. This, Maitland responded, was not merely nonsensical but mischievous. It was abundantly clear, and in view of the very convincing fallacies, never to be forgotten that "equitable estates and interests are not *jura in rem* . . . they are essentially *jura in personam*".[6] So the proposition that the trust beneficiary has "not rights against the world at large, but rights against certain persons"[7] was woven by

[2] *Ibid.* [3] *Ibid.*

[4] *Ibid.*, p. 106 *et seq.* Quoting Austin, Jurisprudence (1873), Vol. 1, p. 388.

[5] *Ibid.*, p. 106. [6] *Ibid.*, p. 107. [7] *Ibid.*

the pen of the great Maitland into the deceiving dichotomy of *iura in rem* and *iura in personam.* The owner, it was contended thereafter, truly has rights *in rem.* The person with any equitable interest (or estate) has only rights against those who own and administer on his behalf. His is essentially a right *in personam.*

Controversy was fanned by Maitland's theory, and the latinisms provided a framework within which took place the struggle of the giants. Indeed, something of a drama even developed, for on one side were ranged Langdell, Ames, Maitland and Holland, and on the other Austin, Salmond, Pomeroy and Scott, to mention but the leading names. This was a matter too in which heat could be generated, something of which can be seen in Maitland's comments earlier given here. But by 1917 when Austin Scott and Harlan Stone renewed the controversy in the pages of the *Columbia Law Review*,[8] though the heat had lessened, the intensity of the debate had not, and the level of the discussion in those two articles, particularly from Stone one would think, has surely never been surpassed.

The Latin terminology excluded, however, the difference between those two protagonists is limited. Scott is concerned to argue that the trust beneficiary has not only a personal right against the trustee, he has also a right against an indeterminate class, with but limited exceptions, that it not interfere with the trust property. The beneficiary, therefore, says Scott, is an equitable owner of the trust property. The trustee is merely a buffer between the beneficiary and the world, carrying some of the rights of ownership in himself, but always on behalf of the beneficiary. Scott does not deny that the beneficiary cannot sue the *bona fide* purchaser, the disseisor or the converter, nor does Stone in reply seek to show that the beneficiary is unable to sue directly any third person whom Scott has said is subject to such action. The dispute is jurisprudential.

Adopting Maitland's and Langdell's view that the beneficiary has a personal right against the trustee, Stone is prepared to concede (and in this he goes further than Maitland) that the beneficiary's right against the world that it shall not interfere with the trustee-beneficiary relationship, itself constitutes property. This right against the world enables the beneficiary to protect his chose in action, enforceable against the trustee, from interference by third parties. The beneficiary, therefore, has a new personal action

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[8] A. W. Scott, The Nature of the Rights of the *Cestui que Trust* (1917), 17 Col. L. Rev. 269 and Harlan F. Stone, *loc. cit., ibid.,* at p. 467.

against every interfering party. But Stone will not concede to Scott that the beneficiary has any proprietary right in the trust property. This, then, is where the difference between the protagonists lies.

Does the trust beneficiary have direct rights against third parties because he has an owner's interest in the trust property, or only because he is asserting against those third parties his right to prevent any person from participating in or furthering any breach of the obligation which the trustee owes the beneficiary?

Let us take the cases of the *bona fide* purchaser, the disseisor and the converter. Scott saw in the non-liability of the *bona fide* purchaser to the beneficiary the sensible Chancery rule that the third party has greater claim in equity to the thing than the beneficiary. The non-liability of the disseisor and the converter to the beneficiary is explained by the fact that Chancery thinks the beneficiary adequately protected by the actions which lie with the trustee. Stone disagreed with this view. The *bona fide* purchaser is not liable, because Chancery always recognised the inconvenient commercial results of upsetting the title of the person who acquires in good faith. The non-liability of the disseisor and the converter to the beneficiary is a product of the principle that where "there is no failure on the part of the trustee to perform his duty as trustee" nor "is there any termination of the legal interest with which he is vested as trustee", the beneficiary cannot intervene and himself sue the third party.[9]

In short, Scott sees the trust beneficiary as having rights in the property of the trust. Stone sees him as having only a right against the trustee, "specifically enforceable with reference to the trust *res*", as he puts it.[10]

Had the dispute lain there, it might well have died there, for if one thing was clear it was that the debate turned largely on the use of terms and a nuance of attitude. It was surely possible to cut through the debate and say simply that the beneficiary owns his interest in the trust property. For the greater part his title is asserted in the availability of an action against the trustee arising out of the obligation of the trustee, and when this action is valueless[11] or irrelevant[12] to the issue in dispute, in a recognition of his constant underlying interest in the trust property, and therefore in the availability of an action whereby to claim the property itself.

[9] *Ibid.*, at p. 480. [10] *Ibid.*, at p. 500.

[11] *E.g.*, the trustee has transferred the trust property to a third party, and is insolvent.

[12] *E.g.*, the question is the right of the beneficiary to a specific item of the trust property.

But the dispute could not lie there. Austin had categorised rights as *in rem* or *in personam,* and thereafter every protagonist had to decide into which pigeon-hole the trust beneficiary's interest was to be placed. The protagonists came to be thought of as supporting either the *in rem* or the *in personam* view, and this simplification of the dispute was the cause of much of the heat. As late as 1917 Stone could say that one of his two main reasons for writing his reply to Scott is the danger that Scott's view will merely destroy "a useful although not altogether scientific generalization expressed by the phrase 'rights *in rem*' ", rather than establish "any substantial identity in character of the rights of the *cestui* with the rights of property hitherto commonly spoken of as 'rights *in rem*' ".[13]

I. *Rights in Rem and in Personam.*

The great weakness of this terminology, as we now recognise, is that in the common law it is by and large inapposite. The Romans spoke of an *actio in rem* as an action to recover specific property, the *actio in personam* as an action against a person. They could do this with ease because Roman ownership was absolute; *dominium* stood in stark contrast to *obligatio.* In developing the terms of rights *in rem* and *in personam,* the civilians also thought of the absolute character of ownership, but from the beginning there was ambiguity as to the meaning of the terms. A right *in rem* can mean a right in the thing itself,[14] a right vested in one man as against others because of his relationship to a thing, or the bundle of rights, normally negative, which a man has because of some legally recognised attribute or possession. It is arguable that these terms had only limited value for the civil lawyer, but in the common law they were capable of actually frustrating constructive thought by leading thinkers into mazes of intellectual aridity. Feudalism in England brought relative ownership; it brought, too, the concept of the use and eventually its modern successor, the trust. At once the terms *in rem* and *in personam* lost lucidity of meaning. Now a man owned his estate, however he protected it from the assaults of others; he owned an abstract entity, and he owned simultaneously with others, all of whom ultimately looked to the same economic asset as the rock of reality upon which their ownerships were based. He could enjoy his estate, manage it, and dispose of it. And

[13] *Loc. cit., supra,* footnote 8, at p. 470.

[14] This is regarded in academic circles as a complete misconception of the term, but it is the usage which courts seem to adopt.

mostly he would protect that ownership by a direct personal action against the trustee.

Austin, however, in the early nineteenth century made too deep a mark on the common lawyer with his reassertion of the old civilian dichotomy. And his analysis of the trust in the language of rights *in rem* and *in personam* stuck fast. Inherently an unsuitable terminology, its proper use was bound to become controversial. Those, who understood the right *in rem* to mean the right to exclude an indeterminate class, had little difficulty in seeing the beneficiary's interest itself and the interest in the trust property as being capable of ownership. Their problem was solely the fact that Equity was said to act *in personam,* and could hardly therefore create rights *in rem.* Those, on the other hand who thought actual possession, or at the least the right to possession, an equally essential attribute of the right *in rem,* were compelled to restrict the use of the term. If the trust beneficiary had a right *in personam* against the trustee to compel proper administration, then the beneficiary had a right *in rem* (a right, that is, against the world except the *bona fide* purchaser) that the *in personam* right be not interfered with. Each violation of the *in rem* right by a third party gave rise to a new *in personam* right in the beneficiary against that party. As Stone puts it, Equity creates "successive rights *in personam* against successive takers of the trust *res* not essentially different in character from the right which is asserted by the beneficiary against the trustee, although they differ from it in their origin". And it creates such rights because "the right *in personam* which the *cestui* has against the trustee . . . is a right *in rem* as against all the world, except the trustee".[15]

It is evident at this point that the latinisms are lending little to the debate. Scott uses right *in rem* to refer to the fact that indeterminate persons are bound by it; Stone uses it to refer to the protection of ownership or possession against indeterminate persons. Stone *is* prepared to say that the bailor has a right *in rem,* but it is not a "typical" right *in rem.*[16] The reader might be forgiven for giving up at this stage. Even if the trust beneficiary owns his interest, and third parties are better compared with the owner of a contractual right as against strangers to the contract, than the bailor and strangers to the bailment, are we not still arguing semantically? Indeed, the latinisms are merely making it more

[15] *Loc. cit., supra,* footnote 8, at pp. 467, 476, 477.
[16] *Ibid.,* at p. 473.

difficult to see what the issue is. Scott and Stone are agreed that the trust beneficiary has *a* right *in rem*.

The truth seems to be that the latinisms forced this debate into false divisions of rights. Neither author considered what the significance must be of the fact that the *sui generis* trust concept essentially divides the attributes of ownership between two persons, the rights of disposition and management being in the trustee, and the right of enjoyment in the beneficiary. It might well be that the beneficiary exercises his right solely through his action against the trustee for proper performance of the trust, but the fact remains that the beneficiary has one of the rights making up the ownership of the trust property. Indeed, the trust property is the whole support and *raison d'être* of this right of enjoyment. Might there not then be circumstances where it is more exact to explore the relationship of the beneficiary to the specific trust property than to be concerned with the action to compel performance of the trust which lies against the trustee?

Scott does pursue this thought some way. For the proposition that the trust beneficiary has an interest in the specific trust property, he finds additional proof in Anglo-American conflict rules. Though a trust of land is created in jurisdiction A, where trusts are recognised, over land situated in jurisdiction B, where trusts are not recognised, these trust terms have no effect in A, indeed are invalid, because in Anglo-American law the trust is governed by the *lex situs*. Therefore, said Scott, the would-be beneficiary's rights are rights in the land, something which is further underlined by the fact that English law permits a third party acquiring the land in jurisdiction B with knowelge of the trust to take free of the trust.[17] Stone countered this argument by saying that the rule referring trusts of foreign land to the governance of the *lex situs*, is a mere yielding "to the requirements of expediency or public policy".[18] Within the jurisdiction of the forum of creation of the trust, wherever the trust property happens to be, Anglo-American courts will allow the trust obligations to be enforced on the simple basis that persons subject to those obligations are present within the forum.[19] And they have done this to a degree which has invited criticism. The third party taking with notice, and the heir of the trustee, have both in this way been made subject to action by the trust beneficiary. What better proof could there be, says Stone, of

[17] *Ibid*, at pp. 287-289. [18] *Ibid.*, at p. 497.
[19] *Penn* v. *Lord Baltimore* (1750), 1 Ves. Sen. 444, 27 E. R. 1132.

the *in personam* nature of the beneficiary's rights? [20]

However, this still harps on the people who are subject to the beneficiary's action. Neither protagonist considered the position where the beneficiary claims not against others (the trustee, those entitled under him, or third parties), but directly asserts rights in the specific character of the trust property. He will do this, of course, when he claims to be entitled, prior to distribution, to the actual property, or a specific segment thereof. He may be claiming, for example, that he is not called upon to pay succession duty in the jurisdiction where the trust is being administered, because the specific trust property in which he, as a beneficiary, has an interest, lies outside the jurisdiction. Or again he may be claiming that double income tax relief on dividends received by the trustees is in fact his relief and not the trustees, since the trustees merely hold the shares and receive the dividends on his behalf. Not only did Stone and Scott not consider these problems, but it is surely significant that neither appears to have thought of them. For these are problems which directly provoke discussion not of the persons against whom the trust beneficiary asserts his interest, but of what it means to say that the beneficiary has a right of enjoyment, now or in the future, in the specific and ascertained trust property.

II. *The Baker* v. *Archer-Shee Controversy.*

The *in rem-in personam* controversy has run deep into our treatises on the law of trusts. Most writers feel obligated to take up a position, as one must continually regret, and the distinctly popular view is that Maitland was right, the trust beneficiary's interest *is* a right *in personam*. When *Baker* v. *Archer-Shee*[21] was decided the immediate reaction was one of amazement. Had the House of Lords not cut away the whole base of the trust, namely, that the beneficiary has no right to the specific trust property, but only to a due administration of the trust by the trustees? The House had decided that where dividends were paid by companies to the trustee of stocks, and the trustee deducted his charges and local tax, the life tenant's liability to United Kingdom income tax arose not only upon the sums then paid by the trustee to the life tenant, but upon the gross dividend payments paid to the trustee. Profes-

[20] The writer finds both these arguments unconvincing. The *lex situs* is clearly a product of expediency, and the *Penn* v. *Lord Baltimore* jurisdiction over trustees a product of Equity's strict enforcement of fiduciary duties.

[21] [1927] A.C. 844.

sor Hanbury[22] described the decision "as a contradiction of clear equitable principle", as a "menace" which arose only from "looseness of language and forgetfulness of 'Maitland's axiom' " unless the case was to be explained as solely concerned with income tax law. He "fervently hoped" that the decision would be "confined within narrow limits, and not [be] allowed to upset well-established principles of equity". With that view others have entirely agreed.[23]

In the present writer's view, however, this decision has been largely misunderstood just because the nature of the beneficiary's interest has been falsified by the use since Austin of the *in rem-in personam* dichotomy. And the terms "real" and "personal", as Hohfeld[24] warned us, have only added to the confusion, ambiguous as they are, and suggesting as they do that we are concerned with different kinds of property. Real claims and personal claims become respectively claims to land and chattels, or claims literally to property or against persons. Moreover, there has been the confusion between rights, and remedies to vindicate those rights, a confusion ably assisted by the no-doubt true maxim, *ubi remedium, ubi ius.*[25]

The object of this article is to argue that had juristic discussion been less concerned with the latinisms, and more concerned with the rights that make up ownership in any legal system possessing the trust concept, *Baker* v. *Archer-Shee* would have appeared as a perfectly logical proposition, even if it was not the only possible solution to the problem.[26]

Indeed, there has been examination of what this type of case may imply. In 1954 Dr. V. Korah suggested[27] that, though the trust beneficiary has no right to anything other than due administration of the trust, the courts will "often attach [his] interest to specific trust assets" where "problems of social and economic importance are involved". The difficulty, of course, is to distinguish between situations involving the "mechanical side of the trust" and those involving "social and economic importance".[28] The authori-

[22] Essays in Equity (1934), "A Periodical Menace to Equitable Principles", pp. 16-22.

[23] G. W. Keeton, Law of Trusts (8th ed., 1963), p. 288. For others the case is something of an embarrassment: see Nathan's Equity Through The Cases, by O. R. Marshall (4th ed., 1961), p. 49, footnote 2.

[24] Fundamental Legal Conceptions (1923), Ed. W. W. Cook, p. 67 *et seq.*

[25] This whole subject is exhaustively examined by Hohfeld, *op. cit., ibid.*

[26] The court could have held that the right of enjoyment was in the income paid by the trustee to the life tenant.

[27] The Right of the Beneficiary to Specific Items of the Trust Fund (1954), 32 Can. Bar Rev. 520.

[28] *Ibid.*, at pp. 521, 544.

ties on either side of the line, though interestingly grouped by Dr. Korah, seem often haphazard and unpredictable.

The problem really starts with the apposition of the right to due administration, and the right to specific trust assets. The *object* of an action to secure proper administration is to secure to the plaintiff the enjoyment of property. What is the plaintiff proprietarily entitled to which enables him to sue the trustee? It may be to the enjoyment of a share in a fund; it may be to the enjoyment of a specific asset. It does not seem helpful to say that the trust beneficiary's right is to a procedure, exceptionally to the specific trust asset. The point of referring to the beneficiary's interest as a chose in action may be meaningful if it expresses the existence of a number of beneficiaries with successive or simultaneous interests in that trust asset, or the freedom of the trustee to administer the trust asset. It will not be meaningful if the question touches not those matters, but whether the beneficiary is put to his election or he has a taxable or dutiable interest in the specific trust asset.

Prior to the recent years of heavy taxation, however, the trust problems which then arose did not effectively draw attention to the situation where the trust beneficiary's right of enjoyment is in a *specific* trust asset.[29] But with taxation came *Baker* v. *Archer-Shee*, and this case provides a classic example of just such a situation. There are ascertained and settled investments making up a trust fund, and there is a single life tenant. The question is as to the interest of the life tenant at a particular point of time in the dividends of those investments. The equitable estate concept is serving no function at this single point of time; it is juristic lumber. There is (1) no class or number of beneficiaries simultaneously possessing a similar right of enjoyment in the trust property;[30] there is (2) no uncertainty as to what specific assets constitute trust assets;[31] there is (3) no question as to the period of time during which there is to be a right of enjoyment, now or in the future.[32] Why not ignore the equitable estate, and recognise the fact that this beneficiary's right of enjoyment is actually in the specific dividends?

This does no violence to equitable principles. The genius of the use and of the trust was that it contemplated a separation of the beneficial interest from the dispositive and managerial interests.

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[29] Occasional decisions, most often interpreting statutes, did occur, but their significance only later appeared.

[30] *E.g.*, in the income.

[31] As in the case of an as yet unadministered estate.

[32] *E.g.*, the quantum of immediate or remainder interests. So there is no interference with the trustees' power to vary the investments.

And, since the value of property lies in its enjoyability, it was sheer genius of Equity, no less, to see this beneficial interest as an equitable estate, like the legal estate, capable of disposition. For, having conceived of an abstract entity to express the beneficial interest, Equity was now able to permit successive persons to be entitled simultaneously to successive rights of enjoyment in the trust assets, and it could allow a class of persons to share in the same right of enjoyment.[33] Meanwhile, the trustee was free to exercise his rights of disposition and management by varying and changing the form of the trust assets, unhampered by the dealings with, or number of persons interested in, the beneficial interest.

What violence did the majority in *Baker* v. *Archer-Shee* do to this conception? The issue did not concern a dispute between life tenant and remainderman, the duties of the trustee, or the rights and duties of the life tenant vis-à-vis third parties. It raised a type of question, perhaps the unusual question, where it was arguably mere pedantry to bar the Commissioner of Taxes with the equitable estate of the life tenant. One says arguably, because it is just possible to say that, though the equitable estate served no function in the circumstances, nevertheless the taxpayor was entitled to take advantage of its presence. The writer for his part, however, would suggest that that is an unattractive argument since it turns the creative genius of the trust into an instrument of unmeritorious frustration. Still, either argument (that the equitable estate machinery was irrelevant or that its existence was abused by the House) appears logical and defensible. That is the point of this submission.

All this latent dislike of the popular latinisms and the widespread devotion to the "Maitland axiom" was fanned in the writer's mind by the decisions of the High Court of Australia[34] and the Judicial Committee[35] in *The Commissioner of Stamp Duties* v. *Livingston*. There, though the case was not on all fours with *Baker's* case, all these matters were raised again. And what may be particularly interesting is that the judgment of Kitto J. in the High Court seems to lend weight to the thesis here put forward. Moreover, the learned judge thought his reasoning supported by the precedents. It would be a considerable loss if the later judgment of the Judicial Committee, though finding for the taxpayor as had Kitto J., were to eclipse his Honour's argument.

The remainder of this article therefore turns from the frus-

[33] Moreover, modes of creation and cessation of the equitable estate were possible, which common law rules frowned upon.

[34] (1960), 107 C. L. R. 411. [35] [1965] A.C. 694.

trating academic debate to an examination, culminating in the *Livingston* case, of how the courts have handled this thorny problem of the beneficiary's right to specific trust assets. An attempt will also be made to summarize the present state of the law, and to suggest an approach to this problem for the future.

III. *The Baker* v. *Archer-Shee Principle in the Courts.*

1. *The in rem-in personam dispute.*

As Kitto J. pointed out in *Livingston* v. *The Commissioner of Stamp Duties*,[36] and as the present writer would respectfully agree, "more hindrance than help is likely to come from an attempt to classify [the residuary legatee's rights in an unadministered estate] according to Austinian terminology as rights *in personam* or rights *in rem*".[37] The learned judge then went on to mention the controversy as to the nature of the trust beneficiary's rights, and concluded with an adoption of Turner's well-known condemnation in his *Equity of Redemption* of the whole terminological debate.[38]

> It is a moot question whether the whole discussion raised by these arbitrary classifications borrowed from Roman law and distorted to fit it with new facts is not a mere academical tourney with no real bearing upon the practice of the law, and, being faulty in hypothesis and unsatisfactory in result, would be better abandoned altogether.

This is the first occasion, at least as far as the present writer's information goes, upon which the *in rem-in personam* controversy has been so soundly condemned in the common law courts, and here at last we surely have sufficiently strong judicial authority for the demise of the controversy even in our law teaching texts.

It was Kitto J.'s view that "for the purpose of solving a concrete legal problem" the controversy was a hindrance, and it is in fact singularly significant that, though Kitto J. is the first judge to condemn the controversy outright, this *in rem-in personam* terminology has in fact rarely attracted judicial attention even when it might have been thought to be helpful. The courts have nearly always been content to examine the rights of the trust beneficiary in a pragmatic manner, very often with an eye on the issue between the parties and an intention that the merits of the case shall not be lost in theoretical speculation on the effect of the distinction between legal and equitable estates.

Lord Haldane is the rare judicial exception. In *Attenborough* v. *Solomon*[39] where the question was whether a fraudulent executor

[36] *Supra*, footnote 34.
[37] *Ibid.*, at p. 448.
[38] (1931), p. 152.
[39] [1913] A.C. 76.

was was still acting as an executor when he wrongly pledged with the appellants an asset from the deceased's estate, Lord Haldane distinguished in this way between the position of the executor who is still administering the estate, and one who now acts as trustee to an administered estate. Once the administration is complete, he said, the executors *"right in rem,* their title of property [has] been transformed into a right *in personam,*—a right to get the property back by proper proceedings against those in whom the property should be vested" [40] if it should appear the property is needed to pay debts otherwise unprovided for. But what his Lordship meant by these terms is doubtful. Is this right *in rem* a right to the thing itself or a right to exclude others from it? And, though the right *in personam* is a "right to get the property back", is it a personal action only because the legal title is now in the assignee from the executors? [41]

Somewhat the same difficulties have also arisen from the employment of these terms in the tracing cases, notably *Sinclair* v. *Brougham* [42] and *Re Diplock.* [43] Both those cases are concerned to establish that the trust beneficiary, like all beneficiaries of a fiduciary relationship, has "a right of property recognised by equity". In *Re Diplock* Evershed M.R. talks of "the beneficial owner of the trust money" and "the equitable owner of the trust money". [44] But again it is Lord Haldane in *Sinclair* v. *Brougham* who puts this eminently understandable proposition into the language of rights *in rem* and *in personam.* The claim of the bank depositors against the Society could not "be *in personam* and must be *in rem,* a claim to follow and recover property with which, in equity at all events, they have never really parted". [45] A man can follow the property, "but only so long as the relation of debtor and creditor has not superseded the right *in rem*". [46] Unfortunately, as the writer would think, Lord Haldane's words were adopted in *Re Diplock,* [47] and note again that these terms are merely being used to distinguish the right of the owner to trace, and the right of the one-time owner, whose asset can no longer be traced, to damages and compensation against the wrongdoer. For the questionable advantage of this distinction we have the confusion involved in the proposition that the right to follow and recover property, "with which, in equity at

[40] *Ibid.,* at p. 85.
[41] See Hohfeld, *op. cit.,* footnote 24, p. 84. Compare the tracing action, an action "to get the property back", commonly described as a right *in rem.*
[42] [1914] A.C. 398.
[43] [1948] Ch. 465 (C.A.).
[44] *Ibid.,* at p. 547.
[45] *Supra,* footnote 42, at p. 418.
[46] *Ibid.,* at p. 419.
[47] *Supra,* footnote 43, at p. 540.

all events, [the depositors] had never really parted",[48] is a right *in rem.*

It was Lord Dunedin, significantly a Scottish lawyer, who was careful to speak in *Sinclair* v. *Brougham*[49] of a *ius in re.* And, while commenting on Lord Dunedin's judgment, Lord Evershed M.R. himself employed this term in *Re Diplock,*[50] to mean, it would seem, what Lord Haldane had meant by a right *in rem.* But no distinction is drawn in *Re Diplock* between these two terms. So that, if Hohfeld's criticism of this loose employment of latinisms is justified,[51] and most analysts would say that it is, we are left to conclude that the terms added nothing to the reasoning of the tracing cases, and therefore could have been, and can be, ignored.

In the outcome few courts have bothered with the latinisms and those that have ventured a foot have hardly earned academic honours. But something more significant appears. The constant academic reiteration of the Maitland axiom as to the nature of the trust beneficiary's interest has given the courts no help in those cases where the degree of interest in the specific trust assets is the very issue at stake. Indeed, the more theoretically versed among the judiciary have suffered the disadvantage of seeing all too readily the line between traditional Maitland doctrine and heresy. Maitland has mesmerised us with his brilliance of theory and lucidity, and in consequence learned comment has given little or no guidance on when it *might* be legitimate to go behind the trust and observe the economic realities.[52] The courts everywhere have had to make their own running in dealing with this issue, and the account which follows might well seem a monument to both judicial achievement and yet discord. Here is an issue on the borders of traditional doctrine and heresy. Courts will often be divided, and opinions vary. There is the discord. The more pragmatic and the academically inclined will sometimes offend each other, but through the whole judicial debate runs that practical common sense and ingenuity which has always been the hallmark of the property lawyer. There is the achievement.

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[48] *Ibid.*
[49] *Supra,* footnote 42, at p. 431 *et seq.*
[50] *Supra,* footnote 43, at pp. 541, 542.
[51] *Op. cit.,* footnote 24, p. 67 *et seq.*
[52] Maitland lectured at the end of the nineteenth century when the trust had finally taken shape as an operative machinery, and before the revenue cases were to make their impact upon trust theory. It is difficult to believe that he would automatically have dismissed the revenue cases as heresy, had the phenomenon occurred in his time.

2. *The character of the cases which are concerned with the nature of the beneficiary's interest.*

The first striking feature of these cases across the common law and South African jurisdictions is that nearly every one is concerned not with the operation and indeed *raison d'être* of the trust concept, that is, the means of permitting several persons to have separate and presently existing interests in the same property item, but with the power of the Crown to levy taxes and duties upon the beneficial owner because of that ownership. Succession duty, legacy duty, gift duty, estate duty, income tax and surtax liability provide the "concrete legal problem", as Kitto J. puts it.[53] Usually the trust beneficiary is leaning upon the trust machinery, that is, the equitable nature of his interest, in order to avoid the liability, but at other times it is the Crown which is doing this in order to impose liability. The problem may therefore take the form of an enquiry into where the beneficial interest is located as between two jurisdictions, or, as another example, the question is whether the prospective tax or duty payor is entitled to the benefit of a statutory exemption from liability[54] or to the payment of tax or duty at a lower rate.[55]

The second feature is that, despite occasional dicta to the effect that these considerations matter, the courts have not been inhibited by the nature of the particular trust or by the complexity of the beneficial interests arising under it, from describing the beneficiary's interest as an interest in specific property. Trusts of as yet unascertained property, trusts of specific investments with or without a power in the trustees to vary the investments, and trusts for sale of realty or of mixed realty and personalty have come under review. The courts have also applied the description of interest in specific property to private trusts, arising testamentarily or *inter vivos,* and to commercial trusts. There have been dicta to the effect that where the beneficial interests include for example, annuities, such annuities cannot be described as interests in specific property. But when the matter was an issue before the courts the dicta were ignored. Trusts involving a single life tenancy with remainders over have presented little problem, but trusts with quite sophisticated terms have proved no barrier to the decision that

[53] *Commissioner of Stamp Duties* v. *Livingston, supra,* footnote 34, at p. 448.

[54] On the basis that the dividends received by the trustee have already been taxed in the payor company's hands.

[55] Quick succession relief on succession duty; profits earned and unearned.

interests arising under those trusts are interests in specific property. An example would be trust terms setting up two or more joint life tenancies in income, with arrangements as to the paying over of shares in the capital.

Since all duties and taxation impositions arise by statute, however, the explanation of these cases might well be thought to lie in the proper construction of the several statutes. Indeed, some courts have said that particular results follow *inter alia* from the interpretation of the relevant Act. But very often such a comment is not justified in view of the authority used by the particular court in order to arrive at its result, the precedent in question having laid down a general rule or at least having concerned a different statute and different language. And on occasion it is evident that this judicial comment is made in some sort of apologia for what the court feels to be a departure from legal principle.

However, these comments are not alone. As we have said, other cases have attempted to lay down general rules, and it is this very degree of variation in the significance attached by the courts to the language of specific statutes that opens up then this whole enquiry. Is there any general rule determining when a court may lift the equitable veil of beneficial ownership, and determine what specific property is the subject-matter of that ownership? Does the *Baker* v. *Archer-Shee* principle constitute a general rule?

3. *"Income derived from . . .".*

One of the most curious aspects of the storm which arose around the Lords' decision in *Baker* v. *Archer-Shee*[56] is that the result had already been foreshadowed by the 1914 decision of the Privy Council in *Syme* v. *Commissioner of Taxes,*[57] where the Judicial Committee took an equally "realistic" view of the beneficial ownership. The significance of this case must have been overlooked by the critics of *Baker,* for it is not mentioned in any of the adverse comments on *Baker.*

Syme v. *Commissioner of Taxes,* moreover, is but the highlight of a consistent line of Commonwealth and South African authority, stretching from the year 1897 until the most recent Canadian decision in 1960, which holds that where a taxing statute refers to "income derived from" property, the interposition of trustees between the property and the trust beneficiaries does not prevent the beneficiaries from saying that their income is still derived from the

[56] *Supra,* footnote 21.

[57] [1914] A.C. 1013.

property. This reasoning has been applied where the property took the form of dividends arising out of stock held by the trustees, and where it comprised rents from real estate held by the trustees. It has also been applied where the income had to arise from personal exertion, and it was the trustees, not the beneficiaries, who were in fact carrying on the business in question.

Of course, the retort is possible that "derived from" are words which do not require the courts to distinguish between the legal interest of the trustees, and the equitable interest of the beneficiaries. Where payments to trust beneficiaries are only possible because of, and are obviously consequent upon, receipt of monies by the trustees, it is arguable that the monies received by the beneficiaries are clearly derived from the monies paid to the trustees. These cases are interesting, however, because this argument very rarely appeals to the courts. From the beginning in 1897 the courts were prepared to see this issue as one involving a decision on the nature of the beneficiaries' rights. Nor have the courts been content to screen their decisions on this basic issue behind the qualification that the particular result follows only from a proper interpretation of the relevant Act creating the financial liability. Of course, the courts have paid attention to the language of the relevant Act, and to its policy, and some courts are more hesitant than others, but running through all the cases, particularly the litigation which reached the Privy Council as *Syme* v. *Commissioner of Taxes,* is the thread of the basic issue.

In 1897 Hood J. had to decide *In the Matter of the "Income Tax Acts 1895 and 1896"*[58] whether an out-of-State trust beneficiary was entitled to the benefit of a statutory provision which exempted from liability "all income derived or received from interest accruing to any person not resident in Victoria". The trust property comprised Victorian stock, and the Victoria resident trustee claimed the relief with the argument that he was only an agent for the beneficiary. Hood J. accepted the contention that this trustee's position was indistinguishable from that of an agent. "The income is the income of the principal, and the principal is not resident in Victoria."[59] However, there is some justification for the blurring of trusteeship and agency in this case; it appears that the terms of the trust were of the simplest kind, to A in trust for B. But Hood J. seems to attach little importance to this fact. The income was the trust beneficiary's.

[58] (1897), 22 V.L.R. 539.

[59] *Ibid.,* at p. 541.

In *Re The Income Tax Acts (No. 1),*[60] however, the beneficiaries lost their action. The full Supreme Court of Victoria decided that, where the administrator carried on a business with the consent of the beneficiaries, tax was payable on the profits as income derived from property, not from personal exertion. Indeed, the court was unable to see what justification the Commissioner had, first, for treating the administrator as if he were merely an agent for the next of kin, and therefore, secondly, for assessing tax at the "personal exertion" rate. The judgment is short, and no reasons are given, but this is the traditional analysis of the trust situation, and it is the more significant that only a year later the same court, differently constituted but for one member,[61] adopted Hood J.'s reasoning of 1897. The testamentary trust in *Re The Income Tax Acts (No. 2)*[62] was for conversion and investment, the proceeds to provide an annuity for the widow, maintenance payments for the children out of the surplus income, the remaining income to be accumulated until a distribution date when the children were to receive shares of capital. The Commissioner claimed that tax-exempt dividends paid to the trustee lost their character once they were paid to him and that the source from which the annuity was paid and from which it was derived, could not be looked at. He therefore made a demand upon the trustee for a tax payment calculated on the basis that the annuity and the surplus income payments and accumulation were personal incomes of the trust beneficiaries. The trustee argued that the beneficiaries would not have paid tax if the dividends had been paid direct to them by the company, and that it made no difference "that the money had passed through the hands of a trustee, . . . that did not alter its character or its taxability".[63]

The Supreme Court found for the trustee. A'Beckett and Hood JJ. had no doubt. "The dividends are received in the first instance by the trustee", A'Beckett J. said, "but he has no beneficial interest in them; he has merely to deal with them for the purpose of paying them over to other people".[64] And Hood J. pointed out that the tax was personal, imposed upon "the income derived by any person".[65] "It is therefore inaccurate, in this connection, to speak of the income of an estate, or of the trustee thereof, because the income belongs to the beneficiaries . . . . The income is that of the beneficiaries. It is derived from dividends."[66] Only the third

[60] (1902), 28 V.L.R. 102.
[61] A'Beckett J.
[62] (1903), 29 V.L.R. 525.
[63] *Ibid.*, at p. 528.
[64] *Ibid.*
[65] Act No. 1374, ss. 5 and 8.
[66] *Supra,* footnote 62, at p. 531.

member of the court, Hodges J., had any doubt, though he would not carry it to a dissent. The fact remained, he thought, that the dividends were paid to the trustee, and the trustee had to pay so much to each beneficiary whether the monies were dividends or whatever they were.

But, even if the dividends were the beneficiaries' property, this did not get the trustee's argument home. Were not the dividends *part only* of the funds, out of which the trustee made payments to the beneficiaries? A'Beckett J. solved this problem mathematically; the trustee merely worked out the proportion of the dividends to the total income in his hands, and he then calculated how much in the pound of net income should be attributed to the dividend source. And, if that difficulty could be solved, was this not a complex trust (not only for conversion, but with a number of differently entitled beneficiaries), unlike the 1897 case? This was no problem, said Hood J., the Crown had received its tax on the dividends from the company, and the beneficiaries could work out among themselves in what proportion the benefit of that was to be enjoyed.

The importance of this case is that, while the court was concerned with the policy of the Act, namely, as the court discerned it, to prevent double taxation, and discussed the central issue in terms of the language of the Act, nevertheless it is a judicial assumption that in any event no difficulty is provided by the existence of a trust. So far is this true that the number of the beneficiaries and the diversity of their interests are no barrier to the assumption.

The die was therefore cast when in 1909 the full Supreme Court of Victoria came to consider *Re Income Tax Acts (No. 1)*.[67] This time, as in the case of 1902, the trustees were carrying on a business, an asset of the deceased's estate, and the trust beneficiaries claimed that they were entitled to be charged only the lower rate of tax, in view of the fact that their income arose from "personal exertion". The trust property, however, was much more extensive and diverse than that of the 1902 trust. The executors and trustees were in fact carrying on a number of businesses, some of which were of varying profitability, and one of which, a newspaper business, was highly profitable. They also held the property subject to a trust for sale[68] with power to postpone at their absolute discretion. The terms, too, were complex. There was provision for

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[67] [1909] V.L.R. 584.

[68] With the exception of the highly profitable newspaper business.

several annuities, the remaining income was to be divided between the five sons equally (children representing any deceased son), and on the death of the surviving son the newspaper business was to be sold and the whole assets divided between the grandchildren *per stirpes*.

The outcome was a clear decision for the beneficiaries, the Chief Justice giving an unanimous judgment. In the words of Madden C.J., the income beneficiaries,[69]

> . . . say, "We are the owners of this property, which has been given to us in the shares assigned; true, the executors have to collect it, but none the less the property is ours, and there is nothing to show the Legislature intended to differentiate between equitable owners and others". We think that the correct view and the proper view to take of the matter in a case like the present one is that if the return accrues to one or more persons by virtue of a legal or equitable title, and that return can be definitely traced to the business whence it arose, that return is income derived from business . . . .

So the profits of each of the businesses were income derived from personal exertion, though they passed through trustees' hands. The 1902 case was held to be inexplicable, shortly reported, probably decided on its facts, and was not followed. But, most important, the Supreme Court had now quite clearly decided that whatever the source of income, that income in no way changed its character in passing through trustees' hands. Moreover, provided the "proportion" test could be satisfied, there was no difficulty in going behind not only a trust for sale, but a trust comprising a varied number and type of beneficiaries. The dividends, the business, and so on, are owned, it is decided, by the trust beneficiaries.

When this case reached the High Court of Australia, therefore, it did so with this very clear line of Supreme Court of Victoria decisions arguing that trusteeship could be ignored. Yet the High Court overruled the State court, and held in as classic an adoption of the Maitland view as its advocates could hope to meet that trusteeship completely changed the character of property passing from a third party through trustees to trust beneficiaries.

The decision in *Webb* v. *Syme*[70] is based on a twin ratio. Griffiths C.J. thought the case was decided by the Maitland principle of trusteeship, Barton J. considered that the appeal must succeed, both on a correct interpretation of the relevant Acts and on the separate point of the principle of trusteeship, and O'Connor J. solely considered the proper interpretation of the Acts, finding

[69] *Supra*, footnote 67, at p. 590. [70] (1910), 10 C.L.R. 482.

that sufficient. Isaacs J. dissented with an argument which rejected that intervening trusteeship made any difference at all. With the majority judgments, it is important to notice that the principle of trusteeship was not only a ratio, but that it is separately considered from the interpretation point. Moreover, Griffiths C.J. and Barton J. do not equivocate in the least in their decision on the trusteeship point. These are the words of Griffiths C.J., when he is asking himself what the property was from which the taxable income was derived.[71]

> In other words, what are the rights of the beneficiaries under the testator's will with respect to his residuary estate? For those rights are their property, and their property consists of those rights, and nothing else. I think it is clear that they are not entitled to a penny of the money received by the trustees of the will *ipso instanti* of the receipt, and that their property consists in a right to have an account of the annual receipts and disbursements of the trustees of the will, and to claim their share of the income of the residuary estate ascertained by such account. This, it appears to me, is the *fons proxima* to which regard must be had.

Nor in Griffiths C.J.'s view was it possible to talk of tracing the beneficiaries' income back to the source, the payment by the original payor. It was impossible where funds were mixed in the trustees' hands to make any division of sources for the purposes of the income tax Acts; indeed, only where a beneficiary was in actual and exclusive possession for his sole benefit of any part of the trust estate could the situation be otherwise. Barton J. associated himself with all of this and went on to dismiss the agency parallel which had convinced earlier courts in Victoria. "It is the trustees who are to conduct the businesses, but they are not the agents of the beneficiaries, who cannot as such meddle in the management of the trust." [72]

Now this was a case where the Crown claim for tax was solely for the year 1908 and it was assumed by both sides[73] that, though administration may not have been technically complete, there were no prior claims to be made upon the estate for that year. The money coming into the trustees' hands, in other words, was *in toto* available for distribution among the beneficiaries. In effect, therefore, this is an authority on the rights of a beneficiary under a trust, whether that trust arise from testament or *inter vivos*. As this is so, it is most interesting, then, that Griffiths C.J. and Barton

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[71] *Ibid*, at pp. 493, 494. [72] *Ibid.*, at p. 503.
[73] See Isaacs J.'s judgment, *ibid.*, at p. 520.

J. both thought the principle of *Sudeley* v. *A.G.*[74] applicable to the case, though that leading authority is solely concerned with unadministered estates. In view of the assumption that there were no administration charges for the year 1908, the two judges must either have been saying that that was of no significance, the estate was still being administered, or that the principle of *Sudely* v. *A.G.* applies to all trusts. Since they stress the mixed nature of the trust fund and the right of trust beneficiaries merely to have an account from their trustees, their meaning must have been the latter.[75]

In *Syme* v. *Commissioner of Taxes*[76] this "Maitland axiom" decision of the High Court was reversed by the Privy Council, which entirely agreed with the decision of the Supreme Court of Victoria. That is the extent of the significance of the case.

The Board saw the facts as presenting a dilemma. The Acts in the Board's view did not contemplate double taxation, that is, the taxing of the business profits coming to the trustees, and then the taxing of the incomes paid by the trustees to the beneficiaries. Yet to permit both trustees and beneficiaries to pay tax on a "personal exertion" basis was to overlook the fact that in some circumstances the trustees were required by the Acts to pay tax, and in other circumstances the beneficiaries were to pay it. Clearly, if the present trustees were right, they could always throw liability for income tax on to the beneficiaries.

The way out of the dilemma, thought the Board, was to consider the nature of the beneficiaries' rights. "When a trade is carried on by trustees", said Lord Sumner, "there is no doubt that they carry it on for the beneficiaries and not for themselves, save in so far as their remuneration is provided for by law or by the trust deed".[77] It might be that the trustees were carrying on several businesses, and that there were losses to be set against profits, bills to be discharged, and a balance to be struck, but "all this is mere bookkeeping". There might be a complicated set of accounts to be kept, but the trustees kept books, they could trace back sums to the businesses from which they had received them. "What was the

[74] [1897] A.C. 11. That pending completion of administration the equitable interest of the residuary legatee is a right of action against the administrators to compel a proper administration. The interest is not a right in any property of the estate. See *infra*.

[75] Barton J. also noted, *supra*, footnote 70, at p. 503 that *Sudeley* v. *A.G.* had been followed in *Re Smyth*, [1898] 1 Ch. 89, and in *A.G.* v. *Johnson*, [1907] 2 K.B. 885 (both of these are trust cases not apparently involving unadministered estate problems).

[76] *Supra*, footnote 57. [77] *Ibid.*, at p. 1018.

produce of personal exertion in the trustees' hands till they part with it does not, in the instant of transfer, suffer a change, and become the produce of property and not of the personal exertion, as it passes to the hands of the cestui que trust."[78] The Act said nothing to prevent the Board from coming to this conclusion, and so the High Court was reversed.

The view of the Privy Council in *Syme* v. *Commissioner of Taxes* has since been followed in Canada, Australia and South Africa.[79] In the seven cases known to the present writer there has been only one dissenting judgment. That was in *Re Watkins and City of Toronto,*[80] in the Ontario Supreme Court Appellate Division, where Riddell J. took the classic Maitland view of the nature of the trust. In each of these cases the view has succeeded that the intervention of a trust makes no difference. And there have been a variety of factual situations. Six out of the seven cases have concerned family testamentary trusts, but in *C.P.R.* v. *Provincial Treasurer of Manitoba*[81] the Privy Council decision was applied to commercial funds held by and for the benefit of the Canadian Pacific Railway Company. Those funds were made up of moneys paid into the funds by third parties as a result of Canadian Pacific Railway's operating steamship lines. As the Manitoba Act in question exempted from income tax liability money's derived from such a source, did that exemption cover income made by the funds from the investment of moneys paid in? The answer was, yes. Secondly, the cases reveal a variety of kinds of payment to the testamentary trustees. Real estate rents, interest on government bonds, dividends on shares, business carried on; each is represented.

In three[82] of these cases it is also repeated that the trustee is merely an agent, a conduit pipe for the passage of the rents, dividends, and so on, from the original payor to the trust beneficiaries. And in *Armstrong* v. *Commission for Inland Revenue*[83] Stratford C.J. for the South African Supreme Court took the view that the role of the trustee remains that of agency even if there are more beneficiaries than one. If a sole life tenant can succeed, he says, so must several life tenants.

[78] *Ibid.*, at p. 1021.

[79] The present writer knows of no case which has refused to follow *Syme* v. *Commissioner of Taxes.*

[80] (1923), 54 O.L.R. 136. [81] [1953] 4 D. L. R. 233.

[82] *Re Income Tax Acts, 1924-1928 (No. 2),* [1929] Q.S.R. 276; *Armstrong* v. *Commissioner for Inland Revenue* (1938), 10 S.A.T.C. 1; *Re Kemp,* [1948] 1 D.L.R. 65 (Ex. Ct.).

[83] *Ibid.*

Strong support for the ratio principle, adopted by the Privy Council in *Syme* v. *Commissioner of Taxes*, is to be found in several of these cases,[84] and none is doubtful of the principle's validity. Moreover, while Cameron D.J. explicitly reserved the point in the Canadian case of *Gilhooly* v. *M.N.R.*,[85] the South African Supreme Court in *Armstrong's* case had no doubt that though unlike the life tenant, the annuitant was merely entitled to a set income figure, the annuitant equally "derived" his income from the rents, or dividends, and so on. Nor have the courts been unwilling to follow *Syme's* case when confronted with the fact that the trustee did not *have* to make payments out of tax-exempt income, or only in part made such payments out of the tax-exempt income.

The final question, however, must be this; have these later cases considered that the words "derived from" are so comprehensive that whether or not moneys change in character in passing through trustees' hands, that point is irrelevant? Or have they considered it a *principle* that no such change of character takes place, a principle which the words "derived from" do not affect?

Only Middleton J. in *Re Watkins and City of Toronto*[86] based his decision on the view that the words were so wide that they did not raise the question of change of character. Thorson J. in *Re Kemp*[87] took the same argument, but whereas Middleton J. considered *obiter* that a change of character did take place, Thorson J. thought that it did not. So Middleton J. remains the odd man out. The remaining learned judges, especially Meredith C.J.C.P. in *Re Watkins* and Thurlow J. in *Quinn* v. *M.N.R.*,[88] were quite definite that in principle no change of character takes place, and that it is not legitimate to read words into the statute in question that are not there. The words are "derived from" rents, dividends, and so on. That does not mean "derived from . . . *by the trustees*". It is not necessary to determine that the meaning is "derived from (rents, dividends, etc.) *by the taxpayer*", that is the trust beneficiary, in order to get the beneficiary within the statute. Stratford C.J. went so far in the *Armstrong*[89] case as to concede that the trust beneficiary has no action against a company to compel the payment of dividends. The true test, he said, is not the right

[84] *E.g., Re Income Tax Acts, 1924-1928 (No. 2); Armstrong* v. *Commissioner for Inland Revenue, ibid.; Gilhooly* v. *M.N.R.*, [1945] 4 D.L.R. 235 (Ex. Ct.).
[85] *Ibid.*
[86] *Supra*, footnote 80.
[87] *Supra*, footnote 82.
[88] [1960] Ex. C.R. 414.
[89] *Supra*, footnote 82.

of the beneficiary to sue the company, but the derivation of the beneficiary's income.

Though the cases are from a variety of jurisdictions and concern the interpretation of different taxing statutes, they all raise common "fundamental issues". That was the phrase used by Cameron D.J. in *Gilhooly* v. *M.N.R.*,[90] after reviewing the authorities. One of those issues may well be the policy of these taxing statutes—do the statutes intend to tax both trustees and their beneficiaries? Another may be the proper interpretation of statutory words, but the foremost issue, it is submitted, is the validity of this principle that no change in character occurs when moneys are received by trustees and used by them to finance income payments to beneficiaries. Since *Syme* v. *Commissioner of Taxes* the overwhelming view has been that the principle is valid.

IV. *The Conflict between Cooper* v. *Cooper and Sudeley* v. *A.G.*

The importance of the cases concerned with the words "derived from" can be judged from the remark of the Privy Council in *Commissioners of Taxation* v. *Kirk*:[91] "Their Lordships attach no special meaning to the word 'derived', which they treat as synonymous with arising or accruing." And, as Cameron J. noted in the *Gilhooly case*,[92] dictionaries compel one to come to the same conclusion. In *Baker* v. *Archer-Shee*, dividends having been paid to the trustees, the question concerned income of a trust beneficiary "arising from" securities.[93]

Secondly, there was one significant reason given by the courts which held in the "derived from" cases that the trust beneficiary had a direct interest in the specific trust property. It is referred to with varying degrees of stress in three[94] of those cases, but the remark of Henchman J. in the Queensland case of *Re Income Tax Acts 1924-28 (No. 2)* is the most vivid. Referring to the decision of the Victorian Supreme Court in 1903, he said: "In my opinion, [that reasoning] is sound, having regard particularly to the fact that in the interpretation of an Income Tax Act the Court looks to the true substance of a transaction, and not to its form, and

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[90] *Supra*, footnote 84.

[91] [1900] A.C. 588, at p. 592.

[92] *Supra*, footnote 84, at p. 241.

[93] *Supra*, footnote 21. Income Tax Act, 1918, Sch. D, Case IV, r. 1; Case V, rs. 1 and 2.

[94] *Re Income Tax Acts, 1924-1928 (No. 2)*, *supra*, footnote 82; *Gilhooly* v. *M.N.R.*, *supra*, footnote 84; *Quinn* v. *M.N.R.*, *supra*, footnote 88.

treats the ascertainment of the actual source of a given income as a hard practical matter of fact".[95]

This distinction between form and substance is not restricted to the "derived from" cases. It is essentially the way in which the courts have been driven to look at this question as to the nature of the trust beneficiary's interest. The "derived from" cases are only a branch of the wider conflict which has been before the courts since the middle of the last century. Evidence of the parentage of the "derived from" cases is contained in the judgment of the Australian High Court in *Webb* v. *Syme.*[96] The authority adopted by the majority, and ineffectively distinguished by the dissent, was *Sudeley* v. *A.G.*[97] And *Sudeley* is the leading authority at the heart of the controversy over the nature of the trust beneficiary's interest. In that case, decided with a bluff and direct manner, the House of Lords stated categorically that until the residue of an estate is ascertained no residuary legatee has anything other than a personal right of action against the representatives for due administration. "In a certain sense a person may have a claim", said Lord Halsbury L.C., "a person may be entitled to this, that, and the other; but the whole controversy turns upon the character of the particular thing to which the legatee is entitled".[98] There is no point in talking about "interests", "estates" and "entitlement", he said, because until there are ascertained properties forming the residue that sort of language is fallacious. All the legatee has meanwhile is a debt, and that is the end of the matter.

In *Cooper* v. *Cooper,*[99] however, where the House of Lords a few years earlier had faced the same need to analyse the legatee's rights, Lord Cairns swept aside the learning and said, "in point of form, no doubt" the owner of a third undivided share in an estate is entitled only to a share in the proceeds of sale, but "in point of substance and in truth"[100] whether he takes land or money is immaterial, he is the owner of one-third of the estate. And this was still true, Lord Cairns concluded, when the undivided share was an asset in the unadministered estate of the intestate deceased

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[95] *Ibid.*, at pp. 284, 285. Henchman J. adopted as support the similar words of the Australian High Court in *Nathan* v. *Federal Commissioner of Taxation* (1918), 25 C. L. R. 183, at pp. 189, 190.

[96] *Supra*, footnote 70. [97] *Supra*, footnote 74.

[98] *Ibid.*, at p. 15. The same analysis has constantly been applied to the rights of the trust beneficiary. Lord Halsbury himself said, *ibid.*, at p. 15, "whether the character [of the holder of the fund] is that of executor or of trustee seems to me to be immaterial", the same questions arise.

[99] (1874), 7 H.L. 53. [100] *Ibid.*, at p. 64.

owner, and the question concerned the nature of the interest of the successors under the statutory trust for sale.

But, if the wider conflict between these two cases has been conducted in an essentially practical manner with a total absence of the *in rem-in personam* dichotomy as the medium of controversy, the courts have had the utmost difficulty in deciding which cases require an appraisal in terms of form, and which in terms of substance. Indeed, courts that see the nature of the equitable interest as the right to sue for proper administration or trusteeship, often do not recognise any distinction between form and substance, theory and realities. These elements are seen to be one and the same. And courts on the other extreme which evidently recognize the distinction and regard the trust beneficiary's rights as a matter of substance, of the true realities, do not bother to say so. They appear merely to sweep aside the concept of legal and equitable estates, leaving the reader to deduce their theoretical analysis, if any existed. *Baker* v. *Archer-Shee* is a prime example.

1. *The Sudeley* v. *A.G. cases.*

The line of cases which has followed *Sudeley* is distinguished by the fact that each regards *Sudeley* as setting forth a clear principle. This is that while an estate remains unadministered no residuary legatee has any other right than to compel proper administration. Some more recent courts[101] have been prepared to say that a right to some thing no doubt lies hidden within that right of action, but even these courts have been unwilling to go further. The right to something is "inchoate" until administration is complete. "The right to the [residuary] legacy previously existed and existed from the time of the testator's death. The actual or physical enjoyment . . . spring[s] up from the moment of distribution." The moment of distribution is "merely the occasion when the right is realised".[102] Very few *Sudeley* courts appear to have had *Cooper* v. *Cooper* cited to them, and of those prior to the *Livingston* case which have had this benefit, the reasoning of *Re Gibbs*[103] and *Re Cuncliffe-Owen*[104] is as far as the most sceptical souls in the *Sudeley* camp have been prepared to go.

Sudeley has been followed in situations where the problem concerned rights in unadministered estates, and in situations in-

[101] *Re Cuncliffe-Owen,* [1953] Ch. 545 (C.A.); *Re Gibbs,* [1951] Ch. 933.
[102] *Re Cuncliffe-Owen, ibid.,* at p. 560. [103] *Supra,* footnote 101.
[104] *Ibid.*

volving trusts. In both situations the courts have found no difficulty in applying the principle of *Sudeley*.

(a) *Testamentary trusts of residue, and intestacy trusts, while the estate is unadministered.*[105]

One might expect, of course, that there would be no difficulty with the unadministered estates cases. In *Barnardo's Homes* v. *Special Income Tax Commissioners*,[106] where the residue was left to a charity, and income was paid by the executors to the charity before the estate was fully administered, the question was whether the charity was entitled to income tax repayment on this income. In saying no, the House of Lords was in no doubt that, while the residuary was perhaps entitled to something, he had only a right of action against the executors while the estate remained unadministered. The so-called income was therefore not income in law. If that were not so, says the court, how could the executors effectively administer the estate. The clear inference from this is that there is no middle ground between saying on one extreme that residuary legatees have a clear proprietary interest from the moment of the death of the deceased, and saying on the other that they have nothing except the right to demand proper administration.[107] In *Corbett* v. *I.R.C.*[108] the Court of Appeal adopted this inference completely.

But the unadministered estates cases have not entirely left the matter at that. Counsel for the executors conceded in *Young* v. *Commissioner of Stamp Duties*,[109] where the Crown was claiming estate duty, that because the deceased had no *in specie* interest in the estate under which she claimed and only a right to have the administration properly completed, she had merely an intangible right in the nature of a chose in action.[110] This view, too, has been echoed since. In a learned analytical judgment in *M.N.R.* v. *Fitzgerald*[111] Rand J. described the executor as a "*quasi*-trustee" for the

[105] I shall refer to this class as the unadministered estates cases.

[106] [1921] 2 A.C. 1.

[107] The charity was the sole residuary legatee. It is curious that no member of the House mentioned Lord Shand's exception, the situation where the residue is held for a sole beneficiary. It appears from the report that counsel did not bring the point to their Lordships' attention.

[108] [1938] 1 K.B. 567.

[109] (1931), 31 S.R. N.S.W. 316.

[110] Though, interestingly enough, the Supreme Court in accepting this concession relied entirely upon the *trusts* cases which follow *Sudeley*. See, *infra*. The narrow point was the locality of the disputed asset, upon which those cases spoke. But the view that the precedents are interchangeable between the incomplete and the complete administration situations, is worthy of note.

[111] [1949] 3 D.L.R. 497 (S.C. Can.).

beneficiary. The right of the beneficiary, he said, is to resort to the court to have the duty of the executor enforced. The *res,* he concluded, is the "interest in property resulting from a personal equitable right"[112] in the residuary legatee. "An equitable chose in action" Callan J. called it in *Stannus* v. *Commissioner of Stamp Duties,* a trust case where administration was complete.[113]

Then a third explanation of the *Sudeley* point of view came in *Re Cuncliffe-Owen.*[114] The residuary legatee's interest arose on the testator's death, but "the actual or physical enjoyment"[115] sprang up on the moment of distribution. Denning L.J. thought that at that moment the right was "realised",[116] this distinction between a right itself and the realisation of it being one well known to the law. And he compared this situation with the distinction between the existing debt payable in the future, and the existing debt presently owed.

(b) *Inter vivos trusts and testamentary trusts where administration is complete.*[117]

In the trusts cases which follow *Sudeley* incomplete administration provides no problem. That situation either does not exist, or the court specifically says that it regards the administration as having been carried out. The theme of all these cases, nevertheless, is that the trust beneficiary has only a right of action, a right to have the trust properly administered. Many of these cases are concerned with the location of an asset as between two jurisdictions, however, and here *Sudeley* is part affected by the conflicts rule that a trust is enforceable where the *trustees* reside and carry out their duties.[118] In this respect *Sudeley,* decided in 1897, was directly in line with the earlier Court of Appeal decision in *Re Cigala's Settlement Trusts,*[119] and it was this case, and not *Sudeley,* which the Court of Appeal followed in 1901 in the *inter vivos* settlement case, *A.G.* v. *Jewish Colonization Association,*[120] an authority adopted in later trust cases which also adopt *Sudeley.*

[112] *Ibid.,* at p. 503.
[113] [1947] N.Z.L.R. 1.
[114] *Supra,* footnote 101.
[115] *Ibid.,* at p. 560.
[116] *Ibid.,* at p. 563.
[117] I shall refer to this class as the trusts cases.
[118] This rule seems to bolster the conclusion that the residuary legatees possess merely a personal right against the executors and trustees to compel proper administration. The rule itself is by no means incontrovertible since the cases have all concerned English trusts, but *Re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351, per Jessel M.R., has been taken as laying down a principle. See further discussion, *infra,* footnote 274.
[119] *Ibid.*
[120] [1901] 1 K.B. 123.

The conflicts rule simply adds force to the result achieved by applying *Sudeley's* analysis of the residuary legatee's rights.

In *Re Smyth,*[121] the first trust case to follow *Sudeley,* Romer J. held that where there were trusts to certain individuals for life, remainder on failure of their issue on trust for sale for other individuals, and a beneficiary under the trust for sale died during the period of the life interests, that beneficiary was entitled only to a share in the proceeds of sale. His only right was against the trustees to have the trusts of the will carried out. And in *A.G.* v. *Johnson*[122] Bray J. also followed *Sudeley* and adopted the reasoning of *Re Smyth* in a similar situation. The assets of a trust for sale included realty overseas. During the period of earlier interests and prior to the exercise of the power of sale, two persons entitled under the ultimate trust for sale died, and their shares were added to the shares of the survivors. Did those persons die possessed of realty interests? Bray J. thought not. They were merely entitled to the proper administration of the trust for sale by the English trustees. The same principle was applied by Russel J. in *Favorke* v. *Steinkopffe,*[123] a case which did not concern taxation and in which, as in *Re Smyth* and *A.G.* v. *Johnson,* the conflicts rule was of predominant importance.

But in one of these trust cases which did not concern the location of assets, and the conflicts rule, limits were suggested to this argument that the beneficiary has merely a right of action. In *Glenn* v. *Federal Commissioner of Land Tax*[124] the residue included realty, and there was a trust for accumulation during the lives of certain annuitants. The fixed annuities were to be met out of the accumulated funds, and on the dropping of the last life the residue was to be divided equally between the appellants. The question was whether the appellants were entitled, during the lives of the annuitants, to an "estate of freehold in possession".[125] Griffiths C.J. thought the absence of a duty to convert was irrelevant; during the annuity period the only estate in possession was in the trustees.[126]

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[121] *Supra,* footnote 75.

[122] *Ibid.* This decision has now been gravely questioned, if not held to be incorrect: *Philipson-Stow* v. *I.R.C.,* [1961] A.C. 727.

[123] [1922] 1 Ch. 174. [124] (1915), 20 C.L.R. 490.

[125] Isaacs J. took this to mean a present right to present enjoyment (as opposed to the fact of, or right to, actual possession) of the land; *ibid.,* at p. 501.

[126] There was no equitable estate in possession during this time. Otherwise, said Griffiths C.J., the trustees would be bound during that period to call upon the appellants to pay income tax which they would in effect be paying out of their own pockets.

But Isaacs J. was only[127] prepared to agree with the result[128] because preceding the appellants there were other legatees (the annuitants) to whom the trustees had strict duties, and on behalf of whom the trustees therefore needed possession. On the other hand, said Isaacs J., where the rule in *Saunders* v. *Vautier*[129] can be exercised —"the complete interest in the thing is shared by all the objects of the trust"[130]—then, as Grant M.R. said in *Pearson* v. *Lane*,[131] the objects have an interest in the thing which is the subject of the trust. And this interest in the trust property springs from the fact that "if no one else is interested, or if all interested combine, the position is that stated by Lord Cairns in *Brook* v. *Badley*,[132] and the person or persons so interested may claim the property from the trustees as an unqualified right".[133]

Sudeley was distinguished by Isaacs J. on the basis that while there the appellant was entitled to only one quarter of the residuary estate, the present appellants were entitled to the whole. Only the preceding trusts (the interest of the annuitants) prevented the present appellants from having *Saunders* v. *Vautier* rights.[134]

This view, of course, complemented Isaacs J.'s dissenting opinion in *Webb* v. *Syme*,[135] the opinion later upheld in the Privy Council. And it was re-echoed in Younger J.'s conclusions in *Vanneck* v. *Benham*.[136] The intestate estate there was still in fact being administered when the question arose as to the nature of a next-of-kin's interest in his sixth share.[137] But this was one of those rare cases where both *Sudeley* and *Cooper* v. *Cooper* were cited, and Younger J. picked his way through the conflict by distinguish-

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[127] *Supra*, footnote 124, at p. 504.

[128] The beneficiaries were held to be entitled only to rights of action during the annuity period, and therefore to have no "estate of freehold in possession".

[129] (1841), Cr. & Ph. 240.

[130] *Supra*, footnote 124, at p. 503.

[131] (1809), 17 Ves. J. 101.

[132] (1868), L.R. 3 Ch. App. 672, at p. 674.

[133] *Supra*, footnote 124, at pp. 503, 504.

[134] It is tolerably clear that Isaacs J. thought an agreement among all the *residuary legatees*, apportioning specific property to each, would not in itself give them such rights. He is later at pains to point out that "where the trusts are not exclusively for the appellants' benefit", *ibid.*, at p. 504, the appellants would have to appeal to the court for an order if they wished to enter into actual possession of the property. The court's jurisdiction is its power to supervise the administration of estates, and this power is discretionary. This in itself shows that the appellants have no right to the property, but merely a right of action to secure proper administration. See further Isaacs J.'s judgment, *ibid.*, at pp. 504-507. Preceding trust interests prevent *Saunders* v. *Vautier* rights from arising. Would the fact that estate debts and expenses have yet to be paid do the same?

[135] *Supra*, footnote 70.

[136] [1917] 1 Ch. 60.

[137] So that this case should strictly appear in the previous section.

ing *Cooper* as an authority on election. As far as *Blake* v. *Bayne*[138] was concerned, however, where the Privy Council had followed *Cooper,* Younger J. could only suggest that the ordinary legatees there had an interest in property for these two reasons: (1) the residue was capable of fair division, and (2) the parties had in fact agreed to enjoy the property in specie. *Blake* v. *Bayne* could not apply where the effect of division would be to make the property worth less, and in any case in a trust for sale every beneficiary has a right to it being carried out.

The conclusion from the *Sudeley* authorities is therefore clear. Wherever the conflicts rule supports the *Sudeley* principle, concerning the nature of residuary legatees' or trust beneficiaries' rights, that principle is easily accepted. But where the conflicts rule is irrelevant, and especially when *Cooper* v. *Cooper* is cited to the court, the limits of that principle, for instance the rule in *Saunders* v. *Vautier,* force themselves upon those who would uphold it.[139]

2. *The Cooper* v. *Cooper cases.*

These cases, explicitly or in fact, explore the limits of *Sudeley* v. *A.G.* They are not a line of authority, as are the *Sudeley* cases, because *Cooper* v. *Cooper* is often not cited. Probably this is because *Cooper* v. *Cooper* was itself directly concerned only with the principle of election whereas these are almost all revenue cases.[140] Another reason may be that *Cooper* was not cited in the leading revenue case, *Sudeley.* But they all follow in the footsteps of *Cooper* in taking the view that the rights of the trust beneficiary are rights in the trust property.

(a) *Testamentary trusts of residue, and intestacy trusts, while the estate is unadministered.*

Sudeley, of course, was a landmark decision. Both lower courts had noted that there was very little authority, and none right on point. And, though the Court of Appeal judgments[141] of Lopes and Kay L.JJ. formulated precisely the principle which later appealed to the House of Lords, Lord Esher M.R.'s dissenting judgment sounded the note of criticism which was to be heard later in what

[138] [1908] A.C. 371.
[139] See also on the limitations to *Sudeley: Stannus* v. *Commissioner of Stamp Duties, supra,* footnote 113.
[140] *E.g., Blake* v. *Bayne, supra,* footnote 138, a suit arising out of an intestacy administration and loss of assets.
[141] [1896] 1 Q.B. 354.

I have here called the *Cooper* cases. Before probate duty could be charged in England upon the deceased's share in certain New Zealand mortgages,[142] he said, the Act required the deceased to have not an "asset", but an "estate or effects".[143] A right of action against the executors for proper administration is not an estate or effects, he went on, it is a procedure to establish whether a claim is valid or not, to establish what is or is not a part of the deceased's estate, an asset of his estate. The asset in question in this case, Esher M.R. thought, was in New Zealand because the mortgagor was in New Zealand.[144]

Lord Cairns would have had much sympathy with Lord Esher's criticism of Lopes and Kay L.JJ.'s principle. In *Cooper* v. *Cooper*[145] the question was this: are the interests of the next-of-kin in a deceased's intestate estate sufficiently specific in relation to a third undivided share of realty in the estate that they can be put to their election if that share is left to another in the will of a testatrix, and the next-of-kin are also left property under the testatrix's will? The House of Lords thought the interest was sufficiently specific, and that the statutory trust for sale imposed upon the estate of an intestate could be ignored. Lord Cairns's reasoning was simple, and in this he was followed by Lords Hatherley and O'Hagan:[146] "Can any person doubt but that one of these next-of-kin might, before the administration of the estate of the intestate, have released to another next-of-kin, or have assigned to a third party, his interest in any specific item of the estate of the intestate, subject only to that item bearing its share of the administration expenses?"[147]

It was quite clear that a creditor of the estate could do no such thing, he had only a claim for payment of his debt. A sole next-of-kin on the other hand, added Lord Hatherley,[148] could require by

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[142] The deceased had died during the administration of her husband's will. The deceased was entitled under that will to a quarter share in the residue. The estate included mortgages in New Zealand land, and these mortgages had not been specifically bequeathed.

[143] Customs and Inland Revenue Act, 1881, s.38.

[144] It has since been decided, *Re Hoyles*, [1911] Ch. 179, that for English law a mortgage interest in foreign land is an immovable, and therefore governed by the *lex situs*.

[145] *Supra*, footnote 99.

[146] The view of Lord Moncrieff, the remaining member, was not expressed on this point, though there is nothing in his judgment to suggest he was in any disagreement.

[147] Lord Cairns, *ibid.*, at p. 66, likens the intestacy situation to a will requiring the payment of debts and expenses, and leaving the residue to the widow and children.

[148] *Ibid.*, at p. 72.

paying the debts of the deceased, that any specific asset of the estate should not be sold, and then that property would be his alone. What difference did it make if there were three or four next-of-kin? They could do the same thing by acting jointly.

The essence of *Cooper* v. *Cooper,* then, was that, since the interest of the beneficiaries was in the whole estate less the debts, they could jointly resist sale, assume personal liability for the debts of the deceased and take the assets in the form in which they were. And that Lord Cairns did not think of the residuary's interest as a specific interest for the purposes of election only[149] can be seen from his judgment in *Brook* v. *Badley*[150] where no such question arose. And in *Brook* v. *Badley* he also set forth a view which was later to appeal to Lord Esher M.R. in *Sudeley* v. *A.G.* What was the interest of absolutely entitled remaindermen under an express trust for sale of mixed realty and personalty?

> It may very well be that no one of these four persons could insist upon entering on the land, and it may very well be that the only method for each of them to make his enjoyment of the land productive, is by coming to the Court and applying to have the sale carried into execution, but nevertheless the interest of each of them is, in my opinion, an interest in land; and it would be right to say in Equity that the land does not belong to the trustees, but to the four persons between whom the proceeds are to be divided.[151]

This reasoning is a little ambiguous in one respect, for it does not make clear whether the individual interests of the remaindermen are "in land" if asserted individually, or only if asserted jointly. But at least it expressed the alternative point of view to *Sudeley,* namely, that if a right of action exists it must be because of a right of property which it asserts.

Cooper v. *Cooper* seems expressly to have been followed on only four occasions.[152] In *Blake* v. *Bayne* the Privy Council adopted its thinking in a case where action was being brought against a surety because of the loss of the intestate by the administratrix, who was also the eldest of the three next-of-kin. The debts were already paid off, and the Privy Council considered that subject thereto, "the whole estate was the absolute property of the three

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[149] In *Commissioner of Stamp Duties* v. *Livingston, supra,* footnote 35, the Privy Council has ruled that *Cooper* v. *Cooper* is an authority on election only. See *Tevlin* v. *Gilsenan,* [1901] 1 I.R. 514, where the Irish Court of Appeal took a different point of view.

[150] *Supra,* footnote 132. [151] *Ibid.,* at p. 674.

[152] In *Tevlin* v. *Gilsenan, supra,* footnote 149, *Sudeley* was cited to the Irish Court of Appeal, but the Court was clearly at a loss as to how to reconcile that case with *Cooper* v. *Cooper.* The members of the court simply preferred *Cooper* v. *Cooper.*

next-of-kin".[153] But *Sudeley* does not appear to have been cited to the court. Nor was *Sudeley* cited in *Re Dickson*[154] where, following *Cooper,* Stirling J. held that a sole beneficiary under a testamentary trust for sale of chattels was "substantial proprietor" of the chattels, subject only to the creditors claims. By paying the debts, the beneficiary could claim the chattels.

This omission did not occur in *A.G.* v. *Walker,*[155] however, a case which appears at first sight to be on all fours with *Sudeley.* The deceased was entitled to a life interest in shares in an Eirean company, and the shares formed part of an unadministered estate. The administration of the estate was being carried out in Northern Ireland, and the Crown therefore claimed estate duty on the death of the life tenant. Brown J. held that Lord Cairns' words, referring to the "substantial proprietorship" which arises at the moment of death of the testate or intestate, would apply here. The Crown's claim therefore failed. *Sudeley* was distinguished on the ground that there the claimant was only entitled to a quarter share in the residue, whereas here the deceased was the only life tenant, and therefore entitled during her life, to the whole interest in the shares.

This, of course, was the distinction drawn by Isaacs J. in *Glenn* v. *Federal Commissioner of Land Tax,*[156] and, indeed, in *Sudeley* Lord Shand had left this very point open. What if the entire estate had been held by the executors for the widow alone? "The case might have been different", he had said.[157] And Lord Davey had suggested[158] that, if the legatees had agreed between themselves that the claimant was to have the New Zealand mortgages as her fourth share of the residue, or the executors and legatees had agreed to a division and appropriation of the assets, the result of *Sudeley* might have been different.

These concessions in *Sudeley* itself make considerable inroads on the broad principle, which Lord Halsbury laid down. Until the moment of ascertainment, he had said, the residuary legatee has only a right of action. Lords Shand and Davey on the other hand were suggesting that, prior to the completion of administration, three situations would lie outside *Sudeley*: 1) the residue is to be enjoyed by one person only,[159] 2) the residue is to be enjoyed by two or more persons and those persons have agreed between

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[153] *Supra,* footnote 138, at p. 384.
[154] [1890] W.N. 10, 34 Sol. J. 181.
[155] [1934] N.I. 179.
[156] *Supra,* footnote 124.
[157] *Supra,* footnote 74, at p. 20.
[158] *Ibid.,* at p. 21.
[159] *Sed quaere* whether for an absolute interest only, or as well for a lesser interest, *e.g.,* for life.

themselves to a specific division of the residuary assets;[160] 3) the residue is to be enjoyed by two or more persons, and they have come to a specific division agreement with the executors.

In *A.G.* v. *Walker*[161] Brown J. decided that the case he was deciding fell within exception number 1. With such a finding there is no difficulty. But it will be observed that the principle of *Cooper* v. *Cooper* and the view of Isaacs J. in *Glenn* v. *Federal Commissioner of Land Tax*[162] add yet another exception, exception number 4. This is that, whether or not there has been agreement *inter se* or with the executors, if all those entitled to the residue are ascertained and capacitated, and there are no preceding interests in the estate,[163] together they can call for the property, and this is ownership of the property. Indeed, Isaacs J. would seem to go further than Lord Cairns. In Isaacs J.'s view: "If no one else is interested, *or* if all interested combine",[164] the rights of each legatee are in tangible property. The conjunction suggests that, provided the rule in *Saunders* v. *Vautier* can be exercised, each legatee individually can resist the contention that his right is only to an action against the executors.

Nor is this all, for Lord Shand's concession of exception 1 may well apply[165] where the rule in *Saunders* v. *Vautier*[166] would not be available to the parties. Suppose a widow has a life interest in the residue, and her administrators are resisting the Crown's claim to duty on her interest. Exception 1 applies, and takes the case out of *Sudeley* whatever be the degree of ascertainment of the residuary estate or capacity of those who take under the remainder clause or clauses.

That Lord Halsbury could not have agreed with these exceptions is also clear from the fact that he emphasised the necessity of allowing the executors to pay the debts and specific legacies out of the assets, unencumbered by claims to specific property made by the residuary legatees. Not even exception 1 would meet this objection, of course, to continue the above example, though the sole life tenant has an interest in whatever constitutes residue, her successful claim to specific properties would hamstring the executors in their administration. But the remaining exceptions also fly in the face of Lord Halsbury's objection, unless there is some nebulous middle ground between a right of action to demand

[160] Lord Cairns' and Lord Hatherley's point in *Cooper* v. *Cooper*, *supra*, footnote 99.
[161] *Supra*, footnote 155.
[162] *Supra*, footnote 124.
[163] See *supra*.
[164] *Supra*, footnote 124, at p. 503.
[165] See *supra*, footnote 159.
[166] *Supra*, footnote 129.

proper administration, and a right in the specific property of the estate.[167] Moreover, Lord Herschell and even Lord Shand suggested that the right was still only a right of action if the estate was fully administered, but not yet distributed.[168] Only upon distribution, they imply, could one of several residuary legatees say, "This is mine".

Was Lord Herschell riveted to the idea that a chose in action only becomes a right to tangible property when the claimant actually has his hands on the property? No agreement by the residuary legatees *inter se* or with the executors to divide the specific assets of the estate could sensibly be concluded without a personal assumption by the legatees of the debts, expenses and specific legacies, or the allocation of specific assets to meet those charges on the estate. Nor could the sole life tenant claim specific items in the unadministered estate without an agreement with the executors as to which property should meet the debts and expenses. Is the residuary estate not ascertained at the moment of agreement to a scheme of specific division of assets? and, if ascertainment has taken place, and I can point to the tangible property which constitutes my share, is it still correct to say I have nothing more than a chose in action?[169]

It was doubts of this kind to which *Sudeley* gave rise, and the escape route for those who later differed from *Sudeley's* result, was through the exceptions which in large part the House had itself created.

But it was in the House of Lords itself that the most extraordinary challenge to *Sudeley* was to be made. In *Skinner* v. *A.G.*[170] the testator had charged his residuary estate with an annuity in favour of his widow. The widow died in Northern Ireland, where her husband's estate was still being administered at the time of her death. No specific property from the estate had been set aside by the Northern Ireland executors to meet the annuity, but the annuity had in fact been paid each year. Some investments were

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[167] If exceptions 2 and 3 *are* compatible with Lord Halbury's principle, Lord Shand and Lord Davey could not have meant the same thing by a right of property.

[168] Even if there is agreement as to who is to have what?

[169] Lord Davey said on this point, *supra*, footnote 74, at p. 21: "No trust fund had been ascertained, and it is unnecessary to consider what would have been the case if these mortgages had formed part of a duly constituted trust fund vested in trustees for the lady." Lord Herschell agreed that this task was unnecessary. In *I.R.C.* v. *Smith*, [1930] 1 K.B. 713 (C.A.) Lord Hanworth M.R., at p. 729, followed *Sudeley*, but considered the residuary legatee's share was *in specie* when the residue was ascertained and the aliquot share was therefore also known.

[170] [1940] A.C. 350.

in England, and the Crown in England claimed estate duty from the widow's executors on those investments.

At first impression one would have thought this case was decided by *Sudeley*, but in the Court of Appeal[171] the opinion had prevailed that that case was only concerned with what was property of the deceased, and what was its location, for the purposes of probate duty. That case gave no guidance in determining whether the deceased annuitant, within section 2 of the Finance Act, 1894, had any interest in the English investments.

In the House Lord Russell developed a similar argument. Lord Herschell had said in *Sudeley* that there was no interest of the widow *so as to make* [the New Zealand mortgages] *an asset of her estate.*

"My Lords", went on Lord Russell, "I emphasize the last ten words of that sentence, which clearly show that the interest which was being repudiated was a proprietary interest. The case is not in any way a decision that the widow or her executors had no interest in the mortgages, and it is certainly no authority against the view that an annuitant whose annuity is charged on the estate of a testator 'has an interest' in the different items of which that estate from time to time consists".[172]

But, if the widow in *Skinner's* case had something less than a proprietary "interest", meaning a right to specific tangible property, then she must have had only a chose in action, enforceable against the Northern Ireland executors of her husband's will. Lord Russell would not accept this. If she was entitled to an annuity charged on the residue, then she was interested "in all the parts which compose the whole".[173] Her right of action against the executors was "merely the right of enforcing or realizing that interest which she has in the whole and its parts".[174] This was surely a distinction without a difference, and one is left with the only other distinction from *Sudeley* which Lord Russell offered, namely, that *Sudeley* was concerned with probate duty.

However unattractive the latter distinction may have been, at least it could be said that the House was interpreting language in another Act, but Lord Russel had not been prepared to leave it at that. And what he did say was obviously a challenge to *Sudeley,* for none of the exceptions suggested by that case was, or could be, invoked. It should be noticed, too, that no statutory words existed,

[171] [1896] 1 Q.B. 354.
[172] *Supra*, footnote 170, at pp. 358, 359.
[173] *Ibid.*, at p. 358. [174] *Ibid.*

such as "derived from" or "arising from". The decision therefore went beyond those authorities, already discussed, which had accepted that an annuity derived from taxed dividends is itself free of tax.[175] *Skinner* simply decides that where an annuity is charged on the entire residuary estate, that is another situation to which the principle in *Sudeley* does not apply.

(b) *Inter vivos trusts and testamentary trusts where administration is complete.*

So much for the cases where the estate was unadministered, but it was nonetheless successfully argued that the residuary legatee or legatees have rights in specific property. Now let us turn to the trust cases. In these cases the trust fund is fully constituted either because the trust is *inter vivos* or because the residue, upon which the trust is imposed, is ascertained.

The first thing to be remembered is that *Sudeley* was not concerned with this situation. There were dicta from Lord Herschell[176] and Lord Shand[177] that mere ascertainment of the funds is insufficient to make the residuary legatees' interests take effect in specific property, but Lord Herschell thought it unnecessary to decide the point. Lord Davey also said, "it is unnecessary to consider what would have been the case if these mortgages had formed part of a duly constituted trust fund vested in trustees for the lady".[178]

The second thing to observe is that in *Williams* v. *Singer,*[179] the only authority quoted by the majority in *Baker* v. *Archer-Shee,* the members of the House adopted the approach originally taken by the Victorian Supreme Court and later the Privy Council in *Syme* v. *Commissioner of Taxes.* This is the continuity with the "derived from" cases. In all these cases the courts insist that they must be concerned with the realities of the situation. The trustees carry on the trust for the benefit of the beneficiaries. In *Syme* v. *Commissioner of Taxes* this meant that, though the trustees were themselves carrying on businesses, they were carrying them on for the beneficiaries. The trustees only personal interest was their remuneration. Their duties—to pay debtors and accrue profits, to keep profit and loss accounts—were done for the trust beneficiaries. It was nonsense therefore to let the existence of the trust stand in the way of a recognition that effectively any benefits the

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[175] *E.g., Armstrong* v. *Commissioner for Inland Revenue, supra,* footnote 82.

[176] *Supra,* footnote 74, at p. 18.

[177] *Ibid.,* at p. 20.

[178] *Ibid.,* at p. 21.

[179] [1921] 1 A.C. 65.

businesses gained from the taxing Acts were the benefits of the trust beneficiaries. In *Williams* v. *Singer* the Crown was claiming income tax payments from English trustees, though the income arose from foreign investments and was made directly payable to the foreign domiciled and resident life tenant. The Crown failed, and Viscount Cave put the reason this way.

> The object of the Act is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found . . . . In short, the intention of the Acts appears to be that where a beneficiary is in possession and control of the trust income and is *sui juris*, he is the person to be taxed[180]

Trustees are certainly taxable in some circumstances, for example if the trust exists for the purpose of accumulation or for the payment of debts, but they are taxed on behalf of the beneficiaries and only taxed in that representative capacity. Here, said Lord Phillimore, "the trustees . . . merely exist in order to preserve the settlement";[181] their duty was merely to see that the dividends reached the life tenant, a life tenant who was fully capacitated and in possession of the income.[182]

Of course, it is possible to say with Viscount Sumner in the later case of *Baker* v. *Archer-Shee* that *Williams* v. *Singer* said nothing as to whether the Income Tax Acts require the courts to ignore the distinction between legal and equitable estates, which was the point in *Baker*. The facts of *Baker* were indeed different. The sole life tenant of the *Baker* trust was not seeking to deny her personal liability to tax. She was arguing that, though resident in and taxable by the United Kingdom, she was liable only to be taxed on that income from a New York trust which was remitted to the United Kingdom, not on all the income which was paid into her New York bank by the New York trustees. To succeed on this argument, she had to establish that she was taxable not on the income arising from foreign stocks and shares, because she had no such income, but only on the income which her trustees paid to her. They received the dividends of the stocks and shares, made their trust charges and dealt with local taxes, and paid the remainder to her New York agent bank. Her equitable interest was a "possession" within the Acts, and "income arising from posses-

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[180] *Ibid.*, at pp. 72-73. [181] *Ibid.*, at p. 83.

[182] *Ibid.* "In law the trustees are entitled to the dividends, and they must give the discharge to the company, but the person entitled within the meaning of the Act is the beneficiary."

sions out of the United Kingdom" was only taxable on a remittance basis.[183]

But implicit within the approach of the Lords in *Williams* v. *Singer* was the inference that for the purpose of the Income Tax Acts the existence of the trust could be ignored, even when it was a question of what "trust income" meant. And the majority in *Baker* v. *Archer-Shee* followed that lead.[184] As in the "derived from" cases, so here; the New York trustee company, selected and appointed by Lady Archer-Shee as trustee, is described as merely her agent. That was Lord Atkinson's description. And it followed from this that any payments which the trustee made out of the dividends were made by the trustee in an administrative capacity. That administration was done in the beneficiary's interest and on her behalf, and with her money.

All the same, though there is this impelling overtone of the significance of the particular Income Tax Act, this is not the whole of *Baker* v. *Archer-Shee*. The pivot of both Lord Atkinson's and Lord Carson's judgments is that in this case administration was complete, the residue was ascertained, and the trust property was therefore definite and specific. Both considered *Sudeley*, and held that it did not apply to such facts as these. Indeed, Lord Carson went so far to accept the reasoning of *Sudeley* as to say that the present decision might have been different had the residue (and, therefore, the trust fund) been still undetermined. Lord Wrenbury, it is true, says nothing of authority and simply gives it as his view that Lady Archer-Shee had "an equitable interest in possession",[185] but the other two members of the majority were clearly saying that, once there is a definitely constituted trust fund, the income of that fund is the property of the beneficiary as soon as it reaches the trustee's hands. Any accountancy tasks which the trustee may have to fulfill do not necessitate the conclusion that in the trustee's hands the moneys have a different character from that which they have when paid to the beneficiary.

Now this is exactly the thinking of *Syme* v. *Commissioner of* Taxes,[186] which, as we have seen, has since been followed in several jurisdictions. And in view of the fact that in *Baker's* case both Lord Summer and Lord Blanesburgh[187] dissented at this point, arguing

[183] Income Tax Act, 1918, Sch. D. Case V, rule 2.
[184] Though only Lord Carson referred explicitly to *Williams* v. *Singers*, *supra*, footnote 179.
[185] *Supra*, footnote 21, at p. 866.
[186] *Supra*, footnote 57.
[187] *Supra*, footnote 21. As Younger J., Lord Blanesburgh decided *Van-*

that the beneficiary's income cannot be known until the trustee has paid off all outstanding charges on the moneys in his hands, it is a pity that *Syme's* case was not brought to the House's attention. As it was, both dissenting judges considered that *Sudeley* applied even where the administration was complete and the trust fund ascertained. In *Syme's* case the Privy Council had actually overruled majority judgments in the court below which as here, had applied the reasoning of *Sudeley* to a testamentary trust where administration was complete. Moreover, in *Baker* v. *Archer-Shee* Lord Carson was prepared to say that things might have been different had Lady Archer-Shee been entitled to a portion only of the income and profits of the residue trust fund. As it was, she was "sole beneficial owner".[188] In *Syme's* case there were not one, but five life tenants, and, prior to meeting the life tenants' demands, the trustees had to provide for several annuities.[189]

V. *The Subsequent History of Baker* v. *Archer-Shee.*

I have argued earlier that the decision in *Baker* was sound,[190] and I would only add to what I have said that, when the judgments of the majority are examined, it will be found that there was complete unanimity for only one proposition. Namely that when there is a constituted trust fund, and only one beneficiary entitled to all the income which arises from the fund, that beneficiary is entitled subject to deductions properly made by the trustee, to all the dividends and interest arising.

No court decision known to the writer has departed from, and refused to follow *Baker,* even in those common law jurisdictions where the decisions of the House of Lords are merely persuasive.

Nevertheless, the case has had a mixed reception, and in the light of the recent Privy Council decision in *The Commissioner of Stamp Duties* v. *Livingston*[191] it becomes important to see what that reception has been.

In *Reid's Trustees* v. *Commissioners of Inland Revenue*[192] the testator's will gave life estates to his widow and daughter, an ab-

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neck v. *Benham, supra,* footnote 136, and there decided that *Cooper* v. *Cooper* was an authority on election only. *Cooper's* case was not cited to the Lords in *Baker* v. *Archer-Shee,* and was not considered in the judgments.

[188] *Ibid.,* at p. 870.

[189] Another intriguing feature of these two cases, *Baker* and *Syme,* is that, though *Syme* is another income tax authority, it was Lord Sumner (as he then was) who gave the judgment of the Privy Council.

[190] See, *supra.*

[191] *Supra,* footnote 35.

[192] (1929), 14 T.C. 512.

solute sum to his son, and divided the residue equally among the three. The testator had died resident in Scotland, the executors and trustees were resident in Scotland, and the beneficiaries were resident in Scotland or England. Shortly after the testator's death, the trustees received an untaxed dividend payment on some stock in the estate upon which they had already paid estate duty. The Crown claimed from the trustees income tax on the dividends, and the trustees argued that under the Acts they were only liable to income tax on "the ordinary principles of accounting between trustees and income-beneficiaries". This meant, they said, that it was the beneficiary who was liable to tax; they only paid tax where the beneficiary is incapacitated or non-resident, and then only to the extent to which the beneficiary himself would be liable. In effect, the trustees were attempting to carry to its logical conclusion the argument that for tax purposes trustees are mere representatives or agents.

The trustees were unsuccessful, and their invocation of *Williams* v. *Singer* and *Baker* v. *Archer-Shee* in their favour was less than happy. "The argument", said Lord Morison,[193] "that [the trustees' contention] gained support from the speeches in the House of Lords in *Archer-Shee's* case can, in my view, only be described as fantastic".

Lord Sands thought that *Archer-Shee* was only concerned with a situation where the trustees were not domiciled in Great Britain; Lord Morison thought that that case raised no question as to the person chargeable to tax. And Lord President Clyde considered it enough to say that those cases established only one thing, "while trustees are not now *prima facie* assessable for tax in all cases [within Schedule D to the Income Tax Act, 1918], they are in a great many".[194] Evidently, *Archer-Shee,* like *Williams,* was being narrowed to the least possible proposition. And though he was the only member of the court to speak with such vehemence, this is borne out by the words of Lord Sands. The sole subject matter of the decision in *Archer-Shee,* he said,[195] a decision "over-ruling an unanimous judgment of the Court of Appeal", was that regard must be had to the substance of the matter; the minority had considered that form (the existence of a beneficial interest in a trust

[193] *Ibid.,* at p. 532.
[194] "There is nothing inconsistent with the Income Tax Acts in recognising and respecting the distinction between property owned by a person as trustee and property owned by him in his own right.", *ibid.,* at p. 524.
[195] *Ibid.,* at p. 528.

estate) must prevail. His Lordship then distinguished *Archer-Shee* on the facts, and held that anything else the majority had said must be regarded as dicta:[196]

> The *dicta* which might be founded upon as pointing in the direction of a negative answer and as indicating that a trust may be regarded as a mere agency or conduit pipe, are strictly limited to the case where the circumstances are similar, *viz.*, where there is one beneficiary and the estate is already realized and duly vested.

And "*dicta* of any of the noble Lords in the majority, though entitled to the greatest respect, are not conclusive". "In the circumstances of the present case", he concluded, "we are not obliged to consider a proposition so subversive of the view of the law which has hitherto governed the practice of the Inland Revenue in the collection of Income Tax".[197]

The substantial objection which the Court of Session had to *Archer-Shee* sprang from two considerations. First, there are many trusts which do not concern beneficiaries and the payment of income. For example, trusts for the payment of capital debt out of trust income. Does *Archer-Shee* mean that income tax is therefore not payable on *that* income in the trustees' hands? Secondly, there are administrative costs to be met by the trustees before any payment is made to beneficiaries. Does *Archer-Shee* mean that the commissioners can only tax income moneys in the trustees' hands for this purpose, if the beneficiaries are subject to tax?[198]

It is difficult to follow these objections, however. The dissenting judgments of Viscount Sumner and Lord Blanesburgh in *Archer-Shee* might just as well have given rise to them. The truth was that *Archer-Shee* was not concerned with the liability of the trustees. In substance the life tenant *was* entitled to the dividend could shelter behind the concept of the equitable interest in order to avoid income tax on all the dividends which came to the trustees. In substance the life tenant *was* entitled to the dividend moneys less the administrative charges and local taxes, and in the circumstances the trustees *were* in the position of agents. None of the majority judges suggested that their decision relieved trustees in future of their liability to tax. One must conclude that the members of the Court of Session were irritated that there were words in *Archer-Shee* which could be seized upon at all to support such an argument which the trustees had now put up. Again, and

[196] *Ibid.* at p. 529. The distinction was that *Baker* was only concerned with the situation where trustees are not domiciled in Great Britain.

[197] *Ibid.*

[198] The beneficiaries might be incapacitated or non-residents.

unfortunately, *Syme* v. *Commissioner of Taxes* was not brought to the attention of the Court of Session.

Baker v. *Archer-Shee* also had a hostile reception in *Re Young*,[199] a decision of Martin J. at first instance in the Supreme Court of Victoria. A testator gave a life interest in his realty and personalty to his widow, and divided the residue among several persons, including the deceased. The deceased died intestate in 1922 in England during the lifetime of the widow, and the deceased's husband in England claimed all her personalty, as he was entitled to do by the English law of that time. At the date of the widow's death, however, much realty of the testator had not been sold, and the testator's executor took out an originating summons to determine whether any of the deceased's share was in Victorian realty and therefore governed by the intestacy laws of Victoria. On the assumption that the estate of the testator was fully administered at the date of the intestate's death, Martin J. held that the deceased died possessing only a right of action against the administrators, and not an equitable interest in the assets comprising the estate at that time.

His reason was that ascertainment of the trust fund is not the same as allocation to the trust beneficiary of specific property. He drew attention to the mention by Lord Shand and Lord Herschell in *Sudeley* that mere ascertainment might not be enough, referred to Lord Carson's qualification in *Archer-Shee* as to what the position would be if there had been more than one person entitled as life tenant to the dividends, and concluded:[200]

> I do not consider that any of the speeches delivered in *Baker* v. *Archer-Shee* warrant the deduction that, where there are a number of persons entitled to share in the residue of an estate, any one of them has an equitable interest in the actual assets forming part of the trust fund, even assuming that there has been full administration.

The importance of Martin J.'s decision is evident. It is prepared to apply *Sudeley* to trusts with fully constituted trust funds, though *Sudeley* is not binding, and to bring *Archer-Shee* within the first exception to *Sudeley*, namely, a situation where the whole fund is held for one absolutely entitled beneficiary. That bare trust situation would now be broadened to include the situation where the entire income is held for one life tenant.[201]

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[199] [1942] V.L.R. 4. [200] *Ibid.*, at p. 8.

[201] Martin J. also quoted, *ibid.*, Isaacs J. in *Glenn* v. *Federal Commissioner of Land Taxes, supra,* footnote 124. He could have found an alternative reason for his conclusion in Isaacs J.'s judgment. At the date of the intestate's death, the life tenant was still alive. There was therefore a pre-

On the credit side, however, *Archer-Shee* has been followed in two first instance decisions, one in England and one in Canada, and also by the Supreme Court of Canada. Moreover, Martin J.'s decision in *Re Young* has been criticised. This took place in *McCaughey* v. *Commissioner of Stamp Duties,*[202] an appeal heard by the Supreme Court of New South Wales. There in a case concerning an administered estate the Supreme Court was most reluctant to accept *Sudeley.*[203] Why had so much to turn upon an event, such as the completion of administration, when completion date was so hard to discover in so many cases? *Sudeley* was seen to bristle with difficulties, and it is evidently with some relief that Jordan C.J. has this to say:[204]

> In *Baker* v. *Archer-Shee,* however, (in which again *Cooper* v. *Cooper* was not cited) it was held that the applicability of *Sudeley's* case is restricted to the period during which the residuary estate is not yet fully administered; so that there is nothing to prevent *Cooper* v. *Cooper* from being regarded as holding the field where property is simply held in trust: *Nelson* v. *Adamson.* Isaacs J. had already pointed this out in *Webb* v. *Syme.* . . . I am, therefore, with respect, unable to agree with *In re Young* on this point.

The English decision, *Nelson* v. *Adamson,*[205] in fact extended *Baker* to apply where an annuity was a first charge on the trust income, the remaining moneys only being payable to a sole life tenant. And Lawrence J. was prepared to apply the case where there were two life tenants, should such facts arise. In *Pan-American Trust Co.* v. *M.N.R.,*[206] however, the Canadian first-instance case, *Baker* was applied to a commercial trust. A Swiss company incorporated the appellant company in Canada, and the new company's task was to receive dividends from two subsidiaries in Canada of the Swiss company. Formerly these dividends had been paid direct to Switzerland, but on the outbreak of war in 1939 it became advisable for these moneys to be kept in Canada. The Trust Company received the dividends, and credited them to the Swiss company, paying them into a separate bank account. The Crown then claimed that, within the Act, this was "income . . . received from a Canadian estate or trust . . . accruing to the credit of non-resident beneficiaries whether received by them or not".[207] Thorson P.

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ceding trust, and as a consequence the beneficiaries together would not be able to claim the property without an application to the court. This reveals that their rights were still personal rights against the executors and trustees.

[202] (1945), 46 S.R.N.S.W. 192.

[203] See, in particular, at p. 211, *ibid.*

[204] *Ibid.*, at p. 204.

[205] [1941] 2 K.B. 12.

[206] [1949] Ex. C. R. 265.

[207] Income War Tax Act, R.S.C., 1927, c. 97, s. 9B (2) (d).

simply applied *Baker* v. *Archer-Shee*. He was unable to see how the arrangement made, and "the intervention of the appellant as trustee for the Swiss company", could "cause the amounts received by it to lose their character as tax-exempt dividends".[208]

Here there is an important note to be made. This was the first time the thinking of the "derived from" cases had been used in support of the decision in *Baker*. And that association of the *Syme* v. *Commissioner of Taxes* cases with *Baker* was carried a good deal further in 1955 in the Supreme Court of Canada, if by the narrow majority of another three to two decision.

In *M.N.R.* v. *Trans-Canada Investment Corp. Ltd.*[209] the respondent was the administrator of an investment trust. The corporation solicited moneys from the public, bought shares in companies, and vested those shares in a trustee. The trustee then issued "trust unit" certificates to the subscribers in proportion to the amount each individual had subscribed. The respondent itself subscribed moneys for share purchase, and so was issued with certificates. The Crown claimed income tax on the moneys paid to the respondent by the trustee, these moneys being interest arising from the dividend payments of the underlying companies. The dividends had in fact been taxed in those companies' hands, and when the trustee received them it deducted its charges, any taxes or governmental charges, and at its option an amount for contingent tax liability. The remaining moneys were paid as interest to, and divided among, the certificate holders. The respondent claimed that, within the Act,[210] it was "a corporation . . . [which] received a dividend from a corporation" and was therefore entitled to the statutory relief, tax having already been paid on those dividends.

It was in the Exchequer Court[211] that *Baker* was applied with enthusiasm, and, interestingly enough, despite the fact that between the dividends and the certificate holder in this case there existed all the machinery of a modern investment trust, Cameron J. presents the facts as having a real analogy to *Baker*. Certain certificate holders were even entitled on surrendering their trust units to opt for the proceeds of sale of stock represented by the units, or to

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[208] *Supra*, footnote 206, at p. 273.
[209] [1955] 5 D.L.R. 576, [1956] S.C.R. 49.
[210] Income Tax Act, R.S.C., 1952, c. 148, s. 28 (1).
[211] [1953] Ex. C. R. 292. In the Supreme Court, Locke J., *supra*, footnote 209, at p. 587 (D.L.R.), and Cartwright J., *ibid.*, at p. 588, expressly adopted Cameron J.'s reasoning and conclusion. This is important because neither judge refers to *Baker* in his Supreme Court judgment.

take shares themselves. Cameron J. still thought *Baker* applicable. He cited, too, *Syme* v. *Commissioner of Taxes,*[212] and *Re Kemp,*[213] as well as *Nelson* v. *Adamson,*[214] the only case hitherto associated with *Baker.*

In the Supreme Court of Canada, Locke, Cartwright and Fauteux JJ. expressly agreed with Cameron J. and for the reasons he had given for his decision. Locke J. was "quite unable to understand how the character of these moneys became changed through the intervention of the trustee or by the fact that by the agreement it was entitled to make the deductions . . . before paying over the amount to the respondent".[215]

The dissenting judgments of Rand and Estey JJ., however, would severely limit the applicability of *Baker.* Rand J. pointed out that the respondent trust corporation was entitled only to a fractional part of the underlying securities. That was not present in *Baker.* And he stressed the enormous complexity of the trust; the holders of certificates, the charges on the funds, the powers of the administrator and the voting powers over the stocks. There was clearly "an intermediate origin of income"[216] distinct both from the underlying companies and the certificate holders. Estey J. was prepared to concede that "the intervention of a trustee or of more than one beneficiary will not, in circumstances such as existed in *Baker* v. *Archer-Shee,* destroy the identity of the dividends or cause them to lose their character as such",[217] but in his opinion the facts concerning this trust corporation went much further.

There is no doubt that *M.N.R.* v. *Trans-Canada Investment Corporation Ltd.*[218] carries *Baker* to the furthest limit it has yet achieved. The same result could perhaps have been reached by a sole application of *Syme* v. *Commissioner of Taxes* and the "derived from" cases, but the result *was* reached expressly by the application of *Baker.*

It is all the more to be regretted then that *Stannus* v. *Commissioner of Stamp Duties*[219] appears not to have been cited to the

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[212] *Supra,* footnote 57. [213] *Supra,* footnote 82.
[214] *Supra,* footnote 205.
[215] *Supra,* footnote 209, at pp. 587, 588 (D.L.R.). Again there is the hint of policy, as with the "derived from" cases. Cartwright J., with whom Fauteux J. concurred, agreed with Locke J. and Cameron J. that the character of the sums which the corporation received were dividends, but adds that nothing else in the Act convinces him that the Act intends to deprive the corporate beneficiary of the relief which it gave to the individual beneficiary.
[216] *Ibid.,* at p. 579. [217] *Ibid.,* at p. 585.
[218] Cited with approval in *Quinn* v. *M.N.R., supra,* footnote 88.
[219] *Supra,* footnote 113.

Supreme Court or to Cameron J. For in *Stannus*' case in 1947 the New Zealand Court of Appeal, after a closely argued consideration of *Baker*, decided not to apply that authority one whit beyond the facts upon which it was determined.[220]

The facts of *Stannus* are somewhat similar to those in *Baker*. There was a testamentary trust, the estate was fully administered, and the problem concerned the liability of a tenant for life. The principal difference was that there was not one life tenant, but two, who were entitled as tenants in common. In her lifetime one of the life tenants, Mrs. Stannus, released her rights over part of the capital which provided her share of the income, and that capital the trustees advanced under their power to Mrs. Stannus's son. On the death of Mrs. Stannus, the Crown in New Zealand claimed gift duty under the then Death Duties Act, 1921. The trust beneficiaries resisted with two arguments: 1) That Mrs. Stannus was entitled to property in specie—*Baker*—and 2) that since a large part of the trust investment was in England—the advancement had been made from the English investments, and one of the two trustees lived in England—the property in question was sited in England.

Both Northcroft J. in the Supreme Court, and the three members of the majority in the Court of Appeal, adopted the thinking of Martin J. in *Re Young*.[221] The trust fund was ascertained, but specific assets had not been appropriated to the shares of each life tenant. It was clear, thought the majority, what the Lords in *Sudeley* thought of such a situation; the right of the life tenant would remain a mere chose in action. Callan J., who gave the principal majority judgment, declared his unqualified agreement with Viscount Sumner's dissenting judgment in *Baker*. No further reasons for preferring the Maitland view of the beneficiary's rights were forthcoming, but the effect of this view was that Northcroft J. and the Court of Appeal were willing only to accept *Baker* as far as they felt obliged to do so. Northcroft J. thought *Baker* to be concerned with the construction of a special statute and a particular settlement, an explanation which he also applied to *A.G.* v. *Walker*[222] and *Warren's Trustees* v. *Lord Advocate*.[223] But this is the kind of distinction which is rarely satisfactory in this area, and more importance attaches to the weightier reflection, which followed, that these were all cases where there was only one life

[220] And *Syme* v. *Commissioner of Taxes, supra,* footnote 57, was not cited to the New Zealand courts.
[221] *Supra,* footnote 199.
[222] *Supra,* footnote 155.
[223] [1928] S.C. 806.

tenant. Callan J. took this second point, Kennedy J. concurred with him, and Finlay J. added that tenants in common were entitled only to a unity of possession. Neither could point to this or that asset as his. And that was what distinguished Mrs. Stannus and her sister from Lady Archer-Shee.

So much for the fact that in *Stannus* there were two life tenants, and that *Baker* v. *Archer-Shee* was concerned with only one. Was it not true, however, that all the Stannus trustees had to do was to pay over the income of the trust, less the charges, to the life tenants? Neither Callan J. nor Finlay J. is prepared to accept the implications of this.

> It is true that where, as here, neither interest is in any way hypothecated or charged, the function of the trustees is simple, but that does not change the inherent character of the function, for the functional possibilities are present, and might at any time be invoked. This view is not inconsistent with anything stated by any of the learned Law Lords who took part in the judgment in *Baker* v. *Archer-Shee* and is consistent with the statement of Lord Blanesburgh.[224]

And, Callan J. added, investments might vary in safety, and it was not open to either life tenant to make a choice of properties which might adversely affect the other. "In this matter the trustees were not the agents of Mrs. Stannus, and she could not make them her agents."[225]

What then was the proposition for which *Baker* was authority? Callan J. finally summed it up in this way:[226]

> Under English law the sole life tenant of a residuary estate, which has been finally ascertained and settled, is entitled in equity specifically during her life to the dividends upon the stocks in which such residuary estate is for the time being invested . . . [she] has some form of specific interest or property in the particular assets of which such residuary trust fund for the time being consists.

And with this evident and unsatisfactory disagreement between the Supreme Court of Canada and the New Zealand Court of Appeal the matter remains today.

VI. *The Trust Beneficiary's Interest after Livingston.*

The position when *Commissioner of Stamp Duties* v. *Livingston* reached the Privy Council then was this. There was weighty House of Lords authority behind the general principle of *Sudeley*, but only so far as that principle applied to unadministered estates

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[224] *Supra*, footnote 113, at p. 39, per Finlay J.
[225] *Ibid.*, at p. 27.
[226] *Ibid.*, at p. 24.

where residue had not yet been ascertained. The Canadian Supreme Court had also supported this application of the principle, though by a majority judgment only of three to one.[227]

The application of the *Sudeley* principle to trusts where the trust fund is ascertained, had been coloured largely by the conflicts rule that the trust is enforceable in that jurisdiction where the trustees reside. But, though Isaacs J.'s judgment revealed another situation in which the *Sudeley* principle may not apply, the High Court of Australia in *Glenn* v. *Federal Commissioner of Land Tax* had followed *Sudeley* by a majority of two to one. In only one ascertained trust fund case was *Cooper* discussed by a court which adopted *Sudeley,* and that was at first instance.[228] In the New Zealand Court of Appeal a majority of three to one had followed *Sudeley's* principle in preference to *Baker* v. *Archer-Shee,* but no mention was made of *Cooper.*[229]

The *Cooper* principle, on the other hand, had been followed in two cases where administration was not complete, and in particular in a first instance case where Lord Shand's exception in *Sudeley* had been adopted.[230] The second of those cases was in the Privy Council.[231] *Warren's Trustees* v. *Lord Advocate*[232] was another case, this time in the Scottish Court of Session, where a divided court refused to uphold the first instance judge's application of *Sudeley,* but no mention was made of *Cooper* or *Baker.* And in *Skinner* v. *A.G.*[233] the House of Lords, unassisted by *Cooper,* effectively refused to follow *Sudeley.*

As far as ascertained trust fund cases are concerned, *Williams* v. *Singer* and *Baker* v. *Archer-Shee* had had a mixed reception. In courts of appeal *Baker* had been accepted with reluctance only in an unanimous Scottish Court of Session,[234] followed with enthusiasm in the Supreme Court of Canada, though by a majority only of three to two[235] and accepted with reluctance again in the New Zealand Court of Appeal.[236] *Syme* v. *Commissioner of Taxes*

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[227] *M.N.R.* v. *Fitzgerald, supra,* footnote 111.

[228] *Vanneck v. Benham, supra,* footnote 136. Followed by Barton J. in *Re Holmes,* [1917] 1 I.R. 165.

[229] *Stannus* v. *Commissioner of Stamp Duties, supra,* footnote 113.

[230] *A.G.* v. *Walker, supra,* footnote 155.

[231] *Blake* v. *Bayne, supra,* footnote 138. In *Tevlin* v. *Gilsenan, supra,* footnote 149, the Irish Court of Appeal had unanimously preferred *Cooper* v. *Cooper, supra,* footnote 99. See also *Re Dickson, supra,* footnote 154, per Stirling J.

[232] *Supra,* footnote 223.

[233] *Supra,* footnote 170.

[234] *Reid's Trustees* v. *C.I.R., supra,* footnote 192.

[235] *M.N.R.* v. *Trans-Canada Investment Corp. Ltd., supra,* footnote 209.

[236] *Stannus* v. *Commissioner of Stamp Duties, supra,* footnote 113.

in the Privy Council, however, had lent strong support to the *Baker* decision, though *Syme* had not been mentioned in *Baker*. Only in the Canadian Supreme Court's decision[237] was *Syme* adopted together with *Baker*. Did this bolster the majority argument in *Baker*, and account for the Supreme Court's enthusiastic adoption of *Baker*, resulting in the extension of *Baker* to facts involving far more complex trust duties than in *Baker* itself?

1. *The decision in Livingston.*

In this case the deceased beneficiary was entitled to a one-third share in the testator's residue, which *inter alia* included realty in Queensland. The testator died domiciled in New South Wales, and the deceased died intestate domiciled there while administration was being carried out and before the residue was ascertained. Were the Queensland authorities entitled to levy succession duty on the interest of the deceased beneficiary in the Queensland property?

The Supreme Court of Queensland held that it had no competence to decide the substantive issues; the High Court of Australia[238] decided the issues and found for the deceased's administrator, but only by a majority of three to two. The Privy Council on further appeal[239] upheld the majority's decision.

With the exception of the "derived from" cases, all the authorities were ranged before the Judicial Committee. A final appeal court in England was to decide the respective merits of the *Sudeley* authorities and the *Cooper* authorities. Indeed it was *Skinner* v. *A.G.* that counsel for the Commissioner principally relied upon. This then, so it seemed, was at last an occasion when this whole controversial field could be considered by the court against the background of all the authorities, and an attempt be made at this high appellate level to settle the matter once and for all. After all, this was an appeal from Australia which has had a good deal of litigation arising out of the controversy, and the majority in the High Court had attempted to set their decisions against the background of a reasoned explanation of the whole field. Moreover, the Privy Council, like the House of Lords, is sufficiently persuasive in the Dominions as to have practically the standing which it enjoys in the United Kingdom. Unfortunately, the Judicial Committee declined to take on the task. The members of the Com-

[237] See, *supra*, footnote 209.
[238] *Supra*, footnote 34.
[239] *Supra*, footnote 35.

mittee chose instead to decide only the issue with which they were directly concerned, namely, the rights of one of several residuary legatees in the unascertained residue of an administered estate. And the Committee commented on nothing else.

However, the dominant note of the Privy Council's judgment is a complete and unqualified support of the *Sudeley* decision. No trust, let alone a trust fund, can come into existence, said the Committee, until administration is complete. For equity to have given beneficial interests in the assets to the residuary legatees while the estate was still being administered, would have been "a clumsy and unsatisfactory device from a practical point of view",[240] and in plain conflict with the rule that equity does not impose a trust until there are "specific subjects identifiable as the trust fund".[241] Indeed, in emphasizing that the residuary legatee has only a chose in action, the judgment of the Committee goes so far as to associate itself fully with the remark of Lord Herschell in *Sudeley*. Until administration was complete, he had said, the residuary legatee's executors did not have "any estate, right, or interest, legal or equitable, in these New Zealand mortgages so as to make them an asset of her estate".[242]

That left the Committee with but three points to make. First, that Lord Cairns' language in *Cooper* v. *Cooper*[243] was an incorrect statement of the rights of next-of-kin or residuary legatees in an unadministered estate and an authority on the subject of election alone.

Secondly, the Committee saw no need to describe the residuary legatees as having some sort of beneficial interest in the assets prior to completion of administration. During this time there is no separate equitable interest. Equity controls the duties of the executor,

> . . . by the enforcement of remedies which do not involve the admission or recognition of equitable rights of property in those assets. Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines.[244]

This did not prevent the word "interest" from being employed as a means of describing the residuary legatee's claim, so long as it was understood that it was in no sense a property interest but a right against administrators to secure proper administration and any

[240] *Ibid.*, at pp. 707, 708.
[241] *Ibid.*, at p. 708.
[242] *Supra*, footnote 74, at p. 18.
[243] *Supra*, footnote 99.
[244] *Supra*, footnote 35, at p. 712.

property rights that the legatees hoped would arise in the future. Again, a residuary legatee might have an interest in the totality of the assets, but he could have no interest in any particular asset. And when residuary legatees trace the assets into the hands of third parties, they are only acting on behalf of the estate and in the place of defaulting administrators.

Incidentally, this last comment means that it is the more misleading to speak of the residuary legatee as having a right *in rem* when he pursues third parties. *He* has nothing of the sort; he is merely standing in the shoes of, and acting temporarily as if he were, the executor.[245]

Thirdly, *Skinner* v. *A.G.*[246] was a decision confined to the "special meaning" of the word "interest" when used in section 2(1) (b) of the Finance Act, 1894. In the judgment of the Committee Lord Russell must have been referring to the rights of an annuitant who, pending administration, has the rights of the unpaid legatee, and must have been distinguishing the annuitant from the residuary legatee.

The decision of the Committee is clear and definitive, as far as it goes. But if it is "the basic conception of equity that to impose the fetters of a trust upon property, with the resulting creation of equitable interests in that property, there [have] to be specific subjects identifiable as the trust fund",[247] when does the trust fund take on that characteristic?

Can residuary legatees capable of exercising the rule in *Saunders* v. *Vautier*[248] be said to have proprietary interests prior to ascertainment of the residue? The Committee says nothing of this, but since it puts such emphasis on the need for ascertainment of the residue before there can be any proprietary interest in a legatee, their answer presumably is no. Is the residuary "trust fund" ascertained, though because a specific item of realty remains unsold administration is still technically incomplete? If the answer is again no (and this may be a wrong assumption), would it be different if the residuary legatee in question died after contract and before payment and completion? Is it necessary to have not only ascertainment of the trust fund, but allocation of specific assets to the shares of residuary legatees? If not, then the decision in *Blake* v.

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[245] This puts an end to many a textbook remark that the right to trace of *Re Hallett's Estate* (1879), 13 Ch. D. 696 and *Re Diplock, supra,* footnote 43, is a right *in rem.*

[246] *Supra,* footnote 170.

[247] *Supra,* footnote 35, at p. 708.

[248] *Supra,* footnote 129.

Bayne,[249] which followed *Cooper* v. *Cooper,* is still correct.[250]

And what is now the position of the three exceptions to the *Sudeley* principle which are to be found in the judgments of *Sudeley* itself? The Committee says nothing about the exceptions. The more the present writer speculates on what the members of the Committee would have said, the more possibilities come to mind. The only comment that seems worth making here is that, if equity does not recognise beneficial interests in the assets in the administrator's hands during the course of administration because the administrator must be free to carry out his various duties, Lord Shand's exception (the first exception to *Sudeley*) seems to be in some doubt. What difference can it now make that there is one residuary legatee rather than several? But until this has been made clear, one would suggest that *A.G.* v. *Walker,*[251] another case which followed *Cooper* v. *Cooper,* cannot definitely be said to be wrong.

2. *The aftermath of Livingston.*

The decision of the Privy Council is expressly based on the facts of that case, an unadministered estate. So that the case says nothing, expressly or impliedly, as to the law where the trust fund is ascertained. While the Committee is prepared to apply the *Sudeley* decision, which concerned liability to probate duty, to a succession duty problem, that only suggests the general applicability of the rule in *Sudeley's* case within the area of unadministered estates and unascertained residuary funds. This means that what have here been termed the trust cases remain unaffected by the Privy Council decision, and this is where one turns to the majority judgments of the High Court in Australia.

Fullager J.[252] was of the opinion that *Sudeley's* case lays down a principle which with advantage could have been applied, where the locality of equitable interests is in question, to both unadministered estate cases and the testamentary or *inter vivos* trust cases. He thinks *Baker* v. *Archer-Shee* to be the anomaly, he associates himself fully with the dissenting judgments in that case, and, though he will not commit himself as to what he would say if that case came up for decision before himself, he expresses his dislike of the majority opinions by pointing out the "unsatisfactory

[249] *Supra,* footnote 138.
[250] And Younger J.'s rationale of *Blake* v. *Bayne* in *Vanneck* v. *Benham, supra,* footnote 136, is still good law. See, *supra.*
[251] *Supra,* footnote 155.
[252] Menzies J. concurred on this point, *supra,* footnote 34.

distinctions"[253] to which they have led, as, for example, in *Stannus'* case. He suggests, too, that "applications in later cases of the view of the majority [in *Baker's* case] [may] have been based on a misunderstanding of that view".[254]

But in the light of Jordan C.J.'s powerfully argued case in *McCaughey* v. *Commissioner of Stamp Duties*,[255] a case which was not met in the Privy Council in *Livingston*, where the Chief Justice came to the view that it was *Sudeley* which is the anomaly, it is the argument of Kitto J. which contains the better vehicle both for explaining the present law and for reconciling *Baker* v. *Archer-Shee* with *Sudeley*.

It has been the burden of this overlong article to argue that the genius of the common law trust is in part that, deviating thereby from the fundamental conceptions of the civil law, it blended both the notion of a personal right with a proprietary interest (a right of enjoyment) in the trust fund. The trust beneficiary owns exclusively the right of enjoyment of the trust property, whatever form it may take, and for the greater part he asserts his right through the personal remedy which he has against the trustee to compel him to perform his duties of proper control and administration of the trust fund. But the trust beneficiary's rights are something like shot-silk. Looked at from the remedial angle, the beneficiary has only personal, obligatory rights, and whenever he sues the third party to recover the trust property, he does so by stepping into the shoes of the trustee, as it were, whose default in making the transfer to the third party lets in the beneficiary to protect the property. The beneficiary now sues to recover the trust property, not immediately for himself, but for the trust and all the other trust beneficiaries, if there are such.

Looked at from the substantive angle, however, the trust beneficiary's remedial right exists because the beneficiary has a material interest in the trust property. His interest is expressed as an estate in equity, and normally it will be correct to describe this interest or estate as a chose in action. The whole working operation of the trust[256] assumes that the trustees are free to exercise their powers

[253] *Ibid.*, at p. 436.
[254] *Ibid.*
[255] *Supra*, footnote 202. See further, *supra*.
[256] *E.g.*, trustees gathering in and managing the trust property, trustees making income payments and investing capital, trustees accounting to beneficiaries, beneficiaries establishing their degrees of interest in the trust and their rights between themselves.
In *Schalit* v. *Joseph Nadler. Ltd.*, [1933] 2 K.B. 79, *e.g.*, where A leased to B and later conveyed the lease to C on trust for himself (A), the Divisonal

and discretions, and perform their duties unhampered, while the beneficiary secures his interests by his actions for breach and an accounting on the part of the trustees. To maintain this balance, it is obviously better to think of the equitable interest of the beneficiary as a chose in action. But there may be other times when it is more helpful and more correct to look at the substantive side of the matter, at the existence of the actual property which makes the chose in action meaningful. Those circumstances arise when the issue does not concern the working of the trust, but, for example, the liability to tax or duty sought to be laid upon the beneficiary because of his interest in the trust fund. Here no aspect of the trust's flexible ownership device is in question. The citizen is either using the existence of a trust as a shield with which to ward off the Revenue authorities, or the Revenue is using its existence as a sword with which to "get at" the citizen and levy moneys from him. The issue in such a case is between the beneficiary and the Crown, a total stranger to the trust, its purpose and machinery. The Crown is merely concerned to impose tax or duty on property interests where it finds such interests. Sometimes the question may arise where the trustees and the trust fund are in the same taxing or duty jurisdiction,[257] and it may otherwise arise when the trustees are in one jurisdiction and the trust assets are in another.[258] In the latter situation there will be two questions which have to be argued: (1) is the beneficiary entitled to a chose in action or has he an interest in the trust fund?, and (ii) if it is a chose in action, where is it located? In the *Baker* type of case, only the first question arises.

The submission made here is that to answer this first question it becomes necessary to look at the facts of each case. Has the beneficiary a sufficiently direct interest in the trust fund that he can be said to have more than a chose in action? *Baker* v. *Archer-Shee* is again the example; a settled fund, a trustee chosen by the beneficiary, and all the income rights vested in that one bene-

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Court denied the right of A to distrain against B for non-payment of rent. The beneficiary, said the court, was entitled only to an account from the trustee. Were it not so the tenant would not know whether to pay trustee or beneficiary; indeed the tenant might not know of the beneficiary until demand for rent was made. And then there was the point that C, as trustee and titleholder, was liable to a superior landlord. Clearly this is a case where the whole working operation of the trust was jeopardised by the beneficiary's claim that he was entitled to specific trust property. The beneficiary was seeking to disrupt that working operation.

[257] *Baker* v. *Archer-Shee, supra,* footnote 21.

[258] *McCaughey* v. *Commissioner of Stamp Duties, supra,* footnote 202; *Sudeley* v. *A.G., supra,* footnote 74.

ficiary. Though it would have been an obvious heresy had this been a case concerning the working of the trust, it was here possible to say that the trustee was a mere agent of the beneficiary for collection and the payment of local taxes and charges. Very often the court is assisted in finding a direct interest in the trust fund by the wording of the Act which enables the Crown to levy the particular tax or duty. And this, of course, encourages a reluctant court to explain the liability of a particular trust beneficiary as a liability arising from the particular statutory language. As we have seen, where the statute runs "income derived from" or "arising from" dividends, a business, and so on, an obvious situation for this judicial explanation is presented. But, as we have also seen, some courts have been prepared to consider the degree of directness, regardless of the statutory language. This is particularly true in Canada.[259] And the New Zealand Court of Appeal, though hesitant about *Baker* v. *Archer-Shee,* felt compelled to say that it was a decision to the effect that in the *Baker* fact situation there is sufficient directness.[260]

It is possible to argue, of course, that it would be more convenient, even in taxation matters, if the courts never look at the interest in the trust property which makes the equitable chose in action meaningful. Such an attitude would eliminate the obvious controversy[261] as to whether there is sufficient directness in any particular set of facts. But it *is* a question of convenience only. And to apply *Sudeley* may not always provide the convenient answers. The location of a chose in action must necessarily be determined by rules of convention, the proper application of which to a particular set of facts may well be controversial, and in the case of a testamentary trust it is indeed notoriously difficult in many factual instances to decide when administration is complete.[262] *Sudeley* therefore, whether or not it upholds a sound equitable principle, is no panacea. As far as convenience is concerned, the merits may well be balanced between the *Sudeley* approach and the *Baker* approach.

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[259] *M.N.R.* v. *Trans-Canada Investment Corp. Ltd., supra,* footnote 209.
[260] *Stannus* v. *Commissioner of Stamp Duties, supra,* footnote 113.
[261] *M.N.R.* v. *Trans-Canada Investment Corp. Ltd., supra,* footnote 209.
[262] "The exact moment of passage from one character to the other is difficult to define": *Re Mackay,* [1906] 1 Ch. 25, at p. 31. "The question is in every case one of fact, turning upon a consideration of the whole of the circumstances, the continued existence of a mortgage debt not necessarily preventing the change from taking place": *I.R.C.* v. *Smith, supra,* footnote 169. But the courts are not prepared to accept an estate that is almost administered, as if it were completely administered.

If it is possible then when issues arise not involving the working machinery of the trust, to look at the interest of the beneficiary in the trust fund, what sign is there of judicial support for such an analysis? Support seems clearly to come from Kitto J.'s judgment in *Livingston.*[263] Referring to the residuary legatee's rights, he pointed out that such a legatee can indeed be said to be entitled to have the administration of the estate carried out and his share ultimately assigned to him. Alternatively, it can be put this way; the legatee is entitled to have every individual asset which at the time of his death is comprised in the estate, dealt with in the due course of administration. He went on:[264]

> Both descriptions recognise that [the legatee] was entitled to have a process carried out; but while the one emphasizes the purpose of the process and its ultimate benefit to her, the other directs primary attention to the property presently available for the carrying out of the process. Which description is to be used on a given occasion is a question of appropriateness to the purpose in hand; but it is only the one set of rights that is being referred to.

In answering the question in the individual case he could see no gain, but confusion indeed, from thinking in terms of rights *in rem* and rights *in personam.*

It was, of course, a prop of his succeeding argument that the residuary legatee's interest during administration is proprietary as well as a chose in action, and this prop has been knocked away by the Privy Council's judgment.[265] But the prop still remains as far as interests in ascertained trust funds are concerned. And therefore it remains pertinent when he says that the existence of a beneficial interest is one thing, and the nature of it another.

> If a question arises as to whether a particular asset "belongs" to the residuary legatee within the meaning of some statute or other instrument, the answer cannot be reached without consideration of the precise rights of which the residuary interest consists. Similarly, if the question is where should the interest be considered in law as locally situated, the rights which it comprehends must be clearly understood before an answer can be given.[266]

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[263] *Supra,* footnote 34, at p. 446 *et seq.*

[264] *Ibid.,* at p. 448. The residuary legatee was the testator's widow, Mrs. Coulson.

[265] This judgment suggests by implication that where a residuary legatee predeceases the testator, the right of the estate to a resulting trust in that legatee's share is also a mere chose in action until administration is complete. This is a curious result because the testator's interest was proprietary before his death, and his executors, who will have legal title to the assets pending distribution, stand in his shoes and surely retain his proprietary interest. Or are we to conclude that while the residuary legatee's rights are a chose in action, the estate's rights to a reversion constitute a proprietary interest?

[266] *Supra,* footnote 34, at p. 450.

This helps to bring out why some cases explain their results as stemming purely from the statutory language, while others stress the existence of a general rule of law. The interpretation of statutory language and the general propositions of Equity are bound up with one another. Again, it is a matter of judicial emphasis.

This takes the learned judge into the cases on the controversy. Of *Baker* he says, "that the *cestui que trust* had a beneficial interest in the income no one doubted; but the question [whether the dividends 'belonged' to her] could not be answered save by a consideration of the rights of which the interest consisted".[267] Of *Barnardo's Homes*,[268] where, it will be recalled, the charitable residuary legatee was claiming that the moneys received from the unadministered estate were "income", and the House of Lords decided they were not, Kitto J. remarks, "it was because those rights were adjudged not to be sufficiently direct and exclusive that a negative answer to the question was returned".[269] The estate was unadministered and the residue unascertained; the residuary legatee could not point to any asset as being its proprietary interest. Equally, where the locality of a "beneficial interest" is in question, "the prime necessity [is] to take account of the nature of the rights which are comprised in the interest under consideration in the particular case".[270] The most "substantial connexion" of the rights of the residuary legatee in an unadministered estate, said the judge, is with the place of the appropriate forum for enforcing the due administration of the estate. The interest of the beneficiary is both in the individual asset and the totality of assets,[271] a vague property interest only which tips the scale in favour of chose in action emphasis. This, Kitto J. thought, was what was being said by *Sudeley*.

Turning then to the ascertained trust fund cases which follow *Sudeley* he remarked: "Similar reasoning applies, I think, to an interest in a trust fund of inherently variable composition."[272] In *Favorke* v. *Steinkopff*,[273] for example, where it was held that the interest was a chose in action only, the trustees had to pay several annuities, and the trust investments "could be altered from time to time".[274]

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[267] *Ibid.*
[268] *Supra*, footnote 106.
[269] *Supra*, footnote 34, at p. 450.
[270] *Ibid.*, at p. 451.
[271] The Privy Council has now stressed the totality of assets.
[272] *Supra*, footnote 34, at p. 453.
[273] *Supra*, footnote 123. He cites also as further examples, *Re Smyth*, *supra*, footnote 75, and *Watt's* case (1926), 38 C.L.R. 12.
[274] The conflict of laws point is an interesting one, but beyond the con-

Conclusion

Here then is a line of thought and of analysis which is right away from the stultifying *in rem-in personam* controversy, and in that sense Kitto J.'s approach is a sound move forward. But, once it is accepted that latinisms are to go, is it the most helpful analysis? At first sight it is most attractive. But on closer examination it appears to provide *post facto* rationalisation for authorities which were not decided according to that test, and to provide a test only for those situations where it is legitimate to consider whether there *could* be a beneficial interest in the specific trust property. Into the bargain, the test of "sufficiently direct and exclusive" looks ominously vague. It is for these reasons that one has to go yet deeper in examining the worth of Kitto J.'s approach.

There are really two questions which have to be answered when the trust beneficiary is said to have an interest in the specific property. First, is the litigated problem within an area of trusts law where this contention should be listened to? Secondly, if so, does the *particular* beneficiary have a proprietary interest in the specific trust property?

In the past these questions have not been spelled out. The authorities discussed in this article suggest that there are two alternative attitudes to the problem of whether there is a beneficial interest in the trust property. Either one accepts the view that once there is a trust the beneficiary's interest is only a chose in action, and one says as much, or one disagrees with this view, and recognises that there are some precedents to the opposite effect, and applies them according to the particular facts, without attempting any rationale. As the writer has tried to point out, neither of these approaches is adequate. The first approach assumes that all trust problems necessitate the adoption of the reasoning that is applicable when the working operation of the trust is called in question. In the writer's view this is fallacious. The second appreciates that there may be problems where Maitland's theory is inapplicable, but is content in view of the controversy to take the most convenient precedent at hand in order to achieve the desired results.

The result is an endless debate, which has about it many of the

fines of this article since the dominating rule has been, regardless of the nature of the trust beneficiary's interest, that the *lex situs* must govern where the trust property constitutes land. In view of the Privy Council's decision in *Livingston's* case, however, *Re Berchtold,* [1923] 1 Ch. 192 is now open to some question, and may have been wrongly decided. See also footnote 118, *supra.*

frustrations which mark the academic *in rem-in personam* debate. There is something of the same stating of positions by either faction, neither meeting the other. What is more, the unsatisfactory nature of these alternatives is largely due to the fact that the first of the two questions[275] has never been tackled as a question. Where the appeal courts have divided they have almost always done so because one side holds firmly to the view that the beneficiary has only a right of action against the trustees, while the other side is prepared to see "the substance" of the beneficiary's interest and to find respectable precedent to support that approach. This has meant that the pragmatic have often had a too free hand in tackling the second question,[276] because the more academically inclined have taken the initial and single objection that an equitable interest cannot involve any sort of interest in the property. If, on the other hand, the court is predominantly inclined to the academic view then energy is spent in regretting the opposing precedent and in restricting it as much as possible. The second question, as Kitto J. posed it, is never put or even suggested, other than as a medium for criticism.

It would be difficult to think of another area where there have been so many dissenting opinions in so few appeal cases. This alone suggests the importance of another examination of the controversy. And perhaps in a borderline area like this, disagreement is inevitable. But at least the disagreement ought to reflect the real issues.

And, again, the first of those issues is this: are there areas involving trust interests where the contention could be made that the beneficiary has an interest in the trust property? Here the writer has heartily commended the argument that where the problem concerns the working of the trust machinery, it would be better to adhere to the view that the beneficiary asserts his right of enjoyment in the trust property by his action against the trustees to ensure that they exercise faithfully and without negligence their fiduciary role of administration. To do otherwise would be to destroy the independence of the trustees in their powers and discretions concerning the trust property, and set up competition among quarrelsome beneficiaries in their claims to specific prop-

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[275] Is this an area of trusts law where the contention of equitable ownership can be listened to?

[276] If so, does the *particular* beneficiary have a proprietary interest in the specific trust property?

erty in the trust. The trust would thereby lose much of the attraction it traditionally has had for settlors.[277]

But there are areas where the problem concerns the nature of the beneficiary's interest for purposes other than the working of the trust. The first, and most obvious, as we have seen, concerns the claims of the revenue authorities. With the notable exception of *Cooper* v. *Cooper* itself, almost all the controversial cases have been concerned with the levying of tax or duty. In the writer's view the courts should not need to talk here of the "substance" rather than the "form". The issue quite simply does not concern the working of the trust.

The second, and less obvious, situation arises out of statute. In this relatively unheralded field the courts for a century or more have been ruling that the trust beneficiary's interest is in the trust property. In nearly all the cases they have done this simply by "interpreting the Act" in question, without relating the interpretation to the other considerations.[278] And by the same process other cases have been decided the other way, holding that the beneficiary has no interest in the trust property.[279] In yet a third group the Act in question has been interpreted entirely, or largely, as the result of a conceptual view held by the court on the nature of the beneficiary's interest in the trust property.[280] The time seems now to have come when the courts should move away from the haphazard approach, and first ask themselves whether the Act affects the working machinery of the trust.[281] If the Act in question does so, there is a good case for saying that this is not an area of trust law where the rule that the beneficiary has only a chose in action, should be departed from. If the Act does not do so, then the courts should feel free to interpret the Act freely. Among other things, they would be able to consider the policy of the Act, unrestrained by irrelevant trust theory.

It is impossible to foresee all the remaining areas where the problem might arise. Rectification of documents,[282] whether the

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[277] Despite the enormous powers which some jurisdictions now have under Variation of Trusts Acts, the courts have not been prepared to overrule a trustee's discretion which is being properly exercised, and which he does not surrender to the court. See, *e.g., Re Steele's Will Trusts,* [1960] 1 All E.R. 487 (C.A.).

[278] *E.g., Syme* v. *Commissioner of Taxes, supra,* footnote 57.

[279] *E.g., Webb* v. *Syme, supra,* footnote 70, per O'Connor J. (Vict S. Ct.).

[280] *E.g., Stannus* v. *Commissioner of Stamp Duties, supra,* footnote 113; *Commissioner of Stamp Duties* v. *Livingston, supra,* footnote 35.

[281] See, *supra,* footnote 256.

[282] *Vanneck* v. *Benham, supra,* footnote 136.

beneficiary should be put to his election,[283] whether the beneficiary should be able to elect to take specific property,[284] and the ability of the beneficiaries to claim under deed of indemnity for improper administration,[285] these are the sort of areas where the question ought to be put. Though, as one gets away from revenue claims and statute, it is admittedly the more likely that the answer to the question will be difficult to find and arguable. Still, the authorities would be pursuing a theme, a pattern of logical thought. And this is surely an enormous gain over the present decide-as-you-please approach.

The second issue is this: if the litigated problem is in an area where the beneficiary *could* be said to have an interest in the trust property, does he *in fact* have such an interest? It is here that Kitto J.'s judgment may well come into its own. It *is*, one would respectfully suggest, a matter of whether the beneficiary's equitable interest is "sufficiently direct and exclusive". This is a question of fact. And at once the conceptual difficulties are out of the way. Nor does it now particularly matter if the test is vague. In any case, against the background of the infinite variation of facts that may occur, it is bound to be so. Views, of course, may differ as to what is sufficiently direct and exclusive, but at the very least the courts will be agreed as to what they are discussing. Nor is it a disadvantage to have the precedents rationalised, as Kitto J. has advocated. It all helps the courts to get away from the false hares that exist at present.

And if the courts could agree to the "direct and exclusive" test, it would then be possible to consider whether there are guiding criteria which the courts could have before them. For example, should annuitants be said to have only an indirect interest in the trust fund, or if it is possible to assess the proportion of the trust property which goes to produce the annuity, is this enough to satisfy the test of directness?[286] Similarly, if there are several beneficiaries and sources of income coming to the trustees from a variety of directions, and the mathematics of proportioning can be done with the aid of the trustees' books,[287] does this still satisfy the test? Law-

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[283] *Cooper* v. *Cooper*, *supra*, footnote 99.
[284] *Brook* v. *Badley*, *supra*, footnote 132.
[285] *Blake* v. *Bayne*, *supra*, footnote 138.
[286] The present law merely leaves this matter up in the air. Compare *Re Income Tax Acts, 1924-1928 (No. 2)* and *Armstrong* v. *Commissioner for Inland Revenue*, *supra*, footnote 82.
[287] *Syme* v. *Commissioner of Taxes*, *supra*, footnote 57.

rence J.'s attitude in *Nelson* v. *Adamport*[288] might suggest on this basis a more creative approach than was shown by the New Zealand Court of Appeal in *Stannus* v. *Commissioner of Stamp Duties*,[289] where we merely have a reluctant apologia for *Baker* v. *Archer-Shee*.[290] And the attitude of the Canadian Supreme Court majority in *M.N.R.* v. *Trans-Canada Investment Corp. Ltd.*,[291] breath-taking as was their conclusion in view of the complexity of the trust, may be more forward looking than the dour hostility of the Scottish Court of Session in *Reid's Trustees* v. *Commissioners of Inland Revenue*.[292]

The judgment of the Privy Council in *The Commissioner of Stamp Duties* v. *Livingston*[293] unhappily suggests that the Judicial Committee sees no need to end the present conflict of judicial opinion other than by associating itself with one of the factions. Experience shows, however, that the subsequent stubborn court simply distinguishes such a judgment as this. And thus the battle continues. Need it do so?

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[288] *Supra*, footnote 205.
[289] *Supra*, footnote 113.
[290] *Supra*, footnote 21.
[291] *Supra*, footnote 209.
[292] *Supra*, footnote 192.
[293] *Supra*, footnote 35.