VOL. XXXI—PART I

No. 1422—High Court of Justice (King's Bench Division)—16th, 17th, 18th, 21st, 22nd, 23rd and 24th October and 4th November, 1946

Court of Appeal—9th, 10th, 11th, 14th, 15th, 16th, 17th and 30th July, 1947

House of Lords—7th, 9th, 10th, 11th, 14th, 15th, 16th and 17th February and 6th May, 1949

(1) Lord Vestey's Executors and Vestey *v.* Commissioners of Inland Revenue (1) *

(2) Lord Vestey's Executors and Vestey *v.* Colquhoun (H.M. Inspector of Taxes) *

(3) Lord Vestey's Executors and Vestey *v.* Commissioners of Inland Revenue (2) *

Income Tax — Sur-tax — Avoidance of liability to tax — Transfer of assets to persons abroad — Settlement — Demise of properties situate abroad — Rent payable to trustees abroad and accumulated for benefit of lessors' issue — Trustees empowered to lend without security — "Power to enjoy income" — Power to revoke or determine the settlement — "Interest in any income arising under or property comprised in "a settlement" — Discovery — Income Tax Act, 1918 (8 *&* 9 *Geo.* V, *c.* 40), *Section* 125; *Finance Act,* 1936 (26 *Geo.* V *&* I *Edw.* VIII, *c.* 34), *Section* 18; *Finance Act,* 1938 (1 *&* 2 *Geo.* VI, *c.* 46), *Sections* 28, 38 *and* 41.

By lease dated 29th December, 1921, *W (who died in December,* 1940) *and E demised certain properties situate abroad to a company for a term of* 21 *years from 10th April,* 1921, *at a rent of* £960,000 *per annum payable to trustees resident in Paris. The lease was determinable by six months' notice by either the lessors or the lessee. It also provided that the lessors might withdraw any of the properties therefrom, the rent being correspondingly reduced, and this power was exercised from time to time.*

By settlement dated 30th December, 1921, *W and E settled the rent payable to the Paris trustees on trusts for the benefit of their respective children or remoter issue. The trustees were directed, until the expiration of* 20 *years from the death of the last surviving grandchild then living of the settlors, to receive and capitalise the rent by investing the same under wide powers of investment, including power to lend on personal credit or to any company with or without security. Such investment was to be carried out at the directions of certain "authorised persons" specified by the deed of settlement, and at the material times the "authorised "persons" for this purpose were W and E. The rent so dealt with was called the "settled fund". The income of the "settled fund", after meeting certain costs, etc., was to be divided into two parts called "W's fund" and "E's fund" and accumulated until their respective deaths or* 21 *years from*

(1) Section 38, Finance Act, 1938. (2) Section 18, Finance Act, 1936.
* Reported (H.L.) [1949] 1 All E.R. 1108.

the date of the deed, whichever might be the earlier date, when the two funds, with the accumulations thereof, respectively described as "W's "accumulated fund" and "E's accumulated fund", were to be held in trust for their children or remoter issue as they might by deed or by will appoint. Power was reserved to W or E to appoint by will or codicil any interest in their respective funds in favour of the widow of the appointer, but by deed dated 31st March, 1937, E wholly extinguished the power so reserved to him.

In these circumstances W's executors and E were assessed to tax as follows:—

(a) *On the footing that the lease and the settlement together constituted a settlement which fell within Sub-section* (2) *of Section* 38 *of the Finance Act,* 1938, *and was also one in which the settlors had an interest within the meaning of Sub-sections* (3) *and* (4) *of that Section:*

(i) *by additional assessments to Income Tax for the years* 1938-39 *to* 1940-41;

(ii) *by additional assessments to Sur-tax for the years* 1937-38 *to* 1940-41.

(b) *On the footing that W and E, being ordinarily resident in the United Kingdom at the relevant time, had transferred assets abroad and had power to enjoy the income of the Paris trustees within the meaning of Section* 18 *of the Finance Act,* 1936:

(i) *by additional assessments to Income Tax for the years* 1936-37 *to* 1940-41 (*the assessments for the years* 1938-39 *to* 1940-41 *being alternative assessments to those made under* (a) (i) *above*);

(ii) *by additional assessments to Sur-tax for the year* 1936-37.

On appeal to the Special Commissioners, the Appellants contended, inter alia:—

(a) *that the assessments were not authorised as there had been no discovery within Section* 125 *of the Income Tax Act,* 1918;

(b) *that the lease did not form part of a "settlement" within Sections* 38 *and* 41 *of the Finance Act,* 1938; *that, for the purposes of Sub-section* (2) *of Section* 38, *the settlors had no power to determine the settlement and that if there was such a power, neither the settlors nor their wives would become beneficially entitled to the property or income arising from property comprised in the settlement; that, for the purposes of Sub-sections* (3) *and* (4) *of Section* 38, *neither the settlors nor their wives had any "interest" in the income arising under or property comprised in the settlement;*

(c) *that, for the purposes of Section* 18 *of the Finance Act,* 1936, *neither W nor E was ordinarily resident in this country at the material dates; neither of them had made a transfer of assets whereby income became payable to a person abroad; neither of them had power to enjoy income of such a person*

or was entitled to receive any capital sum in connection with such a transfer or associated operation; and that avoidance of liability to taxation was not the main purpose or one of the purposes of any transfer of assets made by either of them.

The Special Commissioners found against the Appellants on all these contentions, and dismissed the appeals.

Held:—

(1) *that although there had been a transfer of assets such as is described in the introductory words of the Section, the provisions of Section* 18, *Finance Act,* 1936, *did not apply, since:—*
   (a) *in that Section (and in Section* 38, *Finance Act,* 1938) *the word "wife" does not include the settlor's widow (Sub-section* (5) (*a*));
   (b) *the power to direct investment was jointly held and therefore not acquired by an individual (Sub-section* (1));
   (c) *there was no "power to enjoy income" as defined in Sub-section* (3);

(2) *as regards Section* 38, *Finance Act,* 1938, *that:—*
   (a) *the "property comprised in the settlement" meant only the property charged with rights in favour of others and therefore did not include the properties which were subjects of the lease (Sub-section* (2) (*b*));
   (b) *the power to determine the lease was not, therefore, a power to determine the settlement within Sub-section* (2) (*a*);
   (c) *in consequence, neither W nor E nor their respective wives could become beneficially entitled to property comprised in the settlement or income arising therefrom within Sub-section* (2) (*b*); *and*
   (d) *neither W nor E had an interest in the settlement within the terms of Sub-section* (3);
   (e) *the power held by W and E as "authorised persons" to direct investments was of a fiduciary character, and therefore outside the ambit of Sub-section* (4);

(3) *that in consequence neither W nor E was assessable to Income Tax or Sur-tax under the provisions of Section* 18, *Finance Act,* 1936, *and Section* 38, *Finance Act,* 1938.

Decision in Chamberlain *v.* Commissioners of Inland Revenue, 25 T.C. 317, *applied, and that in* Commissioners of Inland Revenue *v.* Gaunt, 24 T.C. 69, *over-ruled.*

CASES

(1) *Lord Vestey's Executors and Vestey* v. *Commissioners of Inland Revenue*

CASE

Stated under the Finance Act, 1927, Section 42 (7), and Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 21st and 22nd December, 1942, the executors of the Right Honourable William Baron Vestey (he having died on 10th December, 1940) and Sir Edmund Hoyle Vestey appealed against the following additional assessments to Sur-tax made upon them respectively:—

Executors of Lord Vestey

1937–38	in	the	sum	of	£292,916
1938–39	„	„	„	„	£238,750
1939–40	„	„	„	„	£319,766
1940–41	„	„	„	„	£218,301

Sir Edmund Vestey

1937–38	in	the	sum	of	£292,916
1938–39	„	„	„	„	£238,750
1939–40	„	„	„	„	£320,000
1940–41	„	„	„	„	£320,000

The said assessments were intended, pursuant to Section 38 (2), Finance Act, 1938, to comprise the income alleged by the Respondents to have arisen under a number of transactions which the Respondents contended amounted to an "arrangement" and therefore a "settlement" as defined by Section 41 (4) (*b*), Finance Act, 1938, and attributable to Lord Vestey and Sir Edmund Vestey (hereinafter referred to jointly as "the Vesteys" or separately as "William" and "Edmund" respectively) as settlors within the meaning of the said Section 41 (4) (*b*) in equal shares under the provisions of the said Section 38 (2), in so far as the said income was related to and arose from a rent of £960,000 per annum payable under a lease executed in Brussels dated 29th December, 1921 (hereinafter called "the "lease"), between the Vesteys of the first part, Union Cold Storage Co., Ltd. (hereinafter called "Union") of the second part and Charles Auguste Kennerley Hall, James Meeres Drabble and Kenneth Stirling (all persons residing in Paris, France, and hereinafter called "the Paris trustees") of the third part, who were trustees of a deed of settlement dated 30th December, 1921, and executed in Paris (hereinafter called "the deed of "settlement"), to which trustees the Vesteys had transferred the aforesaid rent upon the trusts, terms and conditions and subject to the powers of appointment therein set out and hereinafter referred to. The lease contained, *inter alia*, this recital:

> "Whereas the Lessors are now absolutely entitled . . . to the "hereditaments and premises . . . set forth in the First Schedule hereto "and are also entitled to the full beneficial interest and power of "dealing with the hereditaments . . . set forth in the Second Schedule".

As the Special Commissioners, in answer to precepts issued by them on 2nd January, 1942, under the powers conferred upon them by Paragraph 4 of Part III of the Third Schedule to the Finance Act, 1938, had been informed that the Paris trustees had acquired approximately one-third of the properties comprised in the lease, two-thirds only of the rent had been included in the assessments; but

(1) following subsequent correspondence with the Special Commissioners and the Solicitor of Inland Revenue which disclosed, as stated in sub-paragraphs 6 (v) and (vi) hereof, that the aforesaid approximate one-third was acquired subject to the lease;

(2) by virtue of the structure of the said settlement or arrangement and/or of the deed of settlement and the several funds hereinafter

referred to therein and thereby created, and of the respective rights of the Vesteys over and in the said settlement or arrangement and/or the lease and/or the deed of settlement and the various funds therein and thereby created;

(3) by reason of the subsequent evidence obtained and referred to in paragraphs 4 and 6 hereof concerning the accounts of the Paris trustees and their and the Vesteys' accounts with Western United Investment Co., Ltd. (hereinafter called "Western"),

the Respondents claimed at the hearing that the assessments should be increased to comprise the whole of the income arising under the deed of settlement pursuant to Sections 38 (3) and 38 (4) of the Finance Act, 1938.

2. By the lease William and Edmund demised or agreed to demise certain properties, cattle lands and freezing works situate abroad, in particular in North and South America, Australasia and China, as set out in the schedules thereto, to Union for 21 years as and from 10th April, 1921. The lease reserved the rent of £960,000 (reducible in a certain event) payable to the Paris trustees, whose receipt only was to be a good discharge for the same, and was determinable by six months' notice by the Vesteys or Union. It also provided that upon like notice the Vesteys might withdraw any of the properties therefrom, the rent being correspondingly reduced.

On a number of occasions in exercise of the power reserved to them the Vesteys have by supplemental deeds withdrawn the undermentioned properties originally comprised in the lease and save in one case have substituted other properties.

Deed dated	Withdrawn	Added
11th July, 1923	Darwin Freezing Works, Australia	Campana Freezing Works, Argentina
22nd April, 1925	Zarate, Argentina	Barretos, Brazil Santos, „ Sao Paulo (Mocca), Brazil Fray Bentos, Uruguay Tientsin, China
30th November, 1927	Campana Fray Bentos Mendes Tomoana Gisborne Westfield Auckland Oil Cake Mill	South Dock Frigorifico, Buenos Aires
24th June, 1931	Poverty Bay Freezing Works	Consideration—Expenditure of upwards of £1,500,000 on extensions and improvements of other properties.
21st August, 1934	Chigago Canning Factory Havana, Cuba, Cold Store	Rua Anna Nery 319/331, Rio de Janeiro, Brazil
26th April, 1939	New Belgium Estate, South Africa	San Isidro, Argentina Barranqueros, Argentine Chaco Nerlandia, Gaveche, Santa Isabel, Gato Gordo, Aceitico — Colombia, South America. Venezuela, South America.

On one occasion, as shewn by sub-paragraphs 6 (v) and 6 (vi) hereof, properties in China subject to the lease were sold by the Vesteys to, and acquired by, the Paris trustees subject to the lease.

By the deed of settlement the Vesteys settled the rent payable to the Paris trustees for the benefit of their respective descendants.

The deed of settlement contained, *inter alia,* the following recital: "Whereas by an Indenture of Lease between the Settlors (as Lessors) "of the first part the Union Cold Storage Co., Ltd. (as Lessees) of the "second part and the Trustees of the third part in consideration of the "rent thereby reserved and made payable to the trustees the Lessors "have leased to "Union" certain properties . . . upon the terms and "conditions including a power of determination therein mentioned "And Whereas the Settlors executed and granted the said Lease "reserving the rent thereunder to the Trustees to the intent that such "rent as and when received by the Trustees shall be held by them "upon the trusts and with and subject to the powers and provisions "hereinafter expressed and declared".

The deed of settlement provides for the investment of the rents and the accumulation of the income thereunder and no income as such has been or can be distributed therefrom.

Thus clause 2 of the deed of settlement provided that the rent payable to the trustees in accordance with the terms and during the continuance of the said lease (subject to any refund or rebate) should be capitalised and invested until the expiration of 20 years from the death of the last surviving grandchild then living of the settlors (thereinafter referred to as "the time of distribution"), and contained a clause giving the trustees a wide power of investment and enabling them, at the direction of the Vesteys and the survivor of them, to invest the rent, *inter alia,* upon personal credit or upon loans to any company or companies wheresoever domiciled and with or without security, to the intent that the trustees should subject to such direction as aforesaid have the same full and unrestricted powers of investment as if they were beneficially entitled to the settled fund.

The rent when received was dealt with in accordance with clause 2 and was called "the settled fund".

Clauses 3 and 4 of the deed of settlement provided, *inter alia,* for (*a*) the division of the residue of the income arising from the settled fund when invested, after meeting certain costs, etc. until the time of distribution into two parts called respectively "William's fund" and "Edmund's "fund", and (*b*) for the accumulation and investment of the residue of William's fund and Edmund's fund respectively until the respective deaths of William and Edmund respectively or for 21 years from the date of the deed, whichever might be the earlier date, when the two funds, with the accumulations thereof respectively described as "William's accumulated "fund" and "Edmund's accumulated fund," should be held in trust for the benefit of the children or remoter issue (and their wives and widows) of William and Edmund as William and Edmund might respectively from time to time by deed revocable or irrevocable or by will or codicil appoint, but so that no appointment either of a lump sum or of any specific investments should be made otherwise than in the shape of a capital payment including power to William and Edmund respectively to direct a cessation or partial cessation of the accumulation of William's fund and Edmund's fund respectively with the result therein stated, and in default of and subject

to any such appointment for the division of the funds between their respective lineal descendants living at the time fixed for distribution.

Clause 11 of the deed of settlement reserved a power to William and Edmund respectively, notwithstanding anything contained in the deed of settlement, to appoint by will or codicil any interest in William's fund or Edmund's fund in favour of the widow of the appointor for her life or any shorter period.

Clauses 5 and 14 contained certain provisions made subject to any appointments previously made.

It is to be observed, therefore, that there was and is income the origin being the rent of £960,000 per annum receivable under the lease) arising in the five separate divisions of the deed of settlement, namely, the settled fund, William's fund and Edmund's fund and William's accumulated fund and Edmund's accumulated fund.

The full terms of the said lease and settlement and the circumstances attending the execution thereof are set out in the printed Case before the House of Lords in the case of *Union Cold Storage Co., Ltd.* v. *Adamson* (16 T.C. 293) which may be referred to in connection with this Case.

A copy of the said lease annexed hereto, marked "A1 ", and a copy of the deed of settlement annexed hereto, marked "A2 ", form part of this Case (1) and reference should be made to each of them for their full terms.

3. In exercise and by virtue of the relevant power given or reserved to them by the aforementioned clause 4 of the deed of settlement or any other relevant powers the Vesteys made the following appointments.

(I) By deed dated 26th November, 1935, William irrevocably appointed and directed that the Paris trustees should, from and after 1st April, 1942, or the earlier determination of the lease, hold the whole of William's share, William's fund and William's accumulated fund, both capital and income, and also any part of the rent mentioned in clause 2 of the deed of settlement which might belong or might originally have belonged to him and not effectively disposed of by inclusion in the said funds in trust for his eldest son if then living and in default in trust for that son's son. A copy of the said deed is attached hereto, marked " B ", and forms part of this Case (1).

(II) By deed dated 31st December, 1935, Edmund irrevocably appointed and directed that the Paris trustees should, from and after 1st April, 1942, or the earlier determination of the lease, hold the whole of Edmund's share, Edmund's fund and Edmund's accumulated fund, both capital and income, including all income accruing in the meantime (except as thereinafter provided), and also any part of the rent not effectively disposed of by inclusion in the said funds in trust for his third son if then living and in default in trust for such son of his third son as should first or alone attain the age of 21 years, except and provided that the said deed should not appoint or affect the investments, moneys and property which on 31st October, 1935, represented Edmund's fund and Edmund's accumulated fund. A copy of the said deed is attached hereto, marked " C ", and forms part of this Case (1).

(III) By deed dated 31st March, 1937, Edmund irrevocably appointed the investments and property left unappointed by the last-mentioned deed in trust for his third son as from 1st June, 1937, if then living and in default in trust for his elder daughter, and wholly released and extinguished

(1) Not included in the present print.

in respect of all funds and income the power to appoint an interest therein in favour of his widow if and so far as such power had not already been extinguished. A copy of the deed is attached hereto, marked "D", and forms part of this Case (1).

It is to be observed that William in the deed of appointment of 26th November, 1935, made no reference to the power of appointment exercisable in favour of his widow as did Edmund in the deed of appointment of 31st March, 1937.

The Vesteys have, in exercise of the special powers of appointment reserved to them by the deed of settlement under clauses 3 and/or 4 and of all other relevant powers and referred to in paragraph 2 hereof, appointed a number of capital sums in favour of their children or children's issue as appears from the undermentioned list.

Deed	Appointor	Amount	Ex fund	Appointees
17th July, 1935	William	£60,000	William's accumulated fund	Samuel Vestey
18th July, 1935	—do—	(*a*) £90,000 after 1st July, 1938		
		(*b*) £90,000 after 1st July, 1940	William's accumulated fund or William's fund	"Special fund" for the issue of C. E. Vestey and L. Vestey
		(*c*) £90,000 after 1st July, 1943		
		(*d*) £135,000 after 1st Jan., 1945		
		(*e*) £135,000 after 1st Jan., 1948		
7th January, 1936	Edmund	£63,000	Edmund's accumulated fund	R. A. Vestey
15th June, 1936	—do—	£5,000	—do—	—do—
		£30,000	—do—	Percy C. Vestey
		£1,000	—do—	Hannah Vestey
		£2,500	—do—	Gladys Fleming
4th November, 1936	—do—	£630	—do—	Dorothy Emmeline Vestey
23rd March, 1937	—do—	£3,732 3*s.* 2*d.*	—do—	R. A. Vestey
		£8,874 15*s.* 9*d.*	—do—	Percy C. Vestey
		£4,887 19*s.* 10*d.*	—do—	Hannah Vestey

(1) Not included in the present print.

4. As the correspondence referred to in paragraphs 1 and 8 hereof discloses, the following accounts and documents, together with some of the deeds and/or particulars thereof herein mentioned, were obtained after the making of the assessments under appeal.

(*a*) Balance sheets of Western as at 31st December, 1937, and 1938, with schedules of liabilities and assets for each year annexed, giving details of the items appearing in the balance sheets under the following headings:—

Liabilities

(i) Amount due to Subsidiary Companies
(ii) Other Creditors for Sundry Advances

Assets

(i) Amount owing by Subsidiary Companies
(ii) Other Debtors for Loans and Advances

(*b*) The following accounts for the years 1937 to 1941 of the Paris trustees with Western:—

(i) Current account
(ii) William's fund
(iii) Edmund's fund
(iv) Ronald's fund

(*c*) The following accounts for the years 1937 to 1941 of William and Edmund respectively with Western:—

(i) William's personal account
(ii) Edmund's „ „
(iii) Edmund's No. 2 „
(iv) William's property „
(v) Edmund's „ „

(*d*) A summary (prepared on behalf of the Respondents) (hereinafter called " the Western extract ") for the years ended 31st December, 1937, to 31st December, 1940, extracted from the accounts of Western mentioned at sub-paragraphs (*b*) and (*c*) of this paragraph showing the amounts owing at each year end:—

(*a*) by Western to the Paris trustees under the heading on the Western balance sheets and annexed schedules of liabilities and assets of " Creditors for Sundry Advances ", and

(*b*) by William and Edmund respectively under the like heading of " Debtors for Loans and Advances ".

(*e*) (i) Statements of Account and related schedules of investments (hereinafter called " statements of account ") for the years ending 31st October, 1936, 1937, 1938 and 1939 made by Messrs. Arthur F. Dodd & Co. (27 Chancery Lane, London, W.C.2), chartered accountants, and supplied by them to the Vesteys as " the authorised persons " under the deed of settlement upon the annual investigation of the books and accounts of the Paris trustees.

(ii) A summary of investment of funds for the years 1925 to 1939 (prepared on behalf of the Respondents) (hereinafter

called "the summary of investments") prepared from, and after an inspection by the Solicitor of Inland Revenue of, the aforementioned statements of account and also those for the years 1925 to 1935.

The original accounts and books of the Paris trustees were not before us. They were last known to be in a box at Bordeaux, where they had been left in June, 1940, at the time of the German occupation of France, and their present whereabouts was not known.

On 28th November, 1942, the Solicitor of Inland Revenue wrote to the Appellants' solicitor asking for a statement covering the years of assessment shewing (*a*) loans made by the Paris trustees to Western and (*b*) loans made by Western to William and Edmund. In reply to this request, on 11th December, 1942, copies of the accounts of the Paris trustees and of the Vesteys referred to in sub-paragraphs (*b*) and (*c*), of this paragraph were supplied.

The summary of investments referred to in sub-paragraph (*e*) (ii) of this paragraph purports to show the manner in which the various aforementioned funds set up pursuant to the deed of settlement have been invested by the Paris trustees at the dates shown.

Among the headings of the investments there appear as part of the respective funds of the deed of settlement the following items relating to advances to William or Edmund as the case may be.

Year	Amount	Ex Fund	Name
1932	£19,045	William's fund	William
1937	1,327	"	"
1938	1,835	"	"
1939	1,877	"	"
1932	£15,751	Edmund's fund	Edmund

Also in the years 1927 and 1928 the amounts of £26,009 and £21,082 respectively appear against the name of Edmund under the heading "Awaiting investment."

Copies of:—

(1) the aforesaid balance sheets of Western, with the schedules of liabilities and assets annexed,

(2) the several accounts of the Paris trustees with Western, the personal and property accounts of William and Edmund with Western,

(3) the Western extract,

(4) the statement of accounts of the Paris trustees, and

(5) the summary of investments,

are contained in the bundle of documents marked "E" and form part of this Case [1].

5. Mr. Edward Brown, associated as private secretary to the late Lord Vestey (William) from 1915, with the whole of the matters concerning the lease and the deed of settlement, gave evidence.

6. The following further facts emerged:—

(i) On 27th August, 1897, Union was incorporated, and by the year 1925 the issued share capital thereof was £12,000,000 made up as follows:—

[1] Not included in the present print.

£8,000,000	6 per cent. first cumulative preference
£2,000,000	7 per cent. second preference
£1,000,000	10 per cent. "A" preference
£1,000,000	ordinary
£12,000,000	

All the shares were of £1 each. Only the holders of the last two categories had voting rights—one vote for each share. An extract from the memorandum and articles of association of Union is annexed hereto, marked "F", and forms part of this Case [1].

(ii) On 26th August, 1918, Western was incorporated with a capital of £1,000,004 divided into 1,000,000 ordinary shares of £1 each and four management shares also of £1 each. At all material times the four management shares were held by William and Edmund and their two sons. By the voting rights attaching to them the four management shares gave the holders control but no beneficial interest in the profits or assets. The holders of the ordinary shares had no rights whatsoever save to receive dividends.

From time to time the whole of the ordinary shares and part of the 10 per cent. preference shares of Union came into the ownership of Western. Further, as the current account of the Paris trustees with Western referred to in sub-paragraph 4 (*b*) shows, the Paris trustees by 31st December, 1937, had acquired 600,993 of the 10 per cent. preference shares, and subsequently to that date they made further purchases thereof.

(iii) On 31st July, 1919, the Vesteys settled £1,000,000 in a settlement (the beneficial interests under which are not material to this appeal), of which the Public Trustee was one of the trustees, to buy the 1,000,000 ordinary shares of Western.

(iv) On 28th November, 1930, the trustees of the settlement of 31st July, 1919, sold the 1,000,000 ordinary shares of Western to the Paris trustees.

(v) On 15th November, 1935, the Vesteys by a settlement executed at Boulogne transferred the Chinese properties, subject to the lease, to trustees of a further settlement, the trusts of which are not material to this appeal.

(vi) On 27th November, 1935, the Paris trustees purchased the Chinese properties subject to the lease for £2,500,000 from the trustees of the settlement of 15th November, 1935.

(vii) Western acts as bankers and financial agents for the operating companies, the Paris trustees and the Vesteys.

Western keeps personal accounts on behalf of William and Edmund respectively and, similarly, property accounts.

The personal accounts are drawn upon by the Vesteys for private, domestic and personal purposes, and fluctuate, being sometimes in credit and sometimes in debit, and no interest is either allowed or charged on the balances.

The property accounts have always been in debit and arise in this way. The properties comprised in the lease are occupied

[1] Not included in the present print.

by the local operating company, which pays for all repairs, renewals and extensions. In terms of the lease outgoings in the nature of repairs are borne by the occupying company, and payments in the nature of capital expenditure properly to be borne by the Vesteys as landlords are first charged to Union then in turn charged to Western, which at the Vesteys' request debits the amount to them in equal shares. No interest is charged on these property accounts.

These personal and property accounts are those referred to in sub-paragraph 4 (*c*) hereof and shown by Western upon its balance sheets and schedule of assets among the items of "Other "Debtors for Loans and Advances".

The Paris trustees have also remitted moneys awaiting investment to Western, being paid interest on the sums lying to their credit.

The moneys so remitted were credited to various accounts, but primarily to the current account of the trustees and the accounts of the trustees known as William's fund and Edmund's fund referred to in sub-paragraph 4 (*b*) hereof. Into the aforesaid current account there was paid (*inter alia*) the rent of £960,000 per annum due from Union under the lease or quarterly instalments thereof. The payments from Union were at first sent direct to Paris, and most of them then remitted back to Western for the credit of the Paris trustees. Sometimes the Paris trustees paid them into their own banking account in Amsterdam, but when the present war commenced, by direction of the Paris trustees, they were paid direct to Western.

The total of the sums credited by Western to the Paris trustees in the current account and the accounts of William's fund and Edmund's fund is shown by Western upon its balance sheets and schedule of liabilities among the items of "Other Creditors for Sundry Advances."

The current account of the Paris trustees with Western is shown in the statements of account of the Paris trustees referred to in sub-paragraph 4 (*e*) hereof under the heading of "Unsecured Loans and Advances."

The accounting years of the Paris trustees and Western end on different dates, namely, 31st October and 31st December respectively, but the moneys owed by Western to the Paris trustees and the moneys due to Western by the Vesteys can be reconciled as shown by the Western Balance sheets and schedules of liabilities and assets, the Western extract and the summary of investments all referred to in paragraph 4 hereof.

The books of Western show that at 31st December, 1937, the aggregate amounts lying to credit of the Paris trustees on the several aforementioned accounts were £104,570, and at 31st December, 1938, £1,482,720. At the same dates the net balances due by William and Edmund respectively to Western on the personal and property accounts were:—(*a*) William £462,235 and £600,268, (*b*) Edmund £473,796 and £517,820, see copy extract from the company's books (i.e. Western extract) in the bundle attached hereto, marked "E" (1) referred to in paragraph 4 hereof.

7. With reference to:—

(*a*) the sums of £19,045, £1,327, £1,835, £1,877, and £15,751 referred to in paragraph 4 hereof and appearing wrongly, as the

(1) Not included in the present print.

Appellants contended, in the accounts of the Paris trustees as advances to William or Edmund as the case may be, and

(*b*) the sums debited by Western to William and Edmund in their property accounts,

the Appellants, while refusing the offer of an adjournment to obtain further evidence, were not prepared to admit that the £19,045 and £15,751 and the items debited to the property accounts were loans or advances, but as to the sums of £1,327, £1,835 and £1,877 it was admitted that William borrowed £1,877 in the following circumstances.

In 1937 the Paris trustees had a fund of German marks standing to their credit in Germany, which they were unable to get out of Germany owing to currency restrictions. In order to get over this difficulty it was arranged that William, who was going from time to time to Germany on holiday, should use as many of those marks as he required while in Germany and should purchase them from the trustees. The balance due by him in respect of these marks at the end of 1937 was £1,327; further marks taken in 1938 raised the balance to £1,835 and marks to the value of £42 taken in 1939 raised the balance to £1,877. This amount was accordingly debited to William in the trustees' books and subsequently paid by him in cash.

8. As stated in paragraph 1 hereof, on 2nd January, 1942, precepts were issued by the Special Commissioners of Income Tax pursuant to Paragraph 4 of Part III of the Third Schedule to the Finance Act, 1938, requiring particulars of the Vesteys' interest in the properties comprised in the lease and the amount of the rent payable in the year to 5th April, 1938. The precepts were addressed to the executors of Lord Vestey and Sir Edmund Vestey respectively. Upon the basis of the particulars then furnished the additional assessments to Sur-tax for the year 1937-38 were made, and the other assessments in question were made following the additional assessments to Income Tax made by the General Commissioners for the City of London under the same provisions.

A copy of correspondence with the offices of the Special Commissioners, H.M. Inspector of Taxes, the Clerk to the General Commissioners for the City of London and the Solicitor of Inland Revenue is attached hereto, marked " G ", and forms part of this Case (1).

The " certain matters " referred to in the first paragraph of the letter of the Special Commissioners to Mr. Brown dated 10th December, 1940, headed " Lord Vestey—Sur-tax " (page 15 of the correspondence) and in the last paragraph of a letter of the same date headed " Sir E. H. Vestey—" Sur-tax " (page 16 of the correspondence) was the possible liability under Section 18 of the Finance Act, 1936, in respect of the lease and the deed of settlement. There was no evidence to show that the question of any liability under Section 38 of the Finance Act, 1938, had ever been considered by anyone in the office of the Special Commissioners prior to the making of the original Sur-tax assessments for 1937-38, 1938-39 and 1939-40 or until just before 16th September, 1941 (see page 17 of the correspondence).

In view of the information furnished in reply to the letters of the Solicitor of Inland Revenue to the solicitor to the Appellants dated 16th and 28th November, 1942, and the information elicited at the hearing of

(1) Not included in the present print.

the appeal, the Respondents claimed the right to reconsider the question of liability under Section 18 of the Finance Act, 1936, and if necessary to support the Sur-tax assessments under appeal by virtue of that Section.

Further, the Respondents alleged that evidence disclosed that there was a possibility of an alternative liability under Section 40 of the Finance Act, 1938, and claimed the right to explore such liability in the light of evidence from Bordeaux (see paragraph 4 hereof) in the event of our determination being adverse to contentions (*e*) and (*f*) of the Respondents referred to in paragraph 10 hereof.

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

(*a*) that the assessments under appeal were additional assessments to Sur-tax to which Section 125, Income Tax Act, 1918, applied, and that as there had been no discovery within the meaning of that Section the assessments were not authorised;

(*b*) that the only "settlement" was that effected by the deed of settlement dated 30th December, 1921, and that neither the lease of 29th December, 1921, nor the formation or structure of Union or Western formed part of the settlement;

(*c*) that the two settlors neither did nor could, nor did nor could either of them, under any of the terms of the settlement, have power at any time to revoke or otherwise determine the settlement or any provision thereof;

(*d*) that, if there was any such power, in the event of the exercise of it neither of the settlors nor their respective wives would or might become beneficially entitled to any part of the property then comprised in the settlement or of the income arising from any part of the property so comprised;

(*e*) that at no time had either of the settlors or their respective wives an interest in any income arising under or property comprised in the settlement within the meaning of Sub-sections (3) or (4) of Section 38 of the Finance Act, 1938;

(*f*) that none of the circumstances relied on by the Respondents as conferring on the late Lord Vestey or on Sir Edmund Vestey an interest in income arising under or property comprised in the settlement conferred any such interest on them or either of them within the meaning of the said Section 38;

(*g*) that the power to appoint in favour of a widow contained in clause 11 of the deed of settlement of 30th December, 1921, did not authorise an appointment in favour of a wife, and that there was therefore no interest in income arising under or property comprised in such settlement within the meaning of Sub-section (4) of the said Section 38; and that the case of *Commissioners of Inland Revenue* v. *Gaunt*, 24 T.C. 69, was wrongly decided;

(*h*) that, as regards the assessments made upon the executors of the late Lord Vestey, assessments on executors in respect of income which is only to be treated as his income but which did not in fact arise or accrue to him, are not authorised by any of the provisions of the Income Tax Acts, and that the case of *Cottingham's Executors* v. *Commissioners of Inland Revenue*, 22 T.C. 344, was wrongly decided on this point;

(*i*) that, having regard to Section 20, Finance Act, 1943, and Part I of the Sixth Schedule thereto, no part of the rent attributable to

properties set out in the third schedule to the said lease of 29th December, 1921, or of the income arising from the investment thereof can be deemed to be the income of either the late Lord Vestey or Sir Edmund H. Vestey;

(*j*) that all the assessments under appeal should be discharged.

10. It was contended on behalf of the Respondents:—

(*a*) that if Section 125 of the Income Tax Act, 1918, applied to Sur-tax there had been a "discovery" within the meaning of that Section;

(*b*) that, alternatively to (*a*), there was no power to make any assessment to Sur-tax in respect of liability under Section 38 of the Finance Act, 1938, unless and until the precepts under Paragraph 4 of Part III of the Third Schedule to that Act had been issued;

(*c*) that the lease and the deed of settlement were contemporaneous documents and together constituted an arrangement within the meaning of Section 41 (4) (*b*) of the Finance Act, 1938;

(*d*) that the fact that the Vesteys were joint settlors did not prevent the application of Section 38 of the Finance Act, 1938;

(*e*) that the power reserved to the Vesteys under the lease to determine it was a power to determine the arrangement or a provision thereof within the meaning of Section 38 (2) of the Finance Act, 1938, and therefore the rent and/or income relating thereto and arising therefrom was to be treated as the income of the Vesteys in equal shares in each of the years of assessment in question;

(*f*) that the Vesteys had an interest in the income arising under or property comprised in the arrangement within Section 38 (3) and (4) of the Finance Act, 1938, because

(i) of the power to withdraw properties under the lease,

(ii) of the power under the deed of settlement to direct the investment of the income of the settled fund in loans to themselves,

(iii) of the fact that William had borrowed the "blocked "marks",

(iv) of the dealings shown in the statements of account of the Paris trustees and in the accounts of Western,

(v) of the power of appointment retained and exercised by the Vesteys under the deed of settlement,

(vi) of the power of the Vesteys under the deed of settlement to appoint to their widows so long as that power existed;

(*g*) that, therefore, the whole of the income under the arrangement should be treated as the income of William and Edmund in equal shares in each of the years of assessment in question;

(*h*) that there is power to assess an executor;

(*i*) that the assessments were competent and correct in principle;

(*j*) that the appeal should be dismissed.

11. We, the Commissioners who heard the appeal, gave our decision in writing as follows:—

1. The Crown contends that the lease and deed are contemporaneous instruments—the product of a scheme to avoid United Kingdom taxation on the rentals of the properties comprised in the lease—and together constitute an arrangement within the meaning of Section 41 (4) (*b*) of the Finance Act, 1938. Accordingly, it is claimed that the power reserved to the lessors to determine the lease is a power to determine a provision of the arrangement within the meaning of Section 38 (2), paragraph (*a*), and that in the event of its exercise the conditions of paragraph (*b*) are fulfilled.

The argument on behalf of the Appellants is that the lease is a commercial transaction and does not fall within Section 41 (4) (*b*); that its effect is to give the lessees the possession and use of the properties and to reserve to the Appellants as lessors the freehold reversion. It is then argued that the subject matter of the deed is the benefit of the rental receivable by the rent trustees so long as it may endure, and that if it should come to an end it would not be by virtue of any power of determination contained in the deed.

We hold that the lease and deed were designed to work side by side and must be regarded together as constituting an arrangement within the meaning of Section 41 (4) (*b*). The power of determination contained in the lease is a provision of the arrangement, and the Appellants as lessors can recover the benefit of the annual value of the properties now enjoyed by the rent trustees, either by resuming possession of the properties or by reletting them. In our opinion the claim of the Crown under Section 38 (2) succeeds.

2. The Crown contends for an extended liability under Section 38 (3) and relies on the power contained in clause 2 of the deed to the trustees to lend on personal credit. It is said that the trustees have in fact deposited large sums with the Western Company, which is controlled by the Vesteys, and that moneys so deposited or part of them have been employed for the benefit of Lord Vestey and Sir Edmund.

It is contended on behalf of the Appellants that this provision is commonly found in investment clauses and has no sinister intent. It is also objected that the evidence does not show that trust moneys were ever employed directly or indirectly for the benefit of Lord Vestey or Sir Edmund. We invited an adjournment for further evidence, but Counsel for the Appellants preferred to stand or fall upon the wording of clause 2.

We hold that the power to lend on personal credit authorised the trustees to lend trust funds to Lord Vestey and Sir Edmund and that this constitutes an interest in income arising from or property comprised in the arrangement within the meaning of Section 38 (3) and (4).

We accordingly hold that the income from the several funds constituted by the deed must be treated as the income of Sir Edmund and Lord Vestey, as the Crown contends. We also agree that the power to withdraw properties from the lease constitutes an interest.

In the alternative the Crown contended (1) that the special power of appointment under clause 4 of the deed conferred an interest within the meaning of Section 38 (4) upon the appointors as settlors; (2) that the appointment of 26th November, 1935, made by Lord

Vestey did not affect income accruing between that date and 1st April, 1942, and that such income might be operated upon under clause 11 of the deed. We mention these arguments so that we may not seem to have overlooked them, but we do not think it necessary to pronounce any opinion upon them.

It is also submitted on behalf of the Appellants that clause 11 of the deed is not affected by the provisions of Section 38 (3) and (4), since it authorises an appointment in favour of a widow alone, and that the word "wife" in Sub-section (4) does not include a widow. It is conceded, however, that this argument is precluded by the decision in the case of *Commissioners of Inland Revenue* v. *Gaunt* (24 T.C. 69).

The other contention is that Section 38 cannot be applied where there are two or more settlors. We reject this contention, for it is plain that on the determination of the lease the properties comprised therein would vest in possession of Lord Vestey and Sir Edmund as tenants in common in equal shares. There is, therefore, no difficulty in attributing the income to them in equal shares.

3. It was further contended on behalf of the Appellants that the assessments in question were incompetent because there had been no "discovery" within the meaning of Section 125 of the Income Tax Act, 1918, but it was really conceded that the case of *Commissioners of Inland Revenue* v. *Mackinlay's Trustees* (22 T.C. 305) prevented this contention being pressed before us.

Assuming that every relevant document and fact was before the Special Commissioners when the first assessments to Sur-tax were raised, it appears to us that the failure to appreciate the applicability of Section 38 at the time and its subsequent realisation does constitute a discovery, and we would observe that upon the facts this case appears to us to be a far stronger one for the Crown than the case cited. We reject this contention.

The Crown, indeed, takes two further points, namely, (1) that Section 125 does not apply to Sur-tax and (2) that the requisites of notice called for by Section 38 had not been given at the time of making the first assessments to Sur-tax, but we make no finding on these further contentions.

The appeal fails. Figures to be agreed.

Figures being agreed we adjusted the assessments as follows:—

Executors of Lord Vestey

1937–38	in	the	sum	of	£503,800
1938–39	,,	,,	,,	,,	£502,264
1939–40	,,	,,	,,	,,	£597,511
1940–41	,,	,,	,,	,,	£283,802

Sir Edmund Vestey

1937–38	in	the	sum	of	£504,932
1938–39	,,	,,	,,	,,	£486,902
1939–40	,,	,,	,,	,,	£581,281
1940–41	,,	,,	,,	,,	£560,215

12. Immediately upon our determination of the appeal the Appellants expressed to us their dissatisfaction therewith as being erroneous in point

of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1927, Section 42 (7), and Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

H. H. C. GRAHAM,
F. ENGLAND,
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94/99, High Holborn,
London, W.C.1.
14th September, 1945.

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(2) *Lord Vestey's Executors and Vestey* v. *Colquhoun (H.M. Inspector of Taxes)*

CASE

Stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 21st and 22nd December, 1942, the executors of the Right Honourable William Baron Vestey (he having died on 10th December, 1940) and Sir Edmund Hoyle Vestey appealed against the following additional assessments to Income Tax made upon them respectively under Case VI of Schedule D pursuant to Paragraph 1 of Part III of the Third Schedule to the Finance Act, 1938.

Executors of Lord Vestey

1938–39	in	the	sum	of	£238,750
1939–40	„	„	„	„	£320,000
1940–41	„	„	„	„	£218,301

Sir Edmund Vestey

1938–39	in	the	sum	of	£238,750
1939–40	„	„	„	„	£320,000
1940–41	„	„	„	„	£320,000

The said assessments were intended pursuant to Section 38 (2), Finance Act, 1938, to comprise the income, alleged by the Respondents to have arisen under a number of transactions which the Respondents contended amounted to an "arrangement" and therefore a "settlement" as defined by Section 41 (4) (*b*), Finance Act, 1938, and attributable to Lord Vestey and Sir Edmund Vestey (hereinafter referred to jointly as "the Vesteys") as settlors within the meaning of the said Section 41 (4) (*b*), in equal shares under the provisions of Section 38 (2) of the Finance Act, 1938, in so far as the said income was related to and arose from a rent of £960,000 per annum payable under a lease dated 29th December, 1921 (hereinafter called "the lease"), between the Vesteys of the first part, Union Cold Storage Co., Ltd. of the second part and the trustees of a deed of settlement dated 30th December, 1921 (hereinafter called "the deed of settlement") of the third part, to which trustees the Vesteys had transferred the aforesaid rent. As the General Commissioners for the City of London, in answer to precepts issued by them on 27th January, 1942, under the powers conferred upon them by Paragraph 4 of Part III of the Third Schedule to the Finance Act, 1938, had been informed that the trustees had acquired

approximately one-third of the properties comprised in the lease, two-thirds only of the rent had been included in the assessments; but by reason of the circumstances and facts as set out in the Case of *Lord Vestey's Executors and Vestey* v. *Commissioners of Inland Revenue* which we have stated on the Appellants' appeal against additional assessments to Sur-tax upon them respectively pursuant to the said Section 38 of the Finance Act, 1938, for the years 1937-38, 1938-39, 1939-40 and 1940-41 the Respondents claimed at the hearing that the assessments should be increased to comprise the whole of the income arising under the deed of settlement pursuant to Sections 38 (3) and 38 (4) of the Finance Act, 1938.

2. Save in regard to the matters concerning the making of the aforesaid assessments referred to in paragraphs 1 and 3 hereof,

(*a*) the facts, evidence, documents, accounts, correspondence relating to the lease and/or deed of settlement and/or arrangement, and subject to paragraph 4 hereof, the contentions, and

(*b*) the questions for our determination,

were the same as those set out in the aforesaid Case Stated relating to Sur-tax, which may be referred to for the purposes of this Case, with the exception that there was in this Case, as stated in paragraph 4, also a question of whether the Inspector had made a discovery, and not the Special Commissioners as in the aforesaid Case Stated.

3. As stated in paragraph 1 hereof, on 27th January, 1942, precepts were issued by the General Commissioners for the City of London pursuant to Paragraph 4 of Part III of the Third Schedule to the Finance Act, 1938, requiring particulars of the Vesteys' interest in the properties comprised in the lease and the amount of the rent payable in the years to 5th April, 1939, 1940 and 1941. The precepts were addressed to the executors of Lord Vestey, and Sir Edmund Vestey respectively. Particulars having been duly furnished, the assessments in question were made by the said General Commissioners.

The Inspector concerned in the case of *Union Cold Storage Co., Ltd.* v. *Adamson* (16 T.C. 293) had left the district concerned before the Finance Act, 1938, was passed. There was no evidence to shew that the effect of Section 38 of the Finance Act, 1938, on the lease and the deed of settlement had been considered by any Inspector until just before 7th October, 1941.

4. In addition to contentions (*b*) to (*j*) but in substitution for contention (*a*) set out at paragraph 9 of the aforesaid Case relating to Sur-tax, it was contended on behalf of the Appellants that there had been no discovery by the Inspector of Taxes within the meaning of Section 125 of the Income Tax Act, 1918, and that the said additional assessments were therefore not authorised by that Section.

5. In addition to contentions (*c*) to (*i*) but in substitution for contentions (*a*) and (*b*) set out at paragraph 10 of the aforesaid Case Stated relating to Sur-tax it was contended on behalf of the Respondent that the Inspector had made a discovery within the meaning of Section 125 of the Income Tax Act, 1918.

6. In accordance with our decision in the aforesaid Case Stated relating to Sur-tax which is set out in paragraph 11 thereof, we held the appeal failed and on the figures being agreed we adjusted the assessments as follows:—

Executors of Lord Vestey

1938–39	in	the	sum	of	£435,821
1939–40	„	„	„	„	£509,635
1940–41	„	„	„	„	£246,298

Sir Edmund Vestey

1938–39	in	the	sum	of	£421,279
1939–40	„	„	„	„	£493,295
1940–41	„	„	„	„	£491,489

7. Immediately upon our determination of the appeal the Appellants expressed to us their dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

H. H. C. GRAHAM, } Commissioners for the Special Purposes
F. ENGLAND, } of the Income Tax Acts.

Turnstile House,
94/99, High Holborn,
London, W.C.1.
14th September, 1945.

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(3) *Lord Vestey's Executors and Vestey v. Commissioners Inland Revenue*

CASE

Stated under the Finance Act, 1936, Section 18, and the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 10th and 11th May, 1944, the executors of the Right Honourable William Baron Vestey (he having died on 10th December, 1940) and Sir Edmund Hoyle Vestey appealed against the following assessments made upon them respectively.

Executors of Lord Vestey

Additional Assessment to Sur-tax

1936–37	in	the	sum	of	£500,000

Additional Assessments to Income Tax

1936–37	in	the	sum	of	£500,000
1937–38	„	„	„	„	£464,011
1938–39	„	„	„	„	£435,821
1939–40	„	„	„	„	£509,635
1940–41	„	„	„	„	£246,298

Sir Edmund Vestey

Additional Assessment to Sur-tax

1936–37	in	the	sum	of	£500,000

Additional Assessments to Income Tax

1936–37	in	the	sum	of	£500,000
1937–38	„	„	„	„	£468,257
1938–39	„	„	„	„	£421,279
1939–40	„	„	„	„	£493,295
1940–41	„	„	„	„	£491,489

The additional assessments to Income Tax for the years 1936-37 and 1937-38 and the additional assessments to Sur-tax for the year 1936-37 were made under Section 18 of the Finance Act, 1936; and the additional assessments to Income Tax for the years 1938-39, 1939-40 and 1940-41 were made pursuant to Section 18 of the Finance Act, 1936, as amended by Section 28 of the Finance Act, 1938.

The said assessments were intended to comprise the income arising under the lease and the settlement respectively hereinafter referred to and attributed to Lord Vestey and Sir Edmund Vestey (hereinafter referred to jointly as "the Vesteys" or separately as "William" and "Edmund" respectively) in equal shares, and were made after our decision in principle given on 4th January, 1942, on appeals against assessments to Income Tax and Sur-tax for the years 1937-38 to 1940-41 inclusive made under the provisions of the Finance Act, 1938, Section 38 (hereinafter referred to as "the Section 38 appeals"). These appeals were heard on 21st and 22nd December, 1942.

On 5th April, 1939, a notice in respect of possible liability to assessment under Section 18 of the Finance Act, 1936, was issued to William and Edmund. After certain correspondence the Special Commissioners decided to take no further action under that Section.

Just prior to the hearing of the Section 38 appeals, fresh information was supplied to the Solicitor of Inland Revenue and in the course of the hearing of the appeals further information was obtained. The fresh information so supplied and obtained is set out in paragraphs 6 and 8 (vii) hereof. In consequence thereof the right to reconsider the liability under Section 18 of the Finance Act, 1936, was reserved on behalf of the Commissioners of Inland Revenue at the Section 38 appeals. Subsequently these assessments were made. A bundle of correspondence, marked "A", is attached hereto and forms part of this Case[1].

2. By the lease dated 29th December, 1921, William and Edmund demised or agreed to demise certain properties, cattle lands and freezing works situate abroad, in particular in North and South America, Australasia and China, as set out in the schedules thereto, to Union Cold Storage Co., Ltd. (hereinafter called "Union") for 21 years as and from 10th April, 1921. The lease reserved a rent of £960,000 (reducible in a certain event) payable to the trustees of the settlement (who were persons residing in Paris and are hereinafter referred to as "the Paris trustees"), whose receipt only was to be a good discharge for the same, and was determinable by six months' notice by the Vesteys or Union. It also provided that upon like notice the Vesteys might withdraw any of the properties therefrom, the rent being correspondingly reduced.

On a number of occasions in exercise of the power reserved to them the Vesteys have by supplemental deeds withdrawn the undermentioned properties originally comprised in the lease and save in one case have substituted other properties.

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[1] Not included in the present print.

Deed dated	Withdrawn	Added
11th July, 1923	Port Darwin Freezing Works, Australia	Campana Freezing Works, Argentina
22nd April, 1925	Zarate, Argentina	Berretos, Brazil Santos, „ Sao Paulo (Mocca), Brazil Fray Bentos, Uruguay Tientsin, China
30th November, 1927	Campana Fray Bentos Mendes Tomoana Gisborne Westfield Auckland Oil Cake Mill	South Dock Frigorifico, Buenos Aires
24th June, 1931	Poverty Bay Freezing Works	Consideration—Expenditure of upwards of £1,500,000 on extensions and improvements of other properties
21st August, 1934	Chicago Canning Factory Havana, Cuba, Cold Store	
26th April, 1939	New Belgium Estate, South Africa	Rua Anna Nery 319/331, Rio de Janeiro, Brazil San Isidro, Argentina Barranqueros, Argentine Chaco Nerlandia, Gaveche, Santa Isabel, Gato Gordo, Aceitico — Colombia, South America; Venezuela, South America

On one occasion, as shown by sub-paragraphs 8 (v) and (vi) hereof, properties in China subject to the lease were sold by the Vesteys to and acquired by the Paris trustees subject to the lease.

By the settlement dated 30th December, 1921, the Vesteys settled the rent payable to the Paris trustees thereof for the benefit of their respective descendants.

The settlement contained a clause giving the trustees a wide power of investment and enabling them, at the direction of the Vesteys and the survivor of them, to invest the rent, *inter alia,* upon personal credit or upon loans to any company or companies wheresoever domiciled and with or without security, to the intent that the trustees should subject to such direction as aforesaid have the same full and unrestricted powers of investment as if they were beneficially entitled to the settled fund.

The settlement further provided for the division of the income arising from the investment of the rent into two parts, called respectively "William's fund" and "Edmund's fund", one part being held by the trustees for the benefit of the children or remoter issue of William and the other for the benefit of the children or remoter issue of Edmund as William and Edmund might respectively from time to time by deed revocable or irrevocable or by will or codicil appoint, but so that no

appointment either of a lump sum or of any specific investments should be made otherwise than in the shape of a capital payment including power to William and Edmund respectively to direct a cessation or partial cessation of the accumulation of William's fund and Edmund's fund respectively with the result therein stated and in default of and subject to any such appointment for the division of the funds between their respective lineal descendants living at the time fixed for distribution.

The settlement further reserved a power to William and Edmund respectively to appoint by will or codicil any interest in William's fund or Edmund's fund in favour of the widow of the appointor for her life or any shorter period.

The terms of the said lease and settlement and the circumstances attending the execution thereof are set out in the printed Case before the House of Lords in the case of *Union Cold Storage Co., Ltd.* v. *Adamson* (16 T.C. 293) which may be referred to in connection with this Case.

A copy of the said lease annexed hereto, marked "B", and a copy of the settlement annexed hereto, marked "C", form part of this Case(1).

3. By a deed dated 26th November, 1935, William irrevocably appointed and directed that the Paris trustees should, from and after 1st April, 1942, or the earlier determination of the lease, hold the whole of William's share, William's fund and William's accumulated fund, both capital and income, and also any part of the rent mentioned in clause 2 of the deed of settlement which might belong or might originally have belonged to him and not effectively disposed of by inclusion in the said funds in trust for his eldest son if then living and in default in trust for that son's son. A copy of the said deed is attached hereto, marked "D", and forms part of this Case(1).

4. By deed dated 31st December, 1935, Edmund irrevocably appointed and directed that the Paris trustees should, from and after 1st April, 1942, or the earlier determination of the lease, hold the whole of Edmund's share, Edmund's fund and Edmund's accumulated fund, both capital and income, including all income accruing in the meantime (except as thereinafter provided), and also any part of the rent not effectively disposed of by inclusion in the said funds in trust for his third son if then living and in default in trust for such son of his third son as should first or alone attain the age of 21 years, except and provided that the said deed should not appoint or affect the investments moneys and property which on 31st October, 1935, represented Edmund's fund and Edmund's accumulated fund. A copy of the said deed is attached hereto, marked "E", and forms part of this Case(1).

By deed dated 31st March, 1937, Edmund irrevocably appointed the investments and property left unappointed by the last-mentioned deed in trust for his third son as from 1st June, 1937, if then living and in default in trust for his elder daughter, and wholly released and extinguished in respect of all funds and income the power to appoint an interest therein in favour of his widow if and so far as such power had not already been extinguished. A copy of the deed is attached hereto, marked "F", and forms part of this Case(1).

5. The Vesteys have in exercise of the special power of appointment reserved to them by the settlement of 30th December, 1921, also appointed a number of capital sums in favour of their children or children's issue as appears from the undermentioned list.

(1) Not included in the present print.

Deed	Appointor	Amount	Ex fund	Appointee
17th July, 1935	William	£60,000	William's accumulated fund	Samuel Vestey
18th July, 1935	—do—	(*a*) £90,000 after 1st July, 1938 (*b*) £90,000 after 1st July, 1940 (*c*) £90,000 after 1st July, 1943 (*d*) £135,000 after 1st January, 1945 (*e*) £135,000 after 1st January, 1948	William's accumulated fund or William's fund	"Special Fund" for the issue of C. E. Vestey and L. Vestey
7th January, 1936	Edmund	£63,000	Edmund's accumulated fund	R. A. Vestey
15th June, 1936	—do—	£5,000	—do—	—do—
		£30,000	—do—	Percy C. Vestey
		£1,000	—do—	Hannah Vestey
		£2,500	—do—	Gladys Flemming
4th November, 1936	—do—	£630	—do—	Dorothy Emmeline Vestey
23rd March, 1937	—do—	£3,732 3*s.* 2*d.*	—do—	R. A. Vestey
		£8,874 15*s.* 9*d.*	—do—	Percy C. Vestey
		£4,887 19*s.* 10*d.*	—do—	Hannah Vestey

6. The following documents were in evidence before us:

(*a*) Balance sheets of Western United Investment Co., Ltd. (hereinafter called "Western") as at 31st December, 1937, and 1938, with schedules of liabilities and assets for each year annexed, giving details of the items appearing in the balance sheets under the following headings:—

Liabilities

(i) Amount due to Subsidiary Companies
(ii) Other Creditors for Sundry Advances

Assets

(i) Amount owing by Subsidiary Companies
(ii) Other Debtors for Loans and Advances

(*b*) The following accounts for the years 1937 to 1941 of the Paris trustees with Western:—

(i) Current account
(ii) William's fund
(iii) Edmund's fund
(iv) Ronald's fund.

(*c*) The following accounts for the years 1937 to 1941 of William and Edmund respectively with Western:—

(i) William's personal account
(ii) Edmund's „ „
(iii) Edmund's No. 2 „
(iv) William's property „
(v) Edmund's „ „

(*d*) A summary (prepared on behalf of the Respondents) (hereinafter called "the Western extract") for the years ended 31st December, 1937, to 31st December, 1940, extracted from the accounts of Western mentioned at sub-paragraphs (*b*) and (*c*) of this paragraph showing the amounts owing at each year end:—

(*a*) by Western to the Paris trustees under the heading on the Western balance sheets and annexed schedules of liabilities and assets of "Creditors for Sundry Advances", and

(*b*) by William and Edmund respectively under the like heading of "Debtors for Loans and Advances."

(*e*) (i) Statements of account and related schedules of investments (hereinafter called "statements of account") for the years ending 31st October, 1936, 1937, 1938 and 1939 made by Messrs. Arthur F. Dodd & Co. (27 Chancery Lane, London, W.C.2), chartered accountants, and supplied by them to the Vesteys as "the authorised persons" under the deed of settlement upon the annual investigation of the books and accounts of the Paris trustees.

(ii) A summary of investments of funds for the years 1925 to 1939 (prepared on behalf of the Respondents) (hereinafter called "the summary of investments") prepared from, and after an inspection by the Solicitor of Inland Revenue of, the aforementioned statements of account and also for the years 1925 to 1935.

The original accounts and books of the Paris trustees were not before us. They were last known to be in a box at Bordeaux, where they had been left and last heard of in June, 1940, at the time of the German occupation of France, and their present whereabouts was not known.

Copies of the accounts of the Paris trustees and of the Vesteys referred to in sub-paragraphs (*b*) and (*c*) of this paragraph were supplied to the Solicitor of Inland Revenue on 11th December, 1942, in reply to a request by him made in a letter dated 28th November, 1942, for a statement covering the years of assessment showing (*a*) loans made by the Paris trustees to Western and (*b*) loans made by Western to William and Edmund.

The summary of investments referred to in sub-paragraph (*e*) (ii) of this paragraph purports to show the manner in which the various aforementioned funds set up pursuant to the settlement of 30th December, 1921, have been invested by the Paris trustees at the dates shown.

Among the headings of the investments there appear as part of the respective funds of the said settlement the following items relating to advances to William or Edmund as the case may be.

Year	Amount	Ex Fund	Name
1932	£19,045	William's Fund	William
1937	£1,327	—do—	—do—
1938	£1,835	—do—	—do—
1939	£1,877	—do—	—do—
1932	£15,751	Edmund's Fund	Edmund

Also in the years ended 1927 and 1928 the amounts of £26,009 and £21,082 respectively appear against the name of Edmund under the heading " Awaiting investment ".

Copies of:—

(1) the aforesaid balance sheets of Western, with the schedules of liabilities and assets annexed,

(2) the several accounts of the Paris trustees with Western, the personal and property accounts of William and Edmund with Western,

(3) the Western extract,

(4) the statements of accounts of the Paris trustees, and

(5) the summary of investments,

are contained in the bundle of documents marked " G ", and form part of this Case(1).

The whole of the documents and information referred to in this paragraph and in paragraph 8 (vii) hereof first came to the notice of the Commissioners of Inland Revenue in November, 1942, or subsequently.

7. As in the case of the Section 38 appeals, Mr. Edward Brown again gave evidence.

In addition to the matters referred to in paragraphs 8 and 9, the further evidence referred to in paragraph 10 hereof was put before us relating to (*a*) the ordinary residence of William and Edmund and (*b*) their purpose or motive for entering into the aforesaid lease and settlement and the transactions connected therewith.

With reference to the question of ordinary residence and motive the following documents were put in evidence:—

(*a*) A letter written by William on 22nd February, 1919, from a London address to the Prime Minister (the Right Honourable David Lloyd George), a copy of which is attached hereto, marked " H ", and forms part of this Case(1), and

(*b*) William's evidence before the Royal Commission on Income Tax in July, 1919, set out in the third instalment of Minutes of Evidence, pages 450-5, which may be referred to as part of this Case.

8. (i) On 27th August, 1897, Union was incorporated, and by the year 1925 the issued share capital thereof was £12,000,000 made up as follows:—

£ 8,000,000	6 per cent. first cumulative preference
£ 2,000,000	7 per cent. second preference
£ 1,000,000	10 per cent. "A" preference
£ 1,000,000	ordinary
£12,000,000	

(1) Not included in the present print.

All the shares were of £1 each. Only the holders of the last two categories had voting rights—one vote for each share. An extract from the memorandum and articles of association of Union is annexed hereto, marked "I", and forms part of this Case[1].

(ii) On 26th August, 1918, Western was incorporated with a capital of £1,000,004 divided into 1,000,000 ordinary shares of £1 each and four management shares also of £1 each. At all material times the four management shares were held by William and Edmund and their two sons. By the voting rights attaching to them the four management shares gave the holders control but no beneficial interest in the profits or assets. The holders of the ordinary shares had no rights whatsoever save to receive dividends.

From time to time the whole of the ordinary shares and part of the 10 per cent. preference shares of Union came into the ownership of Western. Further, as the current account of the Paris trustees with Western referred to in sub-paragraph 6 (*b*) shows, the Paris trustees by 31st December, 1937, had acquired 600,993 of the 10 per cent. preference shares, and subsequently to that date they made further purchases thereof.

(iii) On 31st July, 1919, the Vesteys settled £1,000,000 in a settlement (the beneficial interests under which are not material to this appeal), of which the Public Trustee was one of the trustees, to buy the 1,000,000 ordinary shares of Western.

(iv) On 28th November, 1930, the trustees of the settlement of 31st July, 1919, sold the 1,000,000 ordinary shares of Western to the Paris trustees.

(v) On 15th November, 1935, the Vesteys by a settlement executed at Boulogne transferred the Chinese properties, subject to the lease, to trustees of a further settlement, the trusts of which are not material to this appeal.

(vi) On 27th November, 1935, the Paris trustees purchased the Chinese properties subject to the lease for £2,500,000 from the trustees of the settlement of 15th November, 1935.

(vii) Western acts as bankers and financial agents for the operating companies, the Paris trustees and the Vesteys.

Western keeps personal accounts on behalf of William and Edmund respectively and similarly property accounts.

The personal accounts are drawn upon by the Vesteys for private domestic and personal purposes, and fluctuate, being sometimes in credit and sometimes in debit, and no interest is either allowed or charged on the balances.

The property accounts have always been in debit and arise in this way. The properties comprised in the lease are occupied by the local operating company, which pays for all repairs, renewals and extensions. In terms of the lease outgoings in the nature of repairs are borne by the occupying company, and payments in the nature of capital expenditure properly to be borne by the Vesteys as landlords are first

(1) Not included in the present print.

charged to Union then, in turn, charged to Western, which at the Vesteys' request debits the amount to them in equal shares. No interest is charged on these property accounts.

These personal and property accounts are those referred to in sub-paragraph 6 (*c*) hereof and shown by Western upon its balance sheets and schedule of assets among the items of "Other Debtors for Loans and Advances".

The Paris trustees have also remitted moneys awaiting investment to Western, being paid interest on the sums lying to their credit.

The moneys so remitted were credited to various accounts, but primarily to the current account of the trustees and the accounts of the trustees known as William's fund and Edmund's fund referred to in sub-paragraph 6 (*b*) hereof. Into the aforesaid current account there was paid (*inter alia*) the rent of £960,000 per annum due from Union under the lease or quarterly instalments thereof. The payments from Union were at first sent direct to Paris, and most of them then remitted back to Western for the credit of the Paris trustees. Sometimes the Paris trustees paid them into their own banking account in Amsterdam, but when the present war commenced, by direction of the Paris trustees, they were paid direct to Western.

The total of the sums credited by Western to the Paris trustees in the current account and the accounts of William's fund and Edmund's fund is shown by Western upon its balance sheets and schedule of liabilities among the items of "Other Creditors for Sundry Advances."

The current account of the Paris trustees with Western is shown in the statements of account of the Paris trustees referred to in sub-paragraph 6 (*e*) hereof under the heading of "Unsecured Loans and Advances."

The accounting years of the Paris trustees and Western end on different dates, namely 31st October and 31st December, respectively, but the moneys owed by Western to the Paris trustees and the moneys due to Western by the Vesteys can be reconciled as shown by the Western balance sheets and schedules of liabilities and assets, the Western extract, and the summary of investments, all referred to in paragraph 6 hereof.

The books of Western show that at 31st December, 1937, the aggregate amounts lying to credit of the Paris trustees were on the several aforementioned accounts £104,570, and at 31st December, 1938, £1,482,720. At the same dates the net balance due by William and Edmund, respectively, to Western on the personal and property accounts were (*a*) William £462,235 and £600,268, (*b*) Edmund £473,796 and £517,820, see copy extract from the company's books (i.e., Western extract) in the bundle attached hereto, marked "G", referred to in paragraph 6 hereof.

9. With reference to (*a*) the sums of £19,045, £1,327, £1,835, £1,877 and £15,751 referred to in paragraph 6 hereof and appearing

wrongly, as the Appellants contend, in the accounts of the Paris trustees as advances to William or Edmund as the case may be, and (*b*) the sums debited by Western to William and Edmund in their property accounts, the Appellants, while refusing the offer of an adjournment to obtain further evidence, were not prepared to admit that the £19,045 and £15,751 and the items debited to the property accounts were loans or advances, but as to the sums of £1,327, £1,835 and £1,877 it was admitted that William borrowed £1,877 in the following circumstances.

In 1937 the Paris trustees had a fund of German marks standing to their credit in Germany, which they were unable to get out of Germany owing to currency restrictions. In order to get over this difficulty it was arranged that William, who was going from time to time to Germany on holiday, should use as many of those marks as he required while in Germany and should purchase them from the trustees. The balance due by him in respect of these marks at the end of 1937 was £1,327; further marks taken in 1938 raised the balance to £1,835 and marks to the value of £42 taken in 1939 raised the balance to £1,877. This amount was accordingly debited to William in the trustees' books and subsequently paid by him in cash.

10. Up to the end of 1915 the Vesteys, as partners constituting the firm of Vestey Brothers and in connection with affiliated concerns or companies under their management, controlled from London what was merely a foreign business in the meat industry, in which the capital was in excess of £20,000,000. In the year 1915 taxation was imposed which the Vesteys considered made it impracticable to continue working in England in competition with the American Meat Trust. Their views as to this are fully set forth in the minutes of evidence given by William before the Royal Commission, which should be referred to.

They thereupon left the United Kingdom and removed the control of the aforesaid businesses to Buenos Aires in the Argentine, where they paid no United Kingdom taxation except upon profits made or arising in the United Kingdom.

Union was not one of the businesses whose control was so removed. It now is and always has been controlled in the United Kingdom (see paragraph 8 (i) hereof).

The Vesteys' allegation that it was impossible to continue working in England was based upon their alleged comparative competitive position alongside the American Meat Trust.

William, in his evidence before the Royal Commission, where his proposal was that as regards the Vesteys' meat import business the Vesteys should pay no more taxes than a foreign producer sending meat here, admitted however:—

(*a*) that, whatever their difficulties were compared with the American Meat Trust, he did not contemplate those difficulties would prevent the Vesteys earning profits;

(*b*) that unless the Vesteys' operations were profit producing they did not pay Income Tax;

(*c*) that his real soreness was that someone else should trade beside him on a similar business and retain more of the profit which he made.

When the Vesteys went abroad they first went to the United States, where they remained until 1917, and thence to the Argentine, where they remained until the end of March, 1919.

William in his evidence before the Royal Commission stated that the position of paying no taxes in Buenos Aires suited him admirably but he wanted to come back to the United Kingdom to live, work and die. He also stated in his aforementioned letter to the Prime Minister that "if we" (i.e., the Vesteys) "could get an assurance that should we return "to England we shall only be charged for taxation the same rate as the "American Beef Trust pay on similar business and nothing extra because "we work in England, we will return as speedily as possible."

Both in his evidence before the Royal Commission and in the above letter William, when giving figures shewing the incidence of taxation upon the business profits, included percentages in respect of Super-tax and Death Duties. Following his letter to the Prime Minister, William hoped that the Government would make some arrangement to relieve the Vesteys or Vestey Brothers from taxation.

When this proved impossible he decided to evolve a scheme to achieve the desired result. The scheme was evolved under legal advice.

There was continuous correspondence between the years 1919 and 1921 between the Vesteys, Mr. Brown and their solicitors. Counsel was consulted and the scheme comprising the lease and the settlement was worked out.

Although Mr. Brown, in his evidence before us, stated that the scheme was settled in the spring of 1921 well before 10th April, 1921 (the date on which Union was let into possession of the demised premises and from which the rent became payable), he also stated that between 10th April, 1921, and the actual signing of the documents counsel were still being consulted, chiefly on taxation matters. The delay was due to the necessity of getting the approval of the Paris trustees and the incorporation of various amendments mostly relating to the settlement.

Mr. Brown, from recollection of his own and their movements (as their confidential secretary), stated that from July, 1919, to September, 1920, the Vesteys lived in Holland and then up to April, 1921, in Hamburg.

Edmund arrived in the United Kingdom about 12th April, 1921—it might have been the 10th. William arrived on 23rd April, 1921. After that time neither of them was absent from England for any prolonged period. Both at first took furnished houses: William for at least 5 months, Edmund for a period unknown.

The lease recited that on 29th December, 1921, William resided at Kingswood, Dulwich, and Edmund at Shirley, Croydon; and the latter address was also given in the annual return for 1921 of Western as Edmund's address on 19th December, 1921. William's address in the said annual return was that of the furnished house he occupied before Kingswood.

In the returns of Western dated 24th June, 1919, 8th December, 1919, and 14th December, 1920, the address given for both William and Edmund was 46 Reconquista, Buenos Aires.

11. It was contended on behalf of the Appellants:—

(*a*) that neither the late Lord Vestey nor Sir Edmund Vestey had made any transfer of assets by virtue or in consequence whereof income became payable to persons resident or domiciled out of the United Kingdom;

(*b*) that neither the late Lord Vestey nor Sir Edmund Vestey was ordinarily resident in the United Kingdom either on 10th April, 1921, or on 29th or 30th December, 1921, or, alternatively, that there was no evidence that either of them was so ordinarily resident;

(*c*) that neither the late Lord Vestey nor Sir Edmund Vestey had at any material time within the meaning of Section 18 of the Finance Act, 1936, power to enjoy any income of a person resident or domiciled out of the United Kingdom;

(*d*) that neither the late Lord Vestey nor Sir Edmund Vestey had at any material time received nor was either of them entitled to receive any capital sum within the meaning of Sub-section (1A) of the said Section 18, the payment whereof was in any way connected with any transfer of assets or any associated operation;

(*e*) that the purpose of avoiding liability to taxation was not the main purpose or alternatively was not one of the purposes for which any transfer of assets or any associated operations or any of them were or was effected either by the late Lord Vestey or by Sir Edmund Vestey;

(*f*) that any transfer of assets and any associated operations were *bona fide* commercial transactions and were not designed for the purpose of avoiding liability to taxation;

(*g*) that, as regards the assessments made upon the executors of the late Lord Vestey, assessments on the executors in respect of income which is only to be deemed to be his income for the purposes of the Income Tax Acts, but which did not in fact arise or accrue to him, are not authorised by any of the provisions of the Income Tax Acts, and that the case of *Cottingham's Executors* v. *Commissioners of Inland Revenue*, 22 T.C. 344, was wrongly decided on this point;

(*h*) that, as regards all the assessments under appeal except those for the years 1936-37 and 1937-38, these assessments were made in respect of income in respect of which assessments had already been made under Section 38, Finance Act, 1938, and were invalid as involving double assessment in respect of the same income;

(*i*) that all the assessments under appeal were additional assessments to which Section 125, Income Tax Act, 1918, applied, and that there had been no discovery within the meaning of that Section and the assessments were therefore not authorised;

(*j*) that all the said assessments should be discharged.

12. It was contended on behalf of the Respondents:—

(*a*) that the Vesteys were ordinarily resident in the United Kingdom in fact and within the meaning of Section 18 of the Finance Act, 1936, at the time of the transfer and/or any associated operation; alternatively, it had not been proved that they were not so ordinarily resident;

(*b*) that the Vesteys' right to receive the rent under the lease was an asset within the meaning of Section 18 (5) of the Finance Act, 1936;

(*c*) that the evidence was not sufficient to enable the Vesteys to claim the benefit of the proviso to Section 18 (1) of the Finance Act, 1936, either in its original or amended form;

(*d*) that by the said transfer and/or associated operations the Vesteys had power to enjoy the income of the Paris trustees under one or more of Sub-sections (3) (*c*), (*d*) and (*e*) of Section 18 of the Finance Act, 1936;

(*e*) that, as the Vesteys had power to direct the Paris trustees to lend the income of the settled funds to them upon personal credit. they were entitled to receive a capital sum within the meaning of Section 18 (1) (*a*) of the Finance Act, 1936;

(*f*) that the Vesteys had received capital sums within the meaning of Section 18 (1) (*a*) of the Finance Act, 1936;

(*g*) that the executors of Lord Vestey can be assessed in respect of income under Section 18 of the Finance Act, 1936;

(*h*) that no exception could be taken to the making of the Income Tax assessments for the years 1938-39 and 1939-40 upon the Appellants upon the grounds that they were alternative to assessments for the same years made pursuant to Section 38 of the Finance Act, 1938; and/or that until the Section 38 assessments were finally disposed of these particular assessments should be left in abeyance;

(*i*) that the facts proved before the Commissioners and set out above showed that there had been a discovery within the meaning of Section 125, Income Tax Act, 1918;

(*j*) that the assessments were competent and correct in principle;

(*k*) that the appeals should be dismissed.

13. We, the Commissioners who heard the appeal, gave our decision in writing as follows:—

Lord Vestey arrived in this country on 23rd April, 1921, and Sir Edmund came here between 10th and 12th April, 1921. Each of them intended to establish his permanent home in this country and became resident and ordinarily resident for the year of assessment ending 5th April, 1922. It is contended on behalf of the Appellants that before 10th April, 1921, the general terms of the lease and deed had been agreed upon, and as from that date an effective agreement came into existence giving the Union Cold Storage Co., Ltd. possession and control of the several properties comprised in the lease, and accordingly that there was no transfer by an individual or individuals ordinarily resident in this country within the meaning of Section 18 of the Finance Act, 1936. The evidence is that the terms of the lease and deed were under consideration by Mr. Kennerley Hall and Counsel until December, 1921, and this contention is negatived by the recitals to the lease.

In our opinion the lease created a beneficial right to the rent in Lord Vestey and Sir Edmund which they respectively caused to be transferred to the trustees of the deed by clause 3 of the lease.

We are also of opinion that the power to determine the lease and to withdraw properties therefrom gave them a power to enjoy the income of the settlement trustees within the meaning of Section 18 (3) (*d*), as also did the power to direct the investment of the rent under clause 2 of the deed within the meaning of paragraph (*e*) (see *Lee* v. *Commissioners of Inland Revenue*, 24 T.C. 207).

We hold that clause 2 of the deed authorised the trustees to make loans to the Vesteys upon their personal credit at a proper rate of interest (see In re *Laing's Settlement*, [1899] 1 Ch. 593), and accordingly that Section 28 (2) of the Finance Act, 1938, also applies. It would seem, however, that such a loan would not be a "benefit" within the meaning of Section 18 (4), having regard to the decision in *Commissioners of Inland Revenue* v. *L. B. (Holdings), Ltd.*, 28 T.C. 1.

The benefit of the proviso to Section 18 in its original and amended form is claimed, and we have been referred to Lord Vestey's evidence in 1919 before the Royal Commission on the Income Tax. It does not appear that he complained that United Kingdom tax made it difficult for him to compete against American firms, but only that his profits which he did not spend or give away were subjected to that tax whilst the profits of his foreign competitors were not. To avoid United Kingdom taxation the Vesteys betook themselves abroad from 1915 to 1921. It is said that, having removed the business from the area of taxation, they could not in 1921 have had a purpose of avoiding taxation and that the primary and, indeed, sole object of the lease was to restore the business back to England. In our view, it was the Vesteys' personal desire to reside in this country which led to the lease and deed, and the main purpose of the creation of the rent and its transfer to the settlement trustees was the avoidance of the United Kingdom taxation which would normally accrue on their becoming resident.

We hold that the assessments are correct in principle. The objection that no assessments under Section 18 can be made on executors or, in any case, should be limited to what their testator has received, is covered by the decision in *Cottingham's Executors* v. *Commissioners of Inland Revenue*, 22 T.C. 344, and *Lord Howard de Walden* v. *Commissioners of Inland Revenue*, 25 T.C. 121.

In accordance with our decision the assessments on the executors of Lord Vestey and on Sir Edmund Vestey for the year 1937-38 are confirmed. The respective assessments for the year 1936-37 fall to be adjusted as follows:—

Executors of Lord Vestey

Income Tax...	£357,171
Sur-tax ...	£385,058

Sir Edmund Vestey

Income Tax...	£435,063
Sur-tax ...	£457,239

The remaining assessments are alternative to assessments based on Section 38 of the Finance Act, 1938, which have already been before us on appeal and which have been determined in principle in favour of the Crown. Whilst we are of opinion that these alternative assessments are competently made under Section 151 (2) of the Income Tax Act, 1918, we do not propose to determine them until the other set of assessments are finally disposed of.

14. Immediately upon our determination of the appeal the Appellants expressed to us their dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of

the High Court pursuant to the Finance Act, 1936, Section 18, and the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

H. H. C. GRAHAM, } Commissioners for the Special Purposes
F. ENGLAND, } of the Income Tax Acts.

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

14th September, 1945.

The cases came before Macnaghten, J., in the King's Bench Division on 16th, 17th, 18th, 21st, 22nd, 23rd and 24th October, 1946, when judgment was reserved. On 4th November, 1946, judgment was given substantially against the Crown in the first two cases and in favour of the Crown in the third case.

Sir Patrick Hastings, K.C., Mr. J. Millard Tucker, K.C., and Mr. J. S. Scrimgeour, K.C., appeared as Counsel for the Appellants, and the Solicitor-General (Sir Frank Soskice, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Macnaghten, J.—The Appellants in each of these three cases are the executors of William, Baron Vestey, who died on 10th December, 1940, and his brother, Sir Edmund Vestey; they appeal against decisions of the Special Commissioners dated 14th September, 1945, confirming additional assessments to Income Tax and Sur-tax made upon them severally for each of the five years 1936-37, 1937-38, 1938-39, 1939-40 and 1940-41. The average amount of the assessments on the executors of Lord Vestey for those years amounts to about £450,000 and of those on Sir Edmund Vestey to about £500,000. During those years the standard rate of Income Tax rose from 5*s.* to 10*s.* in the £ and the rates of Sur-tax were increased substantially. The amount at stake in these appeals is, therefore, immense.

The assessments to Income Tax and Sur-tax for the year 1936-37 and the assessments to Income Tax for the following year were made under Section 18 of the Finance Act, 1936. The purpose of that Section was to prevent avoidance of liability to Income Tax by transactions resulting in the transfer of income to persons resident or domiciled out of the United Kingdom. All the other assessments were made under Section 38 of the Finance Act, 1938, which provides that income arising under certain settlements is to be treated for the purposes of the Income Tax Acts as the income of the settlor. The first (1) of the three appeals relates to the assessments made under the Finance Act, 1936, Section 18; the second and third (2) appeals relate to the assessments made under the Finance Act, 1938, Section 38.

The two main contentions put forward in support of these appeals are: (1) that on the true construction of those Sections no assessment could be

(1) Third in the present print — See pages 20-34 *ante*.
(2) First in the present print — See pages 3-18 *ante*.

(Macnaghten, J.)

made upon the Appellants or either of them, and (2) that, even if the first contention were to fail, the assessments are nevertheless, by reason of the provisions contained in the Income Tax Act, 1918, Section 125, invalid and should be discharged.

It is, I think, convenient to deal in the first place with the second contention. All the assessments to Income Tax were additional Schedule D assessments made under Section 125 of the Income Tax Act, 1918, which provides that such assessments may be made if the Surveyor (now the Inspector of Taxes) " discovers that any properties or profits chargeable " to tax have been omitted from the first assessment ". The Appellants contend that these words mean that no additional assessment to Income Tax under Schedule D can be made unless the Inspector discovers some relevant fact previously unknown to him. All the relevant facts of the case were, it is said, fully disclosed in the case of *Union Cold Storage Co., Ltd.* v. *Adamson*, 16 T.C. 293, which was finally decided by the House of Lords in 1931, and were, therefore, well known to the Revenue authorities long before the first of the assessments in question was made. The Inspector, it is said, did not discover any new fact—he only discovered a new point of law—and the assessments are, therefore, invalid. I think I am bound by authority to reject this contention. In the case of *British Sugar Manufacturers, Ltd.* v. *Harris*, 21 T.C. 528; [1938] 2 K.B. 220, Finlay, J., following a previous decision of his own, held that the discovery of a point of law warrants the making of an additional assessment under the Income Tax Act, 1918, Section 125. The question in issue in that case was whether an additional assessment could be sustained in the following circumstances. In the first assessment a sum of money paid by the company had been treated as an income payment and had, therefore, been allowed as a deduction in the computation of its profits. Subsequently, the Inspector came to the conclusion that the payment in question was really a capital payment and ought not to have been allowed as a deduction, and thereupon the additional assessment in respect of the sum in question was made. The company contended that the payment was not a capital but an income payment and was properly allowable as a deduction, and that in any case the additional assessment was invalid because all the relevant facts were admittedly well known to the Inspector when the first assessment was made.

Finlay, J., rejected both these contentions and confirmed the additional assessment. The Court of Appeal reversed his decision without calling for a reply from Mr. King, who appeared for the appellants. Sir Wilfrid Greene, M.R., after giving his reasons for holding that the payment in question was an income payment and was properly allowed in the first assessment as a deduction, was about to give his opinion on the second contention raised by the appellants, namely, that the Inspector had not made any discovery within the meaning of the Income Tax Act, 1918, Section 125, when the Attorney-General ventured to intervene and intimated that the Crown would not appeal against the discharge of the assessment and asked the Court to allow the appeal without giving judgment on the second point. Mr. King was, it seems, quite willing that no judgment should be given on that point, and thereupon the Court of Appeal refrained from giving judgment upon it. It is obvious that if the Court of Appeal had given judgment on the second point it would have been in favour of

(Macnaghten, J.)

the appellants, since the Court had not called for any reply from Mr. King.

Sir Patrick Hastings invited me, having regard to what happened in the *British Sugar Manufacturers'* case(1) in the Court of Appeal, to disregard the decisions of Finlay, J., and to hold that no additional assessment to Income Tax can be made under Schedule D unless the Inspector of Taxes discovers some relevant fact previously unknown to him. I think, however, that I ought to follow the decisions of Finlay, J. Moreover, if the Court of Appeal had given their reasons for holding in the *British Sugar Manufacturers'* case that the additional assessment was invalid, I doubt whether those reasons would be applicable to the present case. The Respondents contend that the assessments to Sur-tax made by the Special Commissioners would be valid even if the assessments to Income Tax were held to be invalid by reason of the provisions of the Income Tax Act, 1918, Section 125. It is unnecessary for me to consider that contention because it is admitted that if the assessments to Income Tax are valid, the assessments to Sur-tax cannot be impugned under that Section. Therefore the second of the two contentions put forward by the Appellants must fail.

I come now to the more serious and difficult question whether, on the true construction of the provisions contained in the Finance Act, 1936, Section 18, and the Finance Act, 1938, Section 38, the facts stated by the Commissioners in the cases under appeal warrant any assessment either to Income Tax or Sur-tax under one or other of those Sections.

I will deal in the first place with the assessments under the Finance Act, 1936, Section 18. The Section begins with this preamble. "For the "purpose of preventing the avoiding by individuals ordinarily resident in "the United Kingdom of liability to income tax by means of transfers of "assets by virtue or in consequence whereof, either alone or in conjunction "with associated operations, income becomes payable to persons resident "or domiciled out of the United Kingdom, it is hereby enacted as follows". Then follow ten Sub-sections, including Sub-sections (1A), (1B) and (4A) which were added to it by Section 28 of the Finance Act, 1938. Sub-section (1) is as follows: "Where such an individual has by means of any "such transfer, either alone or in conjunction with associated operations, "acquired any rights by virtue of which he has, within the meaning of this "section, power to enjoy, whether forthwith or in the future, any income "of a person resident or domiciled out of the United Kingdom which, "if it were income of that individual received by him in the United King-"dom, would be chargeable to income tax by deduction or otherwise, that "income shall, whether it would or would not have been chargeable to "income tax apart from the provisions of this section, be deemed to be "income of that individual for all the purposes of the Income Tax Acts". By Sub-section (7) it is provided: "The provisions of this section shall "apply for the purposes of assessment to income tax for the year 1935-36 "and subsequent years, and shall apply in relation to transfers of assets "and associated operations whether carried out before or after the com-"mencement of this Act".

The meaning of these provisions seems plain enough, though their application to the facts of any particular case may be difficult. They mean,

(1) 21 T.C. 528.

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I think, that the income of a person resident or domiciled abroad shall, for all the purposes of the Income Tax Acts, be deemed to be the income of an individual ordinarily resident in the United Kingdom where the individual has made a transfer of assets and, by virtue or in consequence of the transfer, either alone or in conjunction with associated operations, income becomes payable to a person resident or domiciled abroad, and he himself has acquired rights giving him power to enjoy the income of the person resident or domiciled abroad which, if it were received by him in the United Kingdom, would be chargeable to tax.

The relevant facts of the case are short and simple; they can be stated in a few sentences. By an indenture of lease dated 29th September, 1921, and made between Sir William Vestey, as he then was—he was created Baron Vestey in the following year—and his brother, Sir Edmund Vestey, therein called " the lessors ", of the first part, the Union Cold Storage Co., Ltd., therein called " the lessees ", of the second part, and three gentlemen resident in Paris, Mr. C. A. Kennerley Hall, Mr. J. M. Drabble and Mr. Kenneth Stirling, whom I will call " the Paris trustees ", of the third part, the lessors as beneficial owners demised to the lessees for the term of 21 years from 10th April, 1921, the several properties situate abroad which were described in the first, second and third schedules thereto, at an annual rent of £960,000 which was made payable, not to the lessors who granted the lease, but to the Paris trustees, who had no right, title or interest to or in any of the demised properties. The lease was duly executed by all the parties thereto at Brussels on 29th December, 1921. The Paris trustees had no beneficial interest in the rent so payable to them; they were bare trustees of the rent for Lord Vestey and his brother, who were entitled to it in equal shares.

By an indenture dated 30th December, 1921, and made between Sir William and Sir Edmund Vestey, therein together called " the settlors ", of the one part, and the Paris trustees of the other part, the settlors settled the rent on their descendants. It will be necessary later to consider some of the provisions of the settlement, but for the present it is sufficient to say that by the terms of the settlement the Paris trustees were bound to accumulate the rent year by year during the term created by the lease, and that the accumulated trust fund was as to one half settled on the descendants of Sir William and as to the other half on the descendants of Sir Edmund. Neither Sir William nor Sir Edmund took any interest under the settlement, nor had they any power to revoke it. At the date of the lease both Sir William and Sir Edmund were ordinarily resident in the United Kingdom. On those facts the Respondents submit, and the Special Commissioners have held, that the assessments made under the Finance Act, 1936, Section 18, are valid.

The rent of £960,000 is admittedly income within the meaning of that word in Section 18. By Sub-section (5) (*b*) of Section 18 it is provided that the expression " assets " includes rights of any kind, and the expression " transfer " in relation to rights includes the creation of such rights, and since by the lease the rent was created and was made payable to persons resident abroad, it follows that the lease was a transfer of assets by virtue whereof income became payable to persons resident out of the United Kingdom. That is not, I think, disputed. But, in order to bring the case

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within the scope of Section 18, the Respondents must establish that by means of that transfer of assets, either alone or in conjunction with associated operations, Lord Vestey and Sir Edmund acquired rights by virtue of which each of them had, within the meaning of Section 18, power to enjoy one half of the income payable to the Paris trustees.

It is important to observe that the Section makes provision for two cases, viz., (1) where the individual by means of the transfer of assets alone acquires such rights, and (2) where he acquires the rights by means of the transfer of assets in conjunction with associated operations.

I will deal first with the question as to whether by the transfer of assets alone Lord Vestey and Sir Edmund acquired such rights. To say that a person enjoys an income of so much a year is a common expression; its meaning is, I think, well understood. It means in common parlance that the income belongs to that person, and that he is free, subject to the payment of any tax chargeable thereon, to spend it or save it or to give it away as he pleases, because it belongs to him. The income of £960,000 a year, though payable to the Paris trustees, did not belong to them; it belonged to Lord Vestey and his brother, and each could compel the Paris trustees to pay one half of that sum to him. They, therefore, had the power to enjoy the income of the Paris trustees.

The answer of the Appellants to that argument is twofold. The first answer is this. By Sub-section (3) of Section 18 it is provided as follows: "An individual shall, for the purposes of this section, be deemed to have "power to enjoy income of a person resident or domiciled out of the United "Kingdom if"—and then, under the letters (*a*), (*b*), (*c*), (*d*) and (*e*), the various circumstances are set out in which an individual, though he has in fact no power to enjoy the income, is to be deemed to have such power. It is said that the words in Sub-section (1) "has, within the meaning of "this section, power to enjoy" refer to Sub-section (3) and should be read as restricting Sub-section (1) to the cases coming within Sub-section (3), and that if the individual has in fact power to enjoy the income Sub-section (1) has no application to him at all. In my opinion this construction of Sub-section (1) cannot be sustained. I think Section 18 applies to the individual who has in fact power to enjoy the income of a person resident or domiciled abroad as well as to the individual who by Sub-section (3) is deemed to have such power. But, however that may be, the contention of the Appellants on this point is of no avail, because by Sub-section (3) (*e*) it is provided that the individual shall be deemed to have power to enjoy the income of a person resident or domiciled abroad if he "is able in any "manner whatsoever, and whether directly or indirectly, to control the "application of the income", and Lord Vestey and his brother were undoubtedly able to control its application because it belonged to them.

Then it was said that the settlement dated 30th December, 1921, was an "associated operation" within the meaning assigned to those words by Sub-section (2), and that, by the lease of 29th December, 1921, in conjunction with the settlement, neither Lord Vestey nor his brother had during the five years 1936 to 1941 power to enjoy or control the application of the income payable to the Paris trustees. That the settlement was an "associ-"ated operation" seems obvious, since it recites that the settlors had granted the lease with the intent that the rent reserved thereby should be

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held by the Paris trustees on the trusts declared by the settlement. But if by the lease alone Lord Vestey and his brother acquired power to enjoy the income payable thereunder to the Paris trustees, it seems immaterial to consider any disposition of the income which they made subsequently by virtue of that power.

It matters not, I think, whether they spend the income which they have power to enjoy on themselves or give it away to someone else; in either case the income is deemed by Sub-section (1) to be their income for all the purposes of the Income Tax Acts and, if they choose to give it away, it does not in my opinion matter whether they dribble it out quarter by quarter as it falls due or whether by a single "operation" they dispose of it once and for all; in either case the income is deemed to be their income.

Sub-section (1) of Section 18 does not begin with the words which have become familiar in Finance Acts of recent years, "If and so long as"; it begins with the word "Where". In order to support the argument put forward on behalf of the Appellants, it seems to me necessary to substitute the words: "if and so long as" for the word "where", and to delete the words "either alone or", so that the Sub-section should read: "If and so "long as an individual has by means of any such transfer in conjunction "with associated operations . . . power to enjoy", etc. Moreover, the words "or in conjunction with associated operations" were, it would seem, inserted for the purpose of enlarging the scope and effect of Section 18. A construction which restricts the meaning of the words "Where such an "individual has by means of any such transfer alone", etc., is, I think, inadmissible.

Assuming, however, that it is proper to have regard to the consequences which follow from a conjunction or combination of the lease and the settlement it is said on behalf of the Appellants that, since the settlement was irrevocable, Lord Vestey and his brother had no power at all to enjoy the income or control its application during the five years 1936 to 1941. It is true they could not exercise the power during those years; and the reason why they could not exercise it during those years was that they had already exercised it in 1921, when they made the settlement. But the application of the income during the years 1936 to 1941 was in fact controlled by them and by no one else, and I venture to think that, since its application was in fact controlled by them and the control was duly exercised by virtue of the rights which they had acquired, it cannot be maintained that they had during those years no power to control the application of the income within the meaning of Section 18.

The Respondents relied on paragraphs (*a*), (*c*) and (*d*) as well as on paragraph (*e*) of Sub-section (3). They maintained that on the facts as found by the Special Commissioners Lord Vestey and his brother must be deemed to have had power to enjoy the income of the Paris trustees thereunder. Sub-sections (3) (*a*) and (*c*) read thus: "An individual shall, for ".the purposes of this section, be deemed to have power to enjoy income "of a person resident or domiciled out of the United Kingdom if—(*a*) the "income is in fact so dealt with by any person as to be calculated, at some "point of time, and whether in the form of income or not, to inure for "the benefit of the individual; or . . . (*c*) the individual receives or is "entitled to receive, at any time, any benefit provided or to be provided

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" out of that income or out of moneys which are or will be " available for the purpose by reason of the effect or successive effects " of the associated operations on that income and on any assets which " directly or indirectly represent that income ". By Sub-section 5 (*c*) the word " benefit " includes " a payment of any kind ". It is said that under the provisions of clauses 1 and 2 of the settlement Lord Vestey and his brother could direct the Paris trustees to lend the trust fund to themselves on their personal credit and that any such loan would be a " benefit " to them within the meaning of Section 18. For that proposition the Respondents rely on the observations of Lord Thankerton in *Commissioners of Inland Revenue* v. *L.B. (Holdings), Ltd.*, [1946] 1 All E.R. 598, at page 603 (1). The observations of Lord Thankerton seem to indicate that the question whether the making of a loan in any particular case would be a benefit to the borrower is a question of fact to be determined by the Special Commissioners. In this case the Special Commissioners have determined that question in favour of the Crown. They have held that if Lord Vestey and his brother directed the Paris trustees to lend money to them out of the trust fund the loan would be a " benefit " to them within the meaning of Sub-sections (3) (*a*) and (*c*). If that be a question of fact then, of course, their decision must be accepted by the Court.

The Respondents also rely upon Sub-section (3) (*d*), which reads thus: " If . . . (*d*) the individual has power, by means of the exercise of any " power of appointment or power of revocation or otherwise, to obtain for " himself, whether with or without the consent of any other person, the " beneficial enjoyment of the income ". Clause 11 of the settlement provided: " Notwithstanding anything herein contained the following powers " are reserved—Power for the said Sir William Vestey and Sir Edmund Hoyle " Vestey respectively by Will or Codicil to create any interest in William's " Fund or Edmund's Fund respectively by directing payments to be made " thereout in favour of the widow of the Appointor for her life or any " shorter period ". By Sub-section (5) of Section 18 it is provided: " For " the purposes of this section—(*a*) a reference to an individual shall be " deemed to include the wife or husband of the individual ", and the Respondents argued that the power to create an interest in the trust fund in favour of the widows of Lord Vestey and Sir Edmund brings the case within the provisions of Sub-section (3) (*d*). In answer to that argument it was said that the word " wife " does not include a widow. Obviously the word " individual " in Section 18 cannot in every place where it is used include the individual's widow, or Sub-section (1) would then read " Where " such an individual and his widow have by means of any such transfer ". I think that Sub-section (5) (*a*) should be construed as meaning that the word " wife " has to be read as including the widow of the individual where it is appropriate to do so and that it is appropriate to do so in Sub-section (3) (*d*). But so far as Sir Edmund is concerned, he by deed dated 31st March, 1937, extinguished the power reserved by clause 11 of the settlement, and it is admitted on behalf of the Respondents that Sub-section (3) (*d*) could not apply to him. Nor could it apply to Sir William, because he by a deed dated 26th November, 1935, had appointed the whole of his fund to his son, or in default to his grandson, in the event of their living

(1) 28 T.C. 1, at p. 34.

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until the lease expired, and that, therefore, it was only in the event of these two persons, the son and grandson, dying before the appointed time that Sir William would have had power to appoint in favour of his wife. I doubt whether in these circumstances the contention of the Respondents with regard to Sub-section (3) (*d*) is well founded, but it is not necessary for me to come to a decision because I have already decided that the assessments under Section 18 of the Finance Act, 1936, are valid for the reasons which I have given.

The only assessments under Section 18 of the Finance Act, 1936, which are under appeal before me are assessments for the years 1936-37 and 1937-38; the other assessments under appeal were made under Sub-sections (2) and (3) of Section 38 of the Finance Act, 1938. The assessments under that Act cannot be more, though they may be less, than those under the 1936 Act. Assessments under the 1936 Act were in fact made for each of the five years 1936-37 to 1940-41, but those for the years 1938-39 to 1940-41 were not dealt with by the Special Commissioners. It was unnecessary for them to do so because they had already come to the conclusion that the assessments for those years under the 1938 Act were valid and that the assessments under the 1936 Act amounted to the same sums as the assessments under the 1938 Act. In those circumstances the effect of my decision with regard to the 1936 Act is to render any decision by me as to the assessments under the 1938 Act ineffective. But the question of liability under the 1938 Act was discussed very fully before me and it has a bearing on the question of costs. I think therefore I ought to deal with the assessments under the 1938 Act, but I will only do so briefly. It will not be necessary to refer to any facts other than those I have already mentioned.

By the Finance Act, 1938, Section 38 (2), it is provided as follows:— "If and so long as the terms of any settlement are such that—(*a*) any per- "son has or may have power, whether immediately or in the future, and "whether with or without the consent of any other person, to revoke or "otherwise determine the settlement or any provision thereof; and (*b*) in "the event of the exercise of the power, the settlor or the wife or husband "of the settlor will or may become beneficially entitled to the whole or "any part of the property then comprised in the settlement or of the "income arising from the whole or any part of the property so comprised". By the lease it was provided as follows: "Either the Lessors or the Lessees "may at any time during the term hereby granted determine this Lease "on giving to the other parties six calendar months previous notice in "writing expiring on any of the aforesaid quarterly days for payment of "the said rent"—the lease provided that the annual sum of £960,000 should be paid by quarterly instalments on 1st January, 1st April, 1st July and 1st October in each year—"and after the expiration of such notice "this present demise and everything herein contained shall cease and be "void".

Lord Vestey and Sir Edmund had no power to revoke the settlement, but the power to determine the lease gave them power to determine one of its provisions. In the event, however, of the exercise of that power, neither Lord Vestey nor Sir Edmund nor the wife of Lord Vestey nor the wife of Sir Edmund became entitled to any part of the property comprised

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in the settlement, because by the cancellation of the lease the rent came to an end. The words of Section 38 are singularly inappropriate to the settlement made by Lord Vestey and his brother. It obviously provides for a case where income-producing property is made the subject of a settlement; it does not contemplate a case like the present where an income payable under a lease is made the subject of a settlement. For the Respondents it was argued that the words " property comprised in the settlement " did not mean only the rent payable under the lease but meant something more. Mr. Stamp, who continued the argument when the Solicitor-General was called away on public business, boldly asserted that the words " property " comprised in the lease " included the freehold reversion on the determination of the lease. It appears to me there is no warrant for that contention. Moreover there is no reason to suppose—indeed, the contrary seems to be the case—that Lord Vestey and Sir Edmund had any freehold reversion, except in the case of some cattle lands in South Africa and Paraguay which were a very small part of the vast and valuable properties which were the subject matter of the demise. Most of the properties belonged to foreign companies registered under the laws of the countries in which the property is situate, all over the world, in Europe, Asia, North and South America, Africa, and Australasia. Therefore, in my opinion, the claim to make the assessment under Sub-section (2) of Section 38 of the Finance Act, 1938, fails, and the decision of the Special Commissioners on that point is erroneous and should be reversed.

Sub-section (3) of Section 38 provides: " If and so long as the settlor " has an interest in any income arising under or property comprised in a " settlement, any income so arising during the life of the settlor in any " year of assessment shall, to the extent to which it is not distributed " (and by the settlement the income was to be accumulated) " be treated " for all the purposes of the Income Tax Acts as the income of the settlor " for that year, and not as the income of any other person ". Then Sub-section (4) says: " For the purpose of the last foregoing subsection, the " settlor shall be deemed to have an interest in income arising under or " property comprised in a settlement, if any income or property which may " at any time arise under or be comprised in that settlement is, or will or may " become, payable to or applicable for the benefit of the settlor or the wife " or husband of the settlor in any circumstances whatsoever ". With regard to that Sub-section the Respondents submit that the income arising in each of the relevant years from the sums capitalised by the Paris trustees is assessable. That depends upon the same considerations as the contentions put forward with regard to the meaning of Sub-section (3) of Section 18 of the Finance Act, 1936. I think, in accordance with what I have already said, assessments could be made in respect of that income. They would, of course, be small in amount compared with those allowed by the Special Commissioners, and it will, of course, be necessary to send the case back to the Special Commissioners to adjust the assessments in accordance with this decision.

It only remains for me to consider the question of costs. The Crown have succeeded in the case relating to the assessments under the Finance Act, 1936, Section 18, and the appeal in that case will be dismissed with costs. The case relating to the assessments under the Finance Act, 1938, Section 38, will be remitted to the Special Commissioners to adjust the

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assessments in accordance with my decision. Since the Appellants have succeeded substantially the Appellants will get the costs of that case. In the case where Mr. Colquhoun is the Respondent the costs are, I understand, trifling and since the point raised in that case arose also in the two other cases there will be no Order as to the costs of that case.

Appeals having been entered against the decisions in the King's Bench Division, the cases came before the Court of Appeal (Tucker, Somervell and Evershed, L.JJ.) on 9th, 10th, 11th, 14th, 15th, 16th and 17th July, 1947, when judgment was reserved. On 30th July, 1947, judgment was given in favour of the Crown in all three cases, Evershed, L.J., dissenting in the third case.

Sir Patrick Hastings, K.C., Mr. J. Millard Tucker, K.C., and Mr. J. S. Scrimgeour, K.C., appeared as Counsel for Lord Vestey's executors and Sir Edmund Vestey, and the Solicitor-General (Sir Frank Soskice, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Somervell, L.J.—Tucker, L.J., has asked me to read my judgment first.

These are appeals from decisions of Macnaghten, J. The first two appeals, with cross-appeals, relate to assessments made on the executors of Lord Vestey, and assessments made on Sir Edmund Vestey, under Section 38 of the Finance Act, 1938, for the years from 1937-38 to 1940-41. These two appeals raise the same issues and I will deal with them together. The third appeal relates to assessments made under Section 18 of the Finance Act, 1936. Counsel for the taxpayers desired to keep open a point relating to the position of executors which was not open to him in this Court owing to the decision in *Cottingham's Executors* v. *Commissioners of Inland Revenue,* 22 T.C. 344.

The appeals to be considered first turn mainly, if not entirely, on the application to two documents entered into on consecutive days of Section 38 of the Finance Act, 1938. The first was a lease entered into on 29th December, 1921. The parties were: (1) Sir William Vestey, as he then was, later Lord Vestey, and Sir Edmund Vestey, the lessors, who were recited as being at that date "absolutely entitled for the entire and full interest" to certain properties set out in the first schedule, to the "full beneficial "interest" in certain properties set out in the second schedule, and "en-"titled for an absolute interest to all shares" in companies which owned premises, the companies and the premises being set out in the third schedule; (2) the Union Cold Storage Co., Ltd., hereinafter called "the "Union", to whom the premises were leased, and (3) three individuals living in Paris, referred to in the latter document and hereinafter as "the "Paris trustees", to whom the rent of £960,000 a year was to be paid.

The lease was for 21 years with a right of determination in the lessors or lessees on giving six months' notice in writing, and a further right in the lessors on giving six months' notice to withdraw any part or parts of the premises demised, with a consequent reduction of rent.

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A certain complication arises with regard to the properties comprised in the third schedule. Under the lease the lessors purport to let those premises with the others to the Union. The Vesteys, in their capacity of shareholders, could not, in form, as it seems to me, do this. The shares, as appears from the documents of the same date, were transferred to the Union to hold during the period of the lease for the purpose of ensuring that such lease was given effect to by the respective companies. This arrangement no doubt secured to the Union effectively the rights as set out in the lease.

The second document is a deed of settlement dated 30th December, 1921, made between the two Vesteys and the Paris trustees. It recites the lease and continues: "And whereas the settlors executed and granted the "said Lease reserving the rent thereunder to the Trustees to the intent that "such rent as and when received by the Trustees shall be held by them "upon the trusts and with and subject to the powers and provisions herein-"after expressed and declared And whereas the Settlors respectively declare "that this Settlement shall be irrevocable save to the extent of the powers "of appointment and variation hereinafter contained".

The deed is a complicated document, but the following are the provisions which are relevant to this case. Under clause 2 the rent receivable by the trustees under the lease is to be capitalised as and when received and is called "the Settled Fund". The clause goes on to provide that: "the "Settled Fund (at the direction in writing of the authorised persons . . .) "be invested in the names or under the legal control of the Trustees in or "upon stock funds shares securities or other investments of whatever nature "and wheresoever (but where involving liability only with the consent of "the Trustees) or upon personal credit or upon loans to any Company or "Companies wheresoever domiciled and with or without security". The authorised persons were, in all relevant years except the last, the two Vesteys. In the last year, after Lord Vestey's death in December, 1940, Sir Edmund was himself, and alone, entitled to give the directions. The clause goes on to give the trustees in the absence of directions full power of investing as if they were absolutely entitled.

Under clause 3 the income derived from the settled fund was, after paying certain costs, to be divided into two funds known as "William's "Fund" and "Edmund's Fund". Subject to powers of appointment, the income of these funds was to be accumulated, the two funds so resulting being called "William's Accumulated Fund" and "Edmund's Accumulated "Fund".

Under clause 4 each Vestey had a power of appointment over half the settled fund, known respectively as "William's share" and "Edmund's "share", and their funds and accumulated funds, respectively, among their respective children or remoter issue.

Clause 11 reads as follows: "Nothwithstanding anything herein con-"tained the following powers are reserved Power for the said Sir William "Vestey and Sir Edmund Hoyle Vestey respectively by Will or Codicil to "create any interest in William's Fund or Edmund's Fund respectively by "directing payments to be made thereout in favour of the widow of the "Appointer for her life or any shorter period."

Clause 19 gave the authorised persons power to remove all or any of the trustees and appoint a new trustee or new trustees.

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The first question that arises is whether the provision of Section 38 (2) of the Finance Act, 1938, are applicable and, if so, to what extent. Section 38 (2) reads as follows: " If and so long as the terms of any settlement are " such that— *(a)* any person has or may have power, whether immediately " or in the future, and whether with or without the consent of any other " person, to revoke or otherwise determine the settlement or any provision " thereof; and *(b)* in the event of the exercise of the power, the settlor or " the wife or husband of the settlor will or may become beneficially entitled " to the whole or any part of the property then comprised in the settlement " or of the income arising from the whole or any part of the property so " comprised; any income arising under the settlement from the property " comprised in the settlement in any year of assessment or from a corres- " ponding part of that property, or a corresponding part of any such income, " as the case may be, shall be treated as the income of the settlor for that " year and not as the income of any other person ". I need not read the proviso, but I will read the definition of " settlement ", which is to be found in Section 41 (4) (*b*): " the expression ' settlement ' includes any dis- " position, trust, covenant, agreement or arrangement, and the expression " ' settlor ' in relation to a settlement means any person by whom the settle- " ment was made".

The Crown's contention can be shortly stated. The properties leased, or, at any rate, the rights in respect of them, were property comprised in the settlement. By exercising their power to terminate the lease the Vesteys became beneficially entitled to this property. There is, undoubtedly, here a settlement. The first question is whether both documents constitute the settlement within the meaning of the Sub-section. It is the lease which confers the right to receive the rent upon the trustees. In the deed the Vesteys are referred to as " the Settlors ", and it is necessary to look at the lease in order to see how this description of them has become appropriate. Coming nearer to the matters in issue: Is the right to determine the lease a provision of the settlement, and what is the property comprised in the settlement? The words of the definition are very wide. It cannot of course, be construed as meaning that any arrangement which a man may make must be treated as a settlement. Lord Greene, M.R., made some observations on a similar definition of a settlement in *Hood Barrs* v. *Commissioners of Inland Revenue*, 27 T.C. 385. The definition with which he was dealing was to be found in Section 21 (9) *(b)* of the Finance Act, 1936. The words were the same as the present, with the addition of " transfer of " assets ".

The Master of the Rolls was dealing with an argument that you can only go to the definition clause if you find something which might fall within the word " settlement " apart from the definition. He said this, at page 401: " Speaking for the moment without reference to authority, that appears " to me to restrict the operation of such an interpretation clause as this in a " quite unwarranted and unprecedented manner. The whole object of an " interpretation clause expressed in this way, I should have thought, was to " give to a word which, for the sake of convenience, is used in the body of " the Section, an extended meaning which it would not otherwise bear. " Irrespective of what it originally may mean, taken by itself, it is to have " that extended meaning, and I can see no justification in principle or on " authority for cutting it down in the way suggested."

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The argument was based on some words used by Lord Macmillan in the case of *Chamberlain* v. *Commissioners of Inland Revenue*, 25 T.C. 317, at page 331, to which I will refer later. The Master of the Rolls, after examining these words and the rest of Lord Macmillan's speech and the other speeches, came to the conclusion that what was said in that case supported the conclusion to which he had come. The question here, as it seems to me, is whether the settlement is restricted to the covenant to pay the rent and the trusts declared by the deed or whether it includes the whole of the lease. If the former, then the property comprised in the settlement is the rent; if the latter, then the right to terminate is a provision of the settlement and the property comprised in the settlement includes, as it seems to me, the rights with which the Vesteys parted under the lease.

The learned Judge assumed that the right to terminate the lease was a provision of the settlement, but that the property comprised in the settlement was the rent only and, of course, the various funds and accumulations. On this view he came to the conclusion that the Vesteys had a right to determine a provision of the settlement by virtue of their right to terminate the lease, but that this exercise of their power did not result in their becoming beneficially entitled to the whole or any part of the property comprised in the settlement. They did not, of course, become entitled to the rent. What they became entitled to was the rights which they had parted with under the lease.

This would, I think, clearly be the position, notwithstanding the extended definition, if there had originally been a lease under which the lessor became entitled to a rent, having at that time no idea of making a settlement, and later settled the rent on trustees and declared trusts. In the present case the lease was entered into as an integral part of the arrangement for a settlement. The rent was never payable directly to the Vesteys, though there may have been a resulting trust in their favour in the short period between the two documents. They part with certain rights to the Union in consideration of which the latter undertake to pay a sum of money to the trustees. I will consider, in a moment, the authority relied on by the taxpayers, but unless that authority leads to a different conclusion I should have thought that under the extended definition the whole of what was effected by both documents constituted the settlement.

Counsel for the taxpayers relied particularly on *Chamberlain's* case. It is perhaps worth noting at the outset that in that case Lord Thankerton said that in applying this Section each case is apt to depend on its own facts and other cases are not likely to be of material assistance. In that case there were five settlements, the trustees of which held different classes of shares in a company formed and controlled by the settlor to which he had sold income-bearing assets. The settlor retained throughout a holding of preference shares. The shares were purchased by the various trustees with money paid to them by the settlor. The question was whether, as the Crown contended, all the assets of the company were property comprised in a single settlement, or whether each settlement was to be regarded separately. Lord Thankerton, with whom Viscount Simon, L.C., and Lord Atkin agreed, was of opinion that the latter alternative was correct. The company, in his view, and its shares provided an available investment for the sums settled under the five deeds, but the company, though controlled by the appellant, did

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not hold its assets as part of the provisions settled on the children. Lord Macmillan relied, *inter alia*, on the settlor's continued holding of preference shares as making it impossible to regard all the assets of the company as comprised in the settlement. I agree that that case requires careful consideration, but there are distinctions, as is apparent from what I have said. The extended definition must, as it seems to me, apply in the phrase " property " comprised in the settlement ", and I find it difficult to think of a case which would be covered in respect of that phrase by the extended definition if this case is not. In this case, where, under the same document and in consideration of that with which settlor parts, the trustees derive the property on which the trusts are to operate, there is, I think, an arrangement which must in its entirety be treated as the settlement. There is no question, as in *Chamberlain's* case[1], of the trustees buying assets with money settled on them. The Union is the intermediary by which that which passes from the settlor is converted into the property which passes to the trustees. I think, therefore, that on the main point the Crown's argument succeeds.

There is another point which has to be considered under this and other Sections. The Court is here dealing with two assessments on two separate taxpayers, although only one Case has been stated in respect of them. Under the Section, therefore, you have to find that each person has the power, and the question is whether the words " with or without the consent of any other person " apply to the terms of the lease. It may well be, as was submitted, that those words were originally introduced to cover cases in which the settlor had provided that a power vested in him should be exercised with the consent of some other named person, using the actual words which appear in the statute. It would, I think, be strange if this could be got round merely by providing that the other person should join in its exercise. It was submitted, however, on behalf of the taxpayers, that the words did not cover a case like the present, where the power is exercisable jointly. Reliance was based on the decision of Atkinson, J., in *Wolfson* v. *Commissioners of Inland Revenue*, [1947] 2 All E.R. 150, at page 158 (31 T.C. 142). The question arose there in connection with the power to wind up a company, and the learned Judge said this: " As to winding-up, the settlor had no power himself to wind-up. He needed " the co-operation of another shareholder with the requisite shareholding. " It is said that he could bring that about with the consent of another per- " son, but I do not think he could. I think that the language is not apt for " that. No mere consent can give him power to wind-up the company. He " needs the co-operation of another shareholder." I agree with that, but I do not think it covers the present issue. In the present case one must assume that one of the lessors initiates a suggestion to terminate the lease. He then seeks the " consent " or agreement of the other. If that consent is forthcoming, it seems to me to follow that, the necessary document being drawn up, both will sign. It must almost always be the case where there is a joint power of this kind that one party or the other initiates a discussion in which he seeks the consent of the other. If that consent results the power will be exercised.

It is clear that the right of determining the lease does not enable either taxpayer to become beneficially entitled to any property comprised in the

(1) 25 T.C. 317.

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settlement consisting of the accumulated funds or income from them. Each recovers his rights with which he had parted under the lease and that falls to be treated as his income. No argument was addressed to us on the basis that this was not properly represented by half the amount of the rent in the respective years of assessment.

I now turn to the alternative arguments put forward under Section 38 (3) and (4). Section 38 (3) says: "If and so long as the settlor has an interest in any income arising under or property comprised in a settlement, any income so arising during the life of the settlor in any year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year, and not as the income of any other person: Provided that—(*a*) if and so long as that interest is an interest neither in the whole of the income arising under the settlement nor in the whole of the property comprised in the settlement, the amount of income to be treated as the income of the settlor by virtue of this subsection shall be such part of the income which, but for this proviso, would be so treated as is proportionate to the extent of that interest". Then there is a proviso with which I need not trouble.

The opening words of Sub-section (4) are important: "For the purpose of the last foregoing subsection, the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement, if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever".

The first argument is based on the power of the Vesteys under clause 2 of the deed. It was submitted on behalf of the Crown that under this power the Vesteys could direct that in any given year the rent and the settled fund or any part of it should be lent to either of them without security and at no interest or at a purely nominal rate of interest. I think this is right. I think they could do this, and they could also direct that there should be loans in the same way to any company in which they were interested, and, as the lease shows, there were a number of companies in which they held all the shares. It was submitted on behalf of the taxpayers that they had no power to do this and that they were in some way in a fiduciary capacity. I do not so read that clause. They were perfectly entitled to retain the fullest possible rights as to how this large sum arising and accumulating year by year should be dealt with. I do not think this issue is affected by what was actually done, but it was found in the Case that a company referred to as "Western" acted as bankers and financial agents to the operating companies, the Paris trustees and the Vesteys. The accounts of this company show very large debits to the Vesteys on which no interest was charged. They also show that the liquid resources of this company were increased by very large deposits of money awaiting investment by the Paris trustees. If this was done under the direction of the Vesteys I do not think they were doing anything in the least improper or in breach of any fiduciary duty owed to the *cestui que* trusts.

The next question is whether this power is one which comes within the language of Sub-section (4). It was argued on behalf of the taxpayers

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that it did not come within these words; that " payable to " did not cover a loan even of this kind, and that the words " applicable for the benefit of " the settlor " only covered a case in which the money was paid to discharge some debt of the settlor. I see no reason for giving the words this narrow meaning. The power reserved under clause 2, in ordinary language, was a power of very great benefit to the settlors.

In support of their construction the taxpayers based an argument on Section 40, which says that any capital sum paid by the trustees of a settlement to the settlor shall be deemed to be his income. By Sub-section (5) of that Section " capital sum " includes any sum paid by way of loan. It was, therefore, submitted that sums payable by way of loan cannot be within the meaning of Sub-section (4) of Section 38. There is, I think, more than one answer to this submission. Section 40, I think, is primarily dealing with sums paid out of the capital of the settlement which would not be within the Sub-section now being considered. Further, there is often some overlap between sections of this kind, and it may well be that if the only power was to lend on ordinary terms, namely, with security and at a commercial rate of interest, the argument now being advanced under Section 38 would not apply. There is a further answer to be found in Sub-section (2) *(c)* of Section 40. That provides that there is to be deducted from the amount of the capital sum any income arising under the settlement which has been treated as the income of the settlor by virtue of Sub-section (3) of Section 38. That shows that capital sums (including loans) may fall within the provisions of Section 38 (3). The Solicitor-General relied on an observation of Lord Thankerton in *Commissioners of Inland Revenue* v. *L.B. (Holdings), Ltd.*, [1946] 1 All E.R. 598, at pages 603-4 (28 T.C. 1, at page 34). Lord Thankerton was considering the words " able to secure that income or " assets . . . will be applied either directly or indirectly for his benefit ", and he said this: " Now, what is to be secured is the application of the " company's income or assets for his benefit, and a temporary application " may be of great benefit, even as a loan repayable later, and I see no " reason for excluding such a benefit from the purview of the Special Com- " missioners, though doubtless they will not trouble themselves with doubt- " ful ability, or with benefits which are unsubstantial."

The argument again arises, which I will describe as the " two taxpayers " argument. I think it is covered by the words at the end of Subsection (4), " in any circumstances whatsoever ". The documents themselves obviously contemplate that the two Vesteys will work in co-operation in the exercise of the powers, and, therefore, if they agree to exercise the power in the way suggested by the Crown, the income in question will, in my opinion, become applicable for the benefit of one or other, or both. As I understand it the assessments here are based on the assumption that in the respective years half of the rent falls within the Sub-section.

How much of the income on the above basis does this Sub-section cover? It plainly covers the rent. It also, I think, covers the income from the settled fund because that is income from property in which under the Sub-section the settlor has an interest, although the powers of clause 2 do not enable him to control the investment or use of that income. Once, however, that income has got into William's or Edmund's fund it passes out of the scope of the Sub-section, so far as clause 2 is concerned.

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The learned Judge took the view that the rent was not, but the derivative income was, within the Sub-section, though he may have refrained from dealing with the rent in view of his conclusion under Section 18 of the Act of 1936. I have given my reason for agreeing in part and disagreeing in part with his conclusions. In a very complicated case we have had the advantage of a second and very full argument from which I hope I have benefitted.

The Solicitor-General submitted that if he could establish, as, if I am right, he has done, that "any income", taking these words from Sub-section (4), was applicable for the benefit of the settlor, this enabled him, going back to Sub-section (3), to say that the whole of the income arising under the settlement, including all the derivative income, must be treated as the income of the settlement. I am not sure that this is a possible construction on any view, but it is in direct conflict with proviso *(a)* in Sub-section (3), which expressly provides that the amount of the income to be treated as the income of the settlor shall be that part in which he has an interest as defined. On this point I think the argument of the taxpayers succeeds. In my opinion the Crown can only succeed in respect of the income from William's and Edmund's funds by reason of the powers contained in clause 11 and the extent to which they existed at the material dates.

In 1935 Lord Vestey had made an appointment of the whole of his share, his fund and accumulated fund, in favour of his eldest son if living on 1st April, 1942, and if not, then for that son's son William Vestev if living at such date. The only power that remained, therefore, under clause 11 was a power which could only operate in the event of that appointment failing and of Lord Vestey himself dying. If all those events happened, the income of William's fund could, if the power were exercised, become payable to the settlor's wife. The words to which I have already referred, "in "any circumstances whatever", seem to me to entitle the Crown to rely on this point in respect of the income of William's fund.

The position of Sir Edmund Vestey is different. On 31st December, 1935, he made an absolute appointment in trust for his third son absolutely if he should be living on 1st April, 1942, and, if not, in trust for a son of that son who attains twenty-one. That deed excepted from its operation part of the fund in question. The parts excepted were appointed by deed of 31st March, 1937, to the same son as from 1st June, 1937, and by that deed Sir Edmund wholly released and extinguished his powers under clause 11, and it seems to me, therefore, as from the date of that deed the Crown has no argument which it can advance in respect of the derivative income in Sir Edmund's case. As the first assessment in this case is for 1937-38 no assessment can be made in Edmund's case in respect of this matter.

Reliance was also placed by the Crown on the power to determine the lease. I do not think this power can be invoked under this Sub-section. The Sub-section operates on income arising under the settlement in any year of assessment. If the lease is determined the rent comes to an end and ceases to arise as income under the settlement.

Counsel for the taxpayers desired to keep open, should this case go higher, the point decided by this Court in *Commissioners of Inland Revenue*

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v. *Gaunt*, 24 T.C. 69, where it was decided that the word " wife " in Sub-section (4) included " widow ".

Mr. Tucker based an argument on Section 20 of the Finance Act, 1943, which " for the removal of doubts " declared that this Section 38 should have effect in accordance with the provisions of the Sixth Schedule to that Act. The argument, if I rightly understand it, was that where a settlor provides income, once that income is capitalised it ceases to be property which originates from him and, therefore, is not property comprised in the settlement *quoad* that settlor for the purpose of the Section. I cannot accept that argument. It seems to me that where a settlor pays or arranges for the payment of income to trustees, what originates from him is not only that income but any property which may remain in the settlement as the result of accumulation of that income.

In the result, therefore, in my view the assessments in respect of half the rent are within either Sub-section (2) or Sub-section (3). Under the latter Sub-section the income from the settled fund is covered and the income from William's fund in all years in the case of William.

I now pass to the appeal which deals with assessments made under Section 18 of the Finance Act, 1936. Those assessments covered the years from 1936-37 to 1940-41. The Special Commissioners affirmed the assessments, with certain adjustments for 1936-37 and 1937-38. The remaining assessments, being alternative to assessments already considered based on Section 38 of the Finance Act, 1938, were not determined and were left over to be disposed of when the other assessments were finally disposed of. In this case, therefore, we are only dealing with the first two years.

The relevant parts of Section 18 are as follows: " For the purpose of " preventing the avoiding by individuals ordinarily resident in the United " Kingdom of liability to income tax by means of transfers of assets by " virtue or in consequence whereof, either alone or in conjunction with " associated operations, income becomes payable to persons resident or " domiciled out of the United Kingdom, it is hereby enacted as follows:— " (1) Where such an individual has by means of any such transfer, either " alone or in conjunction with associated operations, acquired any rights " by virtue of which he has, within the meaning of this section, power " to enjoy, whether forthwith or in the future, any income of a person " resident or domiciled out of the United Kingdom which, if it were income " of that individual received by him in the United Kingdom, would be " chargeable to income tax by deduction or otherwise, that income shall, " whether it would or would not have been chargeable to income tax apart " from the provisions of this section, be deemed to be income of that " individual for all the purposes of the Income Tax Acts ".

Sub-section (3) says: " An individual shall, for the purposes of this " section, be deemed to have power to enjoy income of a person resident " or domiciled out of the United Kingdom if—(*a*) the income is in fact " so dealt with by any person as to be calculated, at some point of time, " and whether in the form of income or not, to inure for the benefit of the " individual; or (*b*) the receipt or accrual of the income operates to increase " the value to the individual of any assets held by him or for his benefit; " or (*c*) the individual receives or is entitled to receive, at any time, any " benefit provided or to be provided out of that income or out of moneys

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" which are or will be available for the purpose by reason of the effect or " successive effects of the associated operations on that income and on any " assets which directly or indirectly represent that income; or (*d*) the " individual has power, by means of the exercise of any power of appoint- " ment or power of revocation or otherwise, to obtain for himself, whether " with or without the consent of any other person, the beneficial enjoyment " of the income, or may, in the event of the exercise of any power vested " in any other person, become entitled to the beneficial enjoyment of " the income; or (*e*) the individual is able in any manner whatsoever, and " whether directly or indirectly, to control the application of the income." " (4) In determining whether an individual has power to enjoy income " within the meaning of this section, regard shall be had to the substantial " result and effect of the transfer and any associated operations, and all " benefits which may at any time accrue to the individual as a result of the " transfer and any associated operations shall be taken into account irrespec- " tive of the nature or form of the benefits." I will not refer continuously to Sub-section (4), but I have borne it in mind in construing the Section.

There is no dispute here that there was a transfer of assets within the meaning of the Section, and there was a finding, which was not disputed before us, that the main purpose of the creation of the rent and its transfer to the settlement trustees was the avoidance of the United Kingdom taxation which would normally accrue on their (the Vesteys) becoming resident. The Special Commissioners relied on the power to determine the lease as falling within Section 18 (3) (*d*), and the power to direct the investment of rent under clause 2 as coming within the meaning of Sub-section (3) (*e*). In the " contentions " on behalf of the Crown, reliance was placed on the transfer and/or associated operations as bringing the assessments within one or more of Sub-section (3) (*c*), (*d*) and (*e*).

Before us reliance was also placed on Sub-section (3) (*b*). Counsel for the taxpayers pointed out that this had not been expressly raised below but, as I understand it, did not challenge this being raised before us provided, of course, that the argument was based on the documents and other matters as found in the Case or as plainly apparent from the Case and the exhibits thereto. Findings under one paragraph of the Sub-section may be sufficient to dispose of the case, but as the various issues were fully argued I will express my view on them.

The learned Judge, in upholding the assessments, relied on the rights of the Vesteys in 1921 after the lease had been entered into and before the deed of settlement was entered into on the next day. I feel a difficulty about this. Having entered into the lease, the Vesteys could, I think, have entered into a deed which would have made it impossible to contend that in subsequent years of assessment either of them had power to enjoy within the Section. The question I think which we have to consider is whether, as a result of the two documents and any associated operations, each of them has in the years under consideration power to enjoy within the meaning of this Section.

I will consider first the argument under Sub-section (3) (*b*). It was submitted on behalf of the Crown that the right to direct dealings with the rent and the settled fund under clause 2 of the deed was an asset held by each of the Vesteys. "Asset" is defined (in Sub-section (5) (*b*)) as including property or rights of any kind. I bear in mind what the Master of the Rolls

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has said about extended definitions. As powers of appointment are expressly dealt with in Sub-section (3) (*d*) they are, at least to the extent they are there covered, taken out of paragraph (*b*) even though they are a right "of any kind". I have, however, come to the conclusion that the right or rights under clause 2 are an asset within the meaning of the definition. I do not think the right ceases to be an asset by reason of the fact that it is exercisable jointly. An asset may be held by an individual jointly with another individual. The receipts or accrual of the rent operates to increase the value of that asset and, therefore, *prima facie* Sub-section (3) (*b*) applies.

This paragraph came before this Court in the case of *Lord Howard de Walden* v. *Commissioners of Inland Revenue,* 25 T.C. 121. That case was concerned with a series of very complicated transactions. The taxpayer was entitled to receive from four Canadian companies sums on promissory notes at quarterly intervals. Those sums were payable out of the income of the Canadian companies. The income of those companies resulted from assets transferred to them by the taxpayer. The taxpayer also held certain shares in two of the companies. The main point in the case was based on an argument for the taxpayer that he had only an interest in a fraction of that income and that, applying Sub-section (3) (*b*), the only sum in respect of which he ought to be assessed should be such of the income of the companies as represented the increased value of the assets, namely the promissory notes and the shares. Lord Greene, M.R., giving the judgment of the Court, stated as follows, at page 133: "Mr. Tucker argued that Sub-section "(3) does not deal with the quantum, but only with the character of the "income which the taxpayer is to be deemed to have power to enjoy. But "the real question depends upon the meaning of the words 'any income' in "Sub-section (1), words which, in our opinion, are, in the context of the "Sub-section when read together with Sub-section (3), incapable of being "construed as limited to income which the taxpayer is entitled or able to "enjoy in fact. Our conclusion on this matter can be tested by writing (for "example) the provisions of Sub-section (3) (*b*) into Sub-section (1) which "will then run as follows: 'Where such an individual has by means of any "'such transfer . . . acquired any rights by virtue of which the receipt or "'accrual of any income of a person resident or domiciled out of the "'United Kingdom operates to increase the value to the individual of any "'assets held by him or for his benefit . . . that income shall . . . be "'deemed to be the income of that individual'. It seems to us hopeless to "suggest that as a matter of language the income which is deemed to be "the income of the taxpayer is to be confined to such part of the income "as represents the increased value of the assets."

It is clear from this that the taxpayer is liable to be assessed in respect of the income which operates to increase the value of the assets. A question was raised in the *Howard de Walden* case, but not decided, whether, assuming the company had income in no way derived from assets transferred by the taxpayer, would he be liable to be assessed on that too? This question was also considered in *Congreve* v. *Commissioners of Inland Revenue* (1), [1947] 1 All E.R. 168. Cohen, L.J., made some general observations on this issue, at page 174 (2), but I do not understand him as expressing a concluded opinion upon it and, reading his judgment as a

(1) 30 T.C. 163. (2) *Ibid.*, at p. 199.

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whole, it was not necessary for the decision in that case. A somewhat different point arises in this case. The income which operates to increase the value of the asset in question is the rent and not the income from the various funds, and applying the words as formulated by the Master of the Rolls, it seems to me it brings in only the rent. The Solicitor-General argued that it brought in the whole income. This turns on the construction of Sub-section (1). The question is this. The words " any income " in line 4 clearly cover any part of the total income of the person resident abroad. When we come later to the words " that income ", do these words mean the total income of the foreign resident, or do they mean that part of the income, if it is only a part, which has been covered by the previous words " any in- " come "? I think the latter is the natural meaning and the words are capable of this meaning. There is nothing said as against this view either in the *Howard de Walden* case[1] or in the *Congreve* case[2] as I read them.

A further point was raised by Mr. Tucker for the taxpayers and it was this. He stressed the words " by virtue of " in the phrase " acquired any " rights by virtue of which the receipt or accrual of any income ", etc., in the combination of the different parts of the Section given by the Master of the Rolls. He submitted that the only relevant right acquired here was the right under clause 2, and it was not by virtue of this right that the receipt of the income operated to increase its value. There appear to me to be some difficulties arising from these words " by virtue of ". They can, I think, be illustrated by referring to Sub-section (3) (*a*). That seems to bring within the Section cases in which the power to enjoy as defined does not arise, at any rate directly, from a right acquired by the taxpayer but from *de facto* dealings with income by somebody else, although these dealings may increase the value of some right which he has. I understood from Mr. Tucker that this point was raised in the argument in the *Howard de Walden* case. It applies, I think, with very much the same force in that case as it does in the present. It was not by virtue of the holding of the notes that the receipt of the income operated to increase their value, but by reason of other arrangements previously made under which the income from various assets, by this time out of the control of the taxpayer, had become payable to the companies. That case, therefore, seems to me to be a decision that where, at any rate, the words of paragraph (*b*) apply to the position, they are not made inapplicable by reason of the fact that the receipt or accrual of the income is not, in the strict sense, by virtue of a right acquired by the taxpayer. In other words, what would be the strict and perhaps natural construction of the phrase " by virtue of " must be modified to some extent by the express provisions set out in the various paragraphs of the Sub-section. I have already stated that I do not think the powers of appointment under clause 4 were an asset, and for the same reason I do not think that the powers under clause 11 come within these words.

I now turn to paragraph (*c*). The Solicitor-General submitted, in the first place, that the facts as shown in the Case showed a receipt by each of the Vesteys of a benefit provided out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or

(1) 25 T.C. 121. (2) 30 T.C. 163.

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indirectly represent that income. This turns on facts which have not so far been considered. In 1918 a company called the Western United Investment Co., Ltd., hereinafter called "Western", was incorporated. Western acts as bankers and financial agents to the operating companies, for the Paris trustees and for the Vesteys. The properties comprised in the lease are occupied by the local operating companies, which pay for all repairs, renewals and extensions. These companies pay, in the first instance, for outgoings in the nature of capital expenditure which, under the terms of the lease, are to be borne by the Vesteys as landlords. These are first charged by the operating companies to Union and then, in turn, charged to Western, which then, at the Vesteys' request, debits the amount to them in equal shares. No interest is charged to the Vesteys on these property accounts. Large sums are paid by the Paris trustees to Western, bearing interest, and this matter is dealt with in the two following paragraphs of the Case: "The "accounting years of the Paris trustees and Western end on different dates, "namely, 31st October and 31st December, respectively, but the moneys "owed by Western to the Paris trustees and the moneys due to Western "by the Vesteys can be reconciled as shewn by the Western balance sheets "and schedules of liabilities and assets, the Western extract, and the summ-"ary of investments, all referred to in paragraph 6 hereof. The books of "Western shew that at 31st December, 1937, the aggregate amounts lying "to credit of the Paris trustees were on the several aforementioned accounts "£104,570, and at 31st December, 1938, £1,482,720. At the same dates the "net balances due by William and Edmund, respectively, to Western on "the personal and property accounts were (*a*) William £462,235 and "£600,268, (*b*) Edmund £473,796 and £517,820, see copy extract from the "company's books (i.e. Western extract) in the bundle attached hereto, "marked 'G', referred to in paragraph 6 hereof."

There was some discussion as to the somewhat ambiguous word "reconciled". It will also be noticed that on 31st December, 1937, the sums deposited by the Paris trustees were only £104,570, whereas the debits to the two Vesteys were something like £900,000. The Solicitor-General pointed out that from the accounts annexed on 31st October of that year the sum deposited was in the neighbourhood of £800,000, and that the low figure on 31st December was due to a substantial purchase of shares on that day. The balance sheet of Western with the other documents shows that the deposits made by the Paris trustees formed a very substantial proportion of the liquid resources of Western and were in the neighbourhood of the sums to the debit of the Vesteys. There is no evidence as to whether the trustees in paying over these large sums to Western were acting under directions from the Vesteys in respect of sums which the Vesteys could control under clause 2 of the deed. They may have also paid over derivative income outside the powers of clause 2. The fact remains that the Vesteys had power to direct that the rent each year should be paid over. They also had power over the whole of the accumulated settled fund. I attach importance to the fact that they had power to remove all or any of the trustees and appoint others. It is found that the sums deposited by the trustees bore interest but there was no evidence as to the amount of the interest. These deposits were, I think, associated operations within Sub-

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section (2). The word "reconciled" is, of course, an ambiguous word, and it was suggested at one time that the case ought to be sent back. It seems to me that, apart from the question whether there was or was not a direction, which I deal with below, the necessary facts are before the Court. It is unlikely that in any event there would be any express arrangement by which the funds deposited were to be lent or used as an ear-marked fund to cover advances to the Vesteys. Looking at the arrangement as a whole, it seems to me that the Vesteys were receiving a benefit in the shape of loans without interest outstanding in the years in question provided out of moneys available for the purpose by reason of the effect of the moneys deposited. I think it is impossible to regard these large sums deposited by the trustees as unavailable for the purpose of enabling Western to make them the advances to which I have referred. The deposits with Western must, I think, be presumed to have come out of the income of the trustees as a whole, which, of course, includes the interest of the funds as well as the rent. If this is right, subject to other points dealt with below, applying the principle laid down in the *Howard de Walden* case[1], it seems to me to cover the whole of the income of the trustees.

Can the taxpayer rely on the argument based on the words "by virtue "of"? I have to have regard under Sub-section (4) to the substantial result and effect of the transfer and associated operations. What then are the relevant rights acquired by the Vesteys? They are the right to control the dealings with the rent as it arises each year and with the accumulated settled fund. They have the right to which I have referred of removing and appointing trustees. On the evidence I think the inference is clear. In a scheme of this sort, those concerned work together. The Vesteys were entitled to get, and no doubt did get, trustees who fell in with their views, whether within the area of rights which they had "acquired" or outside it. Was the benefit received by virtue of these rights? Unless the Vesteys had had the rights which they had, and perfectly legitimately had under the scheme, it seems quite impossible to believe that the funds would have been dealt with as they were, i.e., deposited with a company which was allowing overdrafts of a million or so to continue without earning any interest. I have come to the conclusion that the benefit in question was received by virtue of the rights acquired within the meaning of the Section. Each taxpayer acquired a benefit, and the fact that the right was a right in common with another does not under this paragraph seem to affect the matter.

By Section 28 of the Finance Act, 1938, the Section was amended by the introduction of a Sub-section designed to cover advances of capital sums. The capital sums included loans, and therefore it is said loans must be regarded as outside the Section as unamended. It is similar to the argument previously considered in relation to Section 40 of the 1938 Act. It seems to me to be fallacious for the reasons I have there given, excluding the one based on Sub-section (2) (*c*).

I will now pass to Sub-section (3) (*d*), and I can deal with these matters shortly. The Solicitor-General relied on clause 2, but I do not myself think that the benefit which that clause conferred on the Vesteys gave them a right to obtain "the beneficial enjoyment of the income". Reliance was also placed on clause 11, and the question of construction was raised

(1) 25 T.C. 121.

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with regard to Sub-section (5) *(a)*, which says: "For the purposes of this "section—*(a)* a reference to an individual shall be deemed to include the "wife or husband of the individual". If one takes the two words in paragraph (*d*), "individual" in the first line and "himself" in the third, is the Section satisfied if the individual has power to obtain for his wife the beneficial enjoyment of the income? I had some doubt on this point, but I have come to the conclusion that the effect of Sub-section (5) (*a*) is to substitute the words "or wife" wherever you find the individual referred to either by that word or by a pronoun. I therefore think that, to the extent to which that power existed in the years of assessment, it falls under this paragraph, but I think the income is the income of William's fund or Edmund's fund and does not attract the whole income of the trustees. I do not think that the Crown can rely on sub-clause (*e*), except, if necessary, in respect of clause 11 and the income of the respective funds there dealt with. I think that their power under clause 2 was a power to control the application of the rent, but that was a power that they had to exercise together. It is to be noted that the words "whether with or without the consent of "any other person" which occur in paragraph (*d*) do not occur in paragraph (*e*). It is true that there are the words "in any manner whatsoever", but having regard to the close proximity of the words to which I have referred, I think that general phrase in the context must be limited to what the individual himself can do.

The result is that, in my view, the whole of the income of the trustees in the two years has to be deemed to be the income of the Vesteys. Half has, I understand, been assessed on each.

Tucker, L.J. (read by Somervell, L.J.)—I will deal first with the first two appeals and cross-appeals.

I think it is clear that the lease of 29th December, 1921, the deed of 30th December, 1921, and the undertaking of 29th December, 1921, by the Union Cold Storage Company with regard to the shares in the companies referred to in the third schedule of the lease, constituted an "arrangement" within the meaning of those words in Section 41 (4) (*b*) of the Finance Act, 1938, and are, therefore, to be regarded as the "settlement" for the purpose of the present appeals. They are each of them essential to the carrying out of the scheme whereby income in the form of rent was to be secured from the properties set out in the schedules to the lease and then vested in the Paris trustees on the trusts contained in the deed of 30th December. The recital in the deed contains the words: "And whereas the Settlors "executed and granted the said Lease reserving the rent thereunder to the "Trustees to the intent that such rent as and when received by the Trustees "shall be held by them upon the trusts and with and subject to the powers "and provisions hereinafter expressed and declared". This language seems to me conclusive, though I should have arrived at the same result in the absence of this recital.

Although I think the settlement consists of these three documents, it is not easy to answer the question: What is "the property comprised in "the settlement" within the meaning of Sub-section (2) of Section 38 of the Finance Act, 1938? The contention of the Crown is that the property comprised in the settlement consists of the "stations" and shares in the

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companies referred to in the third schedule to the lease or, alternatively, " the bundle of rights " brought into being by the lease. The Respondents, on the other hand, while contending that the deed of 30th December, 1921, alone constitutes the settlement, submit that in any event the property comprised in the settlement consists only of the rent which ceases in whole or in part on the exercise of the power to determine the lease or withdraw individual properties.

Having regard to the conclusions I have reached with regard to Sub-sections (3) and (4) of Section 38, I find it unnecessary to express a final opinion as to the position under Sub-section (2), which would in any event only apply to the rent.

Sub-section (4) provides: " For the purpose of the last foregoing sub-" section, the settlor shall be deemed to have an interest in income arising " under or property comprised in a settlement, if any income or property " which may at any time arise under or be comprised in that settlement is, " or will or may become, payable to or applicable for the benefit of the " settlor or the wife or husband of the settlor in any circumstances what-" soever ".

Under clause 2 of the deed of 30th December, 1921, Lord Vestey and Sir Edmund Vestey as settlors had power at all times material to the present appeal to direct the trustees to lend the whole or any part of the rent as and when received to themselves or either of them or to any company in which they might be interested without security and free of interest. They could also similarly direct loans by way of reinvestment of the " settled " fund ", i.e., accumulations of rent received in previous years. This is the construction which I put upon the words: " The Settled Fund shall (at the " direction in writing of the authorised persons or a majority thereof and " in the event of an equality of voting by such authorised persons at the " Trustees discretion) be invested in the names or under the legal control " of the Trustees in or upon stocks funds shares securities or other invest-" ments of whatever nature and wheresoever (but where involving liability " only with the consent of the Trustees) or upon personal credit or upon " loans to any Company or Companies wheresoever domiciled and with " or without security ".

It is true that any such direction required the consent or co-operation of both settlors, but the words " in any circumstances whatsoever " in Sub-section (4) are apt to include such requirement. I do not accept the argument advanced by the Respondents that " payable to or applicable for the " benefit of " have a technical meaning which would exclude loans. I think the words are designed to cover a wide field and exactly fit the facts disclosed in the Case which show the purposes for which clause 2 of the deed was designed.

Each of the settlors, therefore, had, in my view, an " interest " as defined by Sub-section (4). Turning to Sub-section (3), had they an interest in " income arising under or property comprised in a settlement " ? Whatever else may have been comprised in the settlement, I think it is clear that the rent was so comprised, and that it was in the hands of the trustees " income arising under the settlement ", but as and when received it had to

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be capitalised and then it became " property comprised in the settlement ". Sub-section (3) provides that " any income so arising ", i.e., income arising under the settlement and income arising from property comprised in the settlement, shall be treated as the income of the settlor for the year of assessment. Macnaghten, J., held that only the derivative income accruing from the settled fund would come within Sub-section (3), but for the reasons set out above it appears to me that the Sub-section covers the rent as such, the settled fund and the income in any year from the settled fund, but once the income from the settled fund has become capitalised in William's fund and Edmund's fund, they cannot control its reinvestment nor can they control the income from these funds. Accordingly, applying proviso (*a*) to Sub-section (3) of Section 38, the income from William's fund and Edmund's fund cannot be treated as their income.

With regard to Sub-section (2), the learned Judge took the view that the property comprised in the settlement meant the rent and nothing more, and that on the exercise of the power to determine the settlors did not become entitled to any part of the property comprised in the settlement. As I consider the Crown succeeds by virtue of Sub-section (3) of Section 38, I express no view as to whether the property comprised in the settlement is limited to the rent.

For these reasons I think the Crown's appeals in these cases succeed to the extent indicated above, and the cross-appeals fail.

The third appeal relates only to additional assessments to Income Tax for the years 1936-37 and 1937-38 and additional assessments to Sur-tax for the year 1936-37 made under Section 18 of the Finance Act, 1936.

This Section is designed to prevent the avoidance of Income Tax by individuals ordinarily resident in the United Kingdom by means of transfers of assets by virtue or in consequence of which income becomes payable to persons resident or domiciled out of the United Kingdom.

It is beyond dispute in the present case, and it has been so found by the Special Commissioners, that assets were so transferred and that such transfer was made for the purpose of avoidance of tax, but the question at issue is whether the individuals concerned, viz., Lord Vestey and Sir Edmund Vestey, had thereby acquired the power to enjoy in the years in question the income of the persons resident out of the United Kingdom. This is a mere summary of Sub-section (1) and the preamble to Section 18, the precise language of which must be set out in full and reads as follows: " For the purpose of preventing the avoiding by individuals ordinarily resi- " dent in the United Kingdom of liability to income tax by means of trans- " fers of assets by virtue or in consequence whereof, either alone or in " conjunction with associated operations, income becomes payable to persons " resident or domiciled out of the United Kingdom, it is hereby enacted as " follows:—(1) Where such an individual has by means of any such trans- " fer, either alone or in conjunction with associated operations, acquired " any rights by virtue of which he has, within the meaning of this section, " power to enjoy, whether forthwith or in the future, any income of a per- " son resident or domiciled out of the United Kingdom which, if it were " income of that individual received by him in the United Kingdom, would " be chargeable to income tax by deduction or otherwise, that income shall,

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" whether it would or would not have been chargeable to income tax " apart from the provisions of this section, be deemed to be income of that " individual for all the purposes of the Income Tax Acts ".

Sub-section (2) defines " an associated operation ", and Sub-section (3) says: " An individual shall, for the purposes of this section, be deemed to " have power to enjoy income of a person resident or domiciled out of the " United Kingdom if ", and then follow paragraphs (*a*), (*b*), (*c*), (*d*) and (*e*) setting out the various circumstances in which such power to enjoy shall be deemed to exist. The contention of the Crown is that Lord Vestey and Sir Edmund Vestey had at the material times power to enjoy the income of the Paris trustees under one or more of paragraphs (*b*), (*c*), (*d*) and (*e*). Before dealing with these paragraphs and the contentions of the parties with regard thereto, I will refer briefly to the ground upon which Macnaghten, J., decided this case in favour of the Crown. He held that on the execution of the lease of 29th December, 1921, the rent of £960,000 per annum, though payable to the Paris trustees, did not belong to them; it belonged to Lord Vestey and his brother, and each could compel the Paris trustees to pay one half of that sum to him. He concludes: " They, therefore, had the power to enjoy the income of the Paris " trustees."[1]

Such power to enjoy, he says, comes within Sub-section (1) of Section 18 without the necessity of reference to Sub-section (3), but in any event it would come within paragraph (*e*) of Sub-section (3). The Appellants contend that the power to enjoy must be found to exist in the year of assessment in question, and that the power referred to by the learned Judge existed only in the period between the execution of the lease and the deed in December, 1921. For the powers existing in the years 1936-37 and 1937-38 it is necessary, they say, to look at the deed as well as any powers of appointment executed thereunder prior to the years of assessment.

While the Solicitor-General did not abandon the right to rely on this ground, he was not able to advance any argument to us to meet the submission of the Appellants, and unaided by any such argument I have been unable to find any answer to the Appellants' criticism of the learned Judge's decision on this point.

It becomes necessary, therefore, to ascertain whether in the years in question the power to enjoy existed by virtue of paragraphs (*b*), (*c*), (*d*) or (*e*) of Sub-section (3).

Sub-section (*b*) reads: " the receipt or accrual of the income operates " to increase the value to the individual of any assets held by him or for " his benefit ". "Assets ", by Sub-section (5) (*b*), includes "property or " rights of any kind ". It is said by the Crown that the power of each of the Vesteys in conjunction with his brother under clause 2 of the deed to direct the Paris trustees to advance the whole or any part of the settled fund to themselves free of interest and without security was a " right " within the meaning of Sub-section (5) (*b*), and that it was none the less a right although its exercise by one brother required the consent or co-operation of the other, and that therefore it was an asset held by each of

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[1] Page 38 *ante*.

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the Vesteys within the meaning of Sub-section (3) (*b*). If this be right it is clear that the receipt or accrual of the rent would operate to increase the value of such asset. In dealing with this point Mr. Tucker, on behalf of the Appellants, relied upon a passage in the judgment of Lord Greene, M.R., in *Lord Howard de Walden* v. *Commissioners of Inland Revenue*, 25 T.C. 121, at page 133, where he rejected the contention that the income which is caught by Sub-section (1) is limited to the income which the taxpayer is in fact entitled or able to receive. He says the real question depends upon the meaning of the words " any income " in Sub-section (1), and goes on to state that the matter can be tested by writing (for example) the provisions of Sub-section (3) (*b*) into Sub-section (1) which will then run as follows: " Where such an individual has by means of any such " transfer . . . acquired any rights by virtue of which the receipt or accrual " of any income of a person resident or domiciled out of the United King- " dom operates to increase the value to the individual of any assets held " by him or for his benefit . . . that income shall . . . be deemed to be the " income of that individual ". Mr. Tucker says that, assuming the joint power to direct is a right, the Crown must show that Lord Vestey acquired a right by virtue of which the receipt of the income operated to increase the value of his power to direct the investment of the income.

In the present case the right acquired, namely, the power to direct the investment of the income, was identical with the asset whose value was increased by the income. Although I agree that the language of Sub-section (3) (*b*) read into Sub-section (1), as set out by the Master of the Rolls, is a somewhat clumsy way of expressing what occurred in this case, I think it is sufficient to include the case where the individual has acquired a right by virtue of which the receipt of the income operates to increase the value of that right. As I think a right to exercise a joint power of direction is an asset within the meaning of Sub-section (5) (*b*) it follows, in my view, that the case comes within Sub-section (3) (*b*).

As to that part of Sub-section (3) (*c*) which deals with the actual receipt of benefit provided out of income or moneys available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income, I have had an opportunity of reading the judgment which has just been delivered by Somervell, L.J., and although during the course of the argument I was inclined to the view that further findings of fact by the Special Commissioners would be necessary before a final conclusion could be reached on this Sub-section, I am satisfied for the reasons stated by him that there is really only one conclusion that can be drawn from the facts set out in the Case stated by the Special Commissioners, namely, that the advances made by the Paris trustees to the Western United Investment Company, coupled with the loans by that company to Lord Vestey and Sir Edmund Vestey, amounted to the receipt of benefit by the Vesteys by virtue of the right of control which they had acquired within the meaning of Sub-section (3) (*c*), and that no further finding of fact is required to justify such a conclusion.

As in my view the Crown have succeeded in bringing the case within paragraphs (*b*) and (*c*) of Sub-section (3), I do not consider it necessary

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to express any view as to their contentions with regard to paragraphs (*d*) and (*e*). For these reasons I think this appeal fails.

Evershed, L.J.—These five appeals concern certain additional assessments for Income Tax and Sur-tax made upon the late Sir William Vestey, afterwards Lord Vestey, or his personal representatives, and upon his brother, Sir Edmund Vestey, in respect of the five years 1936-37 to 1940-41, both inclusive. The assessments are for very large sums of money, and all depend upon the alleged effect for Income Tax purposes of certain transactions entered into by the two brothers in December, 1921. The first four appeals relate to Income Tax and Sur-tax assessments made, in respect of the last four of the five years mentioned, under Section 38 of the Finance Act, 1938. The last appeal relates to assessments for Income Tax and Sur-tax in respect of the year 1936-37, and for Income Tax in respect of the year 1937-38, in each case under Section 18 of the Finance Act, 1936. Assessments under the 1936 Act have also been made in respect of the other years mentioned, but appeals in regard to them have not so far been dealt with by the Special Commissioners, pending a final decision of the question whether the assessments for those other years under the 1938 Act were well made.

Having regard to the findings of the Special Commissioners in the Stated Cases before us, it is clear that the transactions of December, 1921, are examples of the manoeuvres devised by some taxpayers for the purpose of avoiding the full burden of taxation which they would otherwise be called upon to discharge. It is, therefore, to be expected that the transactions were somewhat complex and highly artificial. So far as material their effect may be stated as follows.

By a lease executed at 39 Rue Ernest Allard, Brussels, on 29th December, 1921 (hereinafter called "the lease"), the brothers Vestey "as "beneficial owners" demised to the Union Cold Storage Co., Ltd. for the term of 21 years from 10th April, 1921, the several hereditaments and premises referred to in the first, second and third schedules to the deed. The premises consisted of cattle ranches, stations, and other properties connected with the Vesteys' meat businesses. They were situate in various parts of the world from China to Peru, though not one of them happened to be in England, where the terms and form of an English lease would normally apply. Further, though two properties, one in South Africa and one in Paraguay, were in the legal ownership of the brothers Vestey, the rest were either in the legal ownership of nominees for the brothers Vestey or in the legal ownership of companies of which the brothers Vestey held beneficially all the shares. In order, therefore, to give practical effect to the so-called "demise", the brothers Vestey covenanted (at the expense of the Union Cold Storage Company) to do or procure to be done by the owners of the properties in the second and third schedules all things necessary for such purpose. It does not appear how precisely in fulfilment of this covenant the Union Cold Storage Company became (if they did become) lessees of the properties held by nominees of the brothers Vestey. But as regards the properties belonging to the several companies of which the brothers Vestey held all the shares, it appears that, such shares having all been transferred into the name of the Union Cold Storage Company, that company executed on the same day, viz., 29th December, 1921, and also

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at No. 39 Rue Ernest Allard, Brussels, an undertaking that they would re-transfer the shares to the brothers Vestey or as they should direct forthwith upon the expiry or sooner determination of the lease.

The rent fixed by the lease for all the properties together was the annual sum of £960,000. The rent was payable not to the brothers Vestey but to three persons, Messrs. Hall, Drabble and Stirling, all resident in the city of Paris, France, and the Union Cold Storage Company entered into a separate covenant in that behalf with those three persons.

The lease provided that either the brothers Vestey or the lessee company could at any time on giving six calendar months' notice in writing, expiring on any quarter day, determine the whole lease; and that the brothers Vestey could also, in manner therein specified, withdraw any specified property from the lease, in which event the amount of the rent payable would undergo an appropriate adjustment. In fact on some six occasions properties were withdrawn pursuant to the powers last mentioned, but other properties were substituted for them and the rent appears to have remained at all material dates unaltered at the original figure of £960,000.

On 30th December, 1921, i.e., on the day following the date of the lease, but at No. 4 Rue St. Anne, Paris, France, a further document (hereinafter called "the trust deed") was executed by the brothers Vestey (therein described as "Settlors"), and Messrs. Hall, Drabble and Stirling (therein described as "the Trustees" and hereinafter called "the Paris "trustees"). The deed of trust, after reciting that the brothers Vestey had executed the lease with the intent that the rent payable thereunder should, upon receipt by the Paris trustees, be held by them upon the trusts about to be set forth, proceeded to declare those trusts. So far as material those trusts were as follows.

(1) By clause 2 the annual sums of rent when received were to be capitalised by investment of such rents (but not of the resulting income) by or in the names of the Paris trustees. Such capitalised trusts are thereafter called "the Settled Fund." The trust to capitalise by investment was expressed to continue until the expiration of 20 years from the death of the last survivor of the grandchildren then living of the brothers Vestey (therein called "the time of distribution"). When the time of distribution arrived it was (by a later clause of the trust deed) provided that the settled fund should be for the first time divided into two moieties, called respectively "William's share" and "Edmund's share", such shares being then held upon certain trusts under which neither the brothers Vestey nor their wives or widows took any interest. The provisions in regard to the investment of the settled fund, which, as above stated, remained a single fund pending the time of distribution, are contained in clause 2 of the deed and are of great importance in this case. They were as follows: "The Settled Fund "shall (at the direction in writing of the authorised persons or a majority "thereof and in the event of an equality of voting by such authorised per-"sons at the Trustees discretion) be invested in the names or under the "legal control of the Trustees in or upon stocks funds shares securities or "other investments of whatever nature and wheresoever (but where involv-"ing liability only with the consent of the Trustees) or upon personal credit "or upon loans to any Company or Companies wheresoever domiciled and

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" with or without security and with the like power of varying such invest-
" ments from time to time to the intent that the said Trustees shall (subject
" to such direction as aforesaid) have the same full and unrestricted powers
" of investing and transposing the investments of the settled fund in all
" respects as if they were absolutely entitled thereto beneficially." The term
" authorised persons " was defined to mean (during the period to which these appeals relate) the brothers Vestey until the death of Lord Vestey in December, 1940, and thereafter Sir Edmund Vestey alone. It may be stated here that there is no finding in any of the Cases and no evidence that any direction in writing was in fact ever given.

(2) As already stated the trusts declared of the settled fund did not cover the income of that fund. The trusts relating to the income were declared by clause 3 of the trust deed. By that clause such income was (after meeting certain costs and expenses) divisible into two equal parts, respectively called " William's Fund " and " Edmund's Fund "; and after payment of certain duties such respective funds were, subject to the powers of appointment specified in clause 4 of the trust deed, to be accumulated during a period which differs from that provided for the " capitalisation " of the settled fund but is not otherwise material for present purposes. William's fund and Edmund's fund together with their respective accumulations were further defined as "William's Accumulated Fund " and " Edmund's Accumulated Fund ".

(3) By clause 4 of the trust deed Lord Vestey and Sir Edmund Vestey were given special powers of appointment by deed or will in favour of a limited class of persons (which does not include either of themselves or the wives or widows of either of them) over their respective funds, accumulated funds and shares, together with powers to direct the cessation of the accumulation of their respective funds, but again not so as to confer any beneficial interest upon either of themselves or their wives or widows. By the same clause and subsequent clauses final trusts were declared (in default of and subject to the powers of appointment already mentioned) in regard to the two accumulated funds, but again neither of the brothers nor their wives or widows can take any interest therein.

(4) Clause 11 of the trust deed is in the following terms: " Notwith-
" standing anything herein contained the following powers are reserved
" Power for the said Sir William Vestey and Sir Edmund Hoyle Vestey
" respectively by Will or Codicil to create any interest in William's Fund
" or Edmund's Fund respectively by directing payments to be made there-
" out in favour of the widow of the Appointer for her life or any shorter
" period."

It is observed that the powers conferred on each of the brothers by clause 11 were limited (*a*) to testamentary appointment and (*b*) to appointing in each case an interest not greater than a life interest in the income of the two respective funds excluding any accumulations of interest thereon.

(5) By clause 19 of the trust deed the usual power of appointing new trustees was vested in the " authorised persons " (that is, so far as material to the present appeals, the brothers Vestey jointly till Lord Vestey's death in 1940 and thereafter Sir Edmund Vestey), but in addition the " authorised
" persons " were empowered at any time to remove all or any of the Paris

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trustees and to appoint others or another in the place of the trustees or trustee so removed.

Since the powers of appointment in clauses 4 and 11, and particularly the latter, have been much referred to in the argument, it is desirable to refer briefly to the facts proved in regard to their exercise. As appears from the Stated Cases some sums were appointed by one or other of the brothers absolutely in favour of objects of the powers. Such sums were, as I understand, raised and paid out to the appointees and nothing material to the appeals arises out of them. In addition, by a deed dated 26th November, 1935, Lord Vestey irrevocably appointed that the Paris trustees should from and after 1st April, 1942, or the earlier determination of the lease (which would, as above appears, expire by effluxion of time on the 10th April of the same year) hold (*inter alia*) William's fund and William's accumulated fund upon trust absolutely for a named son or (in default) for a named grandson provided that such son (or grandson) survived the date above specified. By a deed dated 31st December, 1935, Sir Edmund Vestey, in like manner, irrevocably appointed that the Paris trustees should hold part only of Edmund's fund and Edmund's accumulated fund in trust absolutely for one of his sons, or in default one of his grandsons, contingently on his surviving the same date, viz., 1st April, 1942, or the earlier determination of the lease. By a further deed dated 31st March, 1937, Sir Edmund Vestey irrevocably appointed that the Paris trustees should from and after 1st June, 1937, hold (*inter alia*) the balance of Edmund's fund and Edmund's accumulated fund unappointed by the deed of 31st December, 1935, upon trust absolutely for the same son of his or (in default) for a daughter of his provided that he or she, as the case might be, survived 1st June, 1937; and he also, by the same deed, wholly released and extinguished all powers of appointment under clause 11 of the trust deed. All three deeds which I have cited contained " directions " under clause 4 of the trust deed for cessation of the accumulation of the income of William's or Edmund's fund, but, in my judgment, such directions are of no practical importance for the purposes of these appeals.

From the above recitals the following conclusion may be stated. As regards Lord Vestey, it was assumed in argument that, upon the happening of the contingency mentioned, his deed of appointment of November, 1935, would have the effect of extinguishing any power to appoint by will to his widow under clause 11 of the trust deed; but since at all times material to these appeals his appointment was contingent, there remained the possibility of his making an effective appointment of the whole or part of the income of William's fund to his widow under clause 11 of the trust deed; and having regard to the decision of this Court in *Commissioners of Inland Revenue* v. *Gaunt*, 24 T.C. 69, it follows that at all material times Lord Vestey's " wife " might " become beneficially entitled " to the whole or part of that income within the meaning of Section 38 (2) (*b*) of the 1938 Act hereafter quoted.

As regards Edmund, a similar position prevailed up to but not beyond 31st March, 1937, for, by the deed of that date, as above appears, Edmund effectively extinguished his power under clause 11 of the trust deed.

In the course of my recitals of the terms and effect of the trust deed I have referred to the periods for capitalisation or accumulation contained

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therein. No suggestions have been put forward in the argument that such periods might be to any extent in excess of the periods allowed by law; nor has it been suggested that for the purposes of either of the Acts of Parliament particularly concerned in these appeals the position of either of the brothers Vestey would be adversely affected in case of any such invalidity.

The claims of the Crown to tax under this Section are preferred cumulatively and alternatively under Sub-sections (2) and (3) of the Section. The material part of Sub-section (2) has been read and I need not again read it. The word " settlement " is defined in Section 41 (4) (*b*), which has also been read by Somervell, L.J.

The claim of the Crown under this Sub-section is based on the premises (*a*) that the settlement or arrangement here in question is not to be found only in the deed of trust but is contained in the deed of trust plus the lease and such other documents as were executed at or about the same time for the purpose of giving effect to the lease, e.g., the transfers of shares of the companies mentioned in the third schedule of the lease and the undertaking by the Union Cold Storage Company of 29th December, 1921; and (*b*) that the property comprised in the settlement consisted of or included the ranches or stations themselves of which the lease purported to grant a demise, or, alternatively, of the whole bundle of rights including, particularly, the right to possession, conferred by the lease. On this basis the Crown claims that upon determination of the lease the brothers Vestey " will or may become beneficially entitled to . . . the property then com- " prised in the settlement ", or to the income of that property or its equivalent, in that they will again resume actual enjoyment of the stations or of the bundle of rights, including possession, the enjoyment of which was had by the Union Cold Storage Company during the period of the lease. On the other hand, it was argued for the taxpayers that the " settlement " or " arrangement " is only to be found in the deed of trust, and that the only property which can fairly be said to be " comprised in the settlement " is the right to receive the annual sum of £960,000 by way of rental, which right automatically ceases to exist on the determination of the lease.

The conclusion of the Special Commissioners was in favour of the Crown's contention: " We hold that the lease and deed "—I am quoting from paragraph 11 of the Case—" were designed to work side by side and " must be regarded together as constituting an arrangement within the " meaning of Section 41 (4) (*b*). The power of determination contained in " the lease is a provision of the arrangement, and the Appellants as lessors " can recover the benefit of the annual value of the properties now enjoyed " by the rent trustees, either by resuming possession of the properties or by " reletting them. In our opinion the claim of the Crown under Section 38 " (2) succeeds."(1)

When the appeals came before Macnaghten, J., the learned Judge was of opinion that in any event the Crown was entitled to assess the brothers Vestey in respect of all the years in question under the 1936 Act so that it was unnecessary to resort to the 1938 Act at all. He held, however, that as a matter of law the Special Commissioners were wrong in holding that the Crown was entitled to succeed under Section 38 (2) of the 1938 Act.

(1) Page 16 *ante*.

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I am clearly of opinion that the Special Commissioners were correct in holding that the deed of trust could not alone be regarded as constituting the settlement. From the recitals in the deed of trust, and the circumstances in which it and the other documents were executed, I think all such documents ought to be read together as constituting or effectuating a single transaction or arrangement. But I share the view of Macnaghten, J., in that I am not satisfied that it is proper to give to the phrase " property " comprised in the settlement " the extended significance for which the Crown contends. Notwithstanding that the Section is to be broadly construed, having regard to its purpose and to what must be taken to be the object of the brothers Vestey in entering into these transactions, I do not think it is right to say that, if a man creates a lease of or a life interest in his freehold estate, it necessarily follows for the purposes of the Section, as a matter of ordinary language or otherwise, that the whole property is " comprised in " the settlement "—even though, e.g., in the case of the creation of a life interest the whole property becomes settled land within the meaning of the Settled Land Act, 1925. I think the answer in any case to the questions: " What is the subject matter of the arrangement ? " and " What, therefore, is the property comprised in the settlement for the purposes of the Act? " must depend upon a commonsense and rational view of the whole facts of that case. I am not for myself satisfied that the subject-matter of the settlement here in question consisted of or included the " bundle of rights " or the right to possession as one of those rights which were or was vested during the term of the lease in the Union Cold Storage Company but which can be said to revest or revert to the brothers Vestey upon its determination. True it is that upon the end of the lease the lessors will or may (subject to the rights of any other person as reversionary lessee or otherwise created in the meantime) resume the full dominion over the properties of which they had *pro tanto* been deprived by the lease. But it does not seem to me that these possessory or other rights resumed can fairly be described as the same rights as those enjoyed by the lessee. The lessee's rights are derived from the contract of lease, subject to the performance by him of his covenants and fortified, as it were, by the lessor's covenant for quiet enjoyment. The lessor's rights on the falling in of the lease have no such derivation or qualifications but arise from the circumstances of his ownership.

Looking, therefore, at the substance of the matter, my own conclusion is that the main item of property comprised in the settlement is the term or interest of 21 years, subject to prior determination, in the stations, etc. (or in the case of those stations covered by the third schedule to the lease, in the shares of the relevant companies) which was created for the purpose of giving effect to the transactions then carried out. I say " the main item ", for in my judgment the question posed is to be asked, not in reference to the date of the lease and the other documents substantially contemporaneous therewith, but in reference to the several dates upon which it becomes necessary to ascertain the facts for the purpose of arriving at tax liability. On this view there must, as I think, also be included as " property com- " prised in the settlement " the investments or other assets for the time being representing the settled fund and William's or Edmund's funds and accumulated funds; for the property for the time being representing these

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several funds is held by the Paris trustees upon trusts declared by the deed of trust.

On the view that I have formed it seems to me that the settlors have power to determine the settlement (i.e. the "arrangement") or some provision thereof, by virtue of their power to determine the lease within Sub-section (2) (*a*) of the Section, but that with one exception it cannot be said that they will or may become beneficially entitled to any part of the property then comprised in the settlement or to the income arising therefrom within the meaning of Sub-section (2) (*b*). What I have called the main item of property comprised in the settlement, viz., the limited or determinable interest of the Union Cold Storage Company and the rent payable by the company in respect thereof, ceases altogether to exist. Nor can the settlors, or their wives, as I have earlier shown, become beneficially entitled to any part of the settled fund or (subject to the one exception already intimated) of the other funds or the income thereof, for in my judgment the phrase "beneficially entitled to" is not apt to cover the settlors' powers to direct loans to themselves or to be given loans by the trustees of the settled fund. To this general statement the exception is the interest of the two brothers in William's fund and Edmund's fund to the extent to which during the material years the brothers respectively retained any testamentary power of appointment in favour of their widows. To this limited extent and having regard to the decision in *Gaunt's* case (1) it can properly be said, in my judgment, that "the wife . . . of the settlor . . . "may become beneficially entitled to" the income arising from some part of the property comprised in the settlement within the meaning of Sub-section (2) (*b*). To that limited extent, therefore, but only to that limited extent, I think that the Crown would be entitled to succeed under Sub-section (2) of the Section. Since, however, on the view which I take, the Crown is entitled to a much more extensive claim—though covering also the interests arising under clause 11 of the trust deed—the limited right which, in my view, the Crown can establish under Sub-section (2) can be disregarded.

I turn, accordingly, to Sub-section (3) of the Section, which has already also been read: "If and so long as the settlor has an interest in any income "arising under or property comprised in a settlement, any income so arising "during the life of the settlor in any year of assessment shall, to the extent "to which it is not distributed, be treated for all the purposes of the Income "Tax Acts as the income of the settlor for that year, and not as the income "of any other person: Provided that—(*a*) if and so long as that interest "is an interest neither in the whole of the income arising under the settle-"ment nor in the whole of the property comprised in the settlement, the "amount of income to be treated as the income of the settlor by virtue of "the subsection shall be such part of the income which, but for this "proviso, would be so treated as is proportionate to the extent of that "interest". In construing Sub-section (3) it is necessary to have in mind Sub-section (4). I do not propose to read again this Sub-section.

The view of the Special Commissioners upon the claims under this Sub-section was also in favour of the Crown. They thought (2) "that the

(1) 24 T.C. 69. (2) Page 16 *ante*.

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" power to lend on personal credit authorised the trustees to lend trust " funds to Lord Vestey and Sir Edmund and that this constituted " an interest in income arising from or property comprised in the arrange- " ment within the meaning of " Sub-sections (3) and (4). Macnaghten, J., having regard to the view he had taken on the 1936 Act, only (as I understand him) considered the application of Sub-section (3) so far as it affected the interest on the " sums capitalised by the Paris trustees ", but to that extent he agreed with the view of the Special Commissioners.

It is plain that the question of the applicability of Sub-section (3) turns mainly, if not wholly, upon the effect of the powers of the brothers Vestey under clause 2 of the trust deed to direct the Paris trustees, and the right of the trustees under the same clause in default of direction to the contrary, to " invest " the sums of rent in their hands or control " upon " personal credit or upon loans to any Company or Companies wheresoever " domiciled and with or without security "—whether it can (as the Crown contends) properly or fairly be said that having regard to such provision the rents may become payable or applicable in any circumstances whatsoever for the benefit of Lord Vestey and Sir Edmund Vestey, with the result (*a*) that by the joint effect of Sub-sections (3) and (4) each of the settlors must be treated as having " an interest " in such rents, and (*b*) that such rents, as income arising under the settlement, must to the extent that they have not been distributed (which in practice means to their whole extent) be treated as the income of the brothers Vestey. In my judgment the contentions of the Crown are correct and the result is that which I have indicated. In my judgment it is not open to doubt that the provisions of clause 2 of the trust deed contemplate loans to the two brothers Vestey and contemplate that such loans may be made without security and (as I think) also without interest. I can see no basis on which it is possible to import an obligation on the part of the Paris trustees to charge interest or to charge it at some specific rate—referred to in the argument as " a com- " mercial rate "—though it would not, in my judgment, affect the result even if some proper rate of interest were necessarily chargeable upon such loans. In my judgment it was of the essence of the whole arrangement that the whole of these large sums of rent should be at the disposal of the two brothers Vestey to do with as they respectively liked for a period which, it must be noted, is not confined to the duration of the lease but is expressed to extend until the " time of distribution ", i.e., the expiration of twenty years from the death of the last survivor of the grandchildren of the two brothers living on 30th December, 1921. In my judgment such a privileged opportunity which each of the two brothers had cannot otherwise be described than as falling within the ambit of the phrase " may become " payable to or applicable for " his " benefit . . . in any circumstances " whatsoever " within the terms of Sub-section (4). Such a construction of the language is, in my view, supported by the terms used by Lord Thankerton in *Commissioners of Inland Revenue* v. *L.B. (Holdings), Ltd.*, [1946] 1 All E.R. 598, at page 603 (28 T.C. 1, at page 34), although they were used in particular reference to another Section of another Act differently phrased from Sub-section (4) of Section 38 of the Act of 1938.

It was argued for the taxpayers that the conception of a loan as within the formula used in Section 38 (4) was excluded by necessary

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implication from the language of Section 40 of the same Act, and particularly of Sub-section (5) (*a*) (i) of that Section. I cannot accept that argument. Sub-sections (2) and (3) of Section 38 are directed to making the income of a settlement, to which their provisions apply, the income for tax purposes of the settlor, on the ground, broadly speaking, that (notwithstanding the screen behind which such income or the property from which it is derived is placed by the settlement) the settlor may by the exercise of appropriate powers resume the enjoyment of such income or property or has an interest therein. Section 40 is designed to "catch" a different case, viz., the case where although the settlor may have no rights to resume enjoyment of the settled property or its income and may have no interest therein as defined by Sub-section (4) of Section 38, capital sums are in fact paid to the settlor "directly or indirectly" by the trustees of the settlement. To the extent that such transactions are found to be within the terms of the Section, the capital sums, notwithstanding their character and origin, are to be treated (subject as is provided in the Section) as income of the settlor. For such purpose "capital sums" are defined (not indeed unnaturally) to include loans. In such a context, as it seems to me, the definition cannot have any bearing on the question whether the application of the income, or for that matter of the capital, of a settlement by lending it to the settlor upon advantageous terms is within the ambit of the formula "is or will or may become payable to or applicable for the "benefit of the settlor . . . in any circumstances whatsoever". It is true that in some circumstances the two Sections may overlap. And there is to my mind nothing surprising in this result. Paragraphs (*b*) and (*c*) of Sub-section (2) of Section 40 seem to be designed to prevent injustice arising from the overlap.

In the present case, as I have said, I think that it was fundamental to the whole arrangement that the sums of rent as they came to the hands of the Paris trustees and the "capitalised sum" representing the previous instalments of rent should remain at the disposal of the two brothers Vestey for whatever purposes of their own they respectively required them. The result was sought, to be attained by including the powers necessary to achieve the purpose, which in my judgment were in no sense fiduciary powers, in the investment clause and under the guise of being a form of investment. In truth it is impossible, in my judgment, for either of the brothers to deny that in some circumstances such rent may become applicable for his benefit. Each brother has therefore, in my view, by virtue of the terms of Sub-section (4) of the Section, an interest in the rent as being income arising under the settlement as I have defined it.

There remains, however, the question whether the interest of the two brothers extends beyond an interest in the accruing rent to any and if so what part of the so-called "derivative income" therefrom. As I have earlier stated, neither of the two brothers nor their respective wives can (apart from clause 11) take any interest in the two funds or accumulated funds which are derived from the income of the capitalised rent. But each of them, as I construe the deed of trust, has the same opportunity of having applied for his benefit by way of loan the past instalments of rent which form his settled fund as he has in regard to the current year's payment. If, therefore, these past instalments, which constitute the settled

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fund from time to time, are, as I think they are, property comprised in the settlement, then each of the brothers has, in my view, an interest in that property, albeit that he has in this instance (apart from clause 11) no interest in any income derived therefrom.

What, therefore, is the result? Each of the two brothers has an interest in part of the income arising under the settlement, viz., the accruing rents, having no interest in the property comprised in the settlement from which that income in fact arises, viz., the lease or other determinable interest vested in the Union Cold Storage Company; also an interest in part of the property comprised in the settlement, viz., the settled fund, having no interest in the income in fact arising from that property (always excepting for present purposes the interest under clause 11 of the trust deed). The result is, in my judgment, that the whole of the accruing rent, being "income so arising" within the terms of the Sub-section, so far as not distributed, and the whole of the income so far as not distributed of the settled fund, as also being "income so arising", but no other income, with the exception already stated, should be treated as income of the two brothers within the terms of the Section. In my judgment the language of proviso (*a*) to Sub-section (3) cannot be prayed in aid to avert this result. The effect, as it seems to me, of the whole Sub-section, including the proviso, is broadly speaking that the taxpayer is liable to be taxed in respect of that part of the income arising under the settlement in which he is shown to have an interest, and also in respect of that part of the income so arising in which he has no interest but which is attributable to property comprised in the settlement in which he has an interest.

Mr. Tucker also tried to avoid the liability in respect of the income of the settled fund by reference to the terms of Section 20 of the Finance Act, 1943, and the Sixth Schedule to that Act. I find myself also unable to accept this argument, upon which I do not desire to add anything to the observations upon it by Somervell, L.J.

There remains the question of liability under clause 11 of the trust deed in respect of the income of William's fund and Edmund's fund. Having regard to the decision of this Court in *Gaunt's* case[1], which Sir Patrick Hastings and Mr. Tucker could only formally challenge before us, it must, as I think, necessarily follow that to the extent that each brother retained a power to appoint in favour of his widow, the income which he could so appoint was income which might become payable to or applicable for the benefit of his wife. I did not indeed understand that Sir Patrick or Mr. Tucker contended to the contrary. In the case, however, of Sir Edmund Vestey his deed of appointment of 31st March, 1937, altogether extinguished his power on that date. During the fiscal years, therefore, with which we are concerned in these four appeals, no liability under this head can be attached to Sir Edmund. But there must be added to the sums already indicated in respect of Lord Vestey for the purpose of computing his income during the material years the interest of William's fund in respect of those years.

Before leaving this part of the case I add that, so far as regards assessments under the 1938 Act, no point of difficulty as it seems to me

(1) 24 T.C. 69.

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arises on the possible differentiation between Lord Vestey and Sir Edmund Vestey—a matter of far greater substance, as will later appear, under the Act of 1936. Although the power of direction under clause 2 of the trust deed is a joint power, the question, which I have answered affirmatively, is whether, as a result of the exercise of that power or as a result of the exercise of the Paris trustees' discretion, the accruing rents or the settled fund "may become payable to or applicable for the benefit of" either brother "in any circumstances whatsoever". For the purposes of these appeals it has, as I follow it, been accepted that if each brother is shown, as I think he is, to have an interest, within the meaning of Subsection (4) of this Section, in any property comprised in or income arising under the settlement, the appropriate income should be treated as attributable to the two brothers Vestey in equal shares.

Then as to the fifth appeal under Section 18 of the Finance Act, 1936, as already indicated the only assesments with which we are concerned are those for the two years 1936-37 and 1937-38, before the Section was amended by Section 28 of the Act of 1938. I shall, therefore, read the material parts of Section 18 as it originally stood. But it will be convenient if I state here that I am unable to accept the argument put forward on behalf of the taxpayers that, from the terms of the amendments to Section 18 added by the Act of 1938, and particularly the definition of capital sum to include "any sum paid or payable by way of loan", the Legislature must be taken to have regarded "loans" as necessarily outside the ambit of the word "benefit" in paragraph (*c*) of Sub-section (3) and in Subsection (4) of Section 18. The argument is similar to that raised under the 1938 Act upon Section 40 of that Act, but the answer to it is, in my judgment, even clearer. Section 18, as originally drawn, deals with the application of income payable to persons outside the jurisdiction. The amendment is designed to catch attempts to evade the effect of the Section by the device of making in favour of the English transferor advances of "capital sums" not related to the income payable to the foreign resident.

The relevant parts of Section 18, which have already been read, are the preamble, Sub-section (1) other than the proviso, Sub-section (2), Sub-section (3), Sub-section (4), Sub-section (5) (*a*), (*b*) and (*c*).

As appears from the Stated Case, the Special Commissioners found (*a*) that the brothers Vestey were at all relevant dates ordinarily resident in the United Kingdom; (*b*) that there was a transfer of assets within the meaning of the Section—"In our opinion", say they, "the lease created "a beneficial right to the rent in Lord Vestey and Sir Edmund which they "respectively caused to be transferred to the trustees of the deed by clause "3 of the lease"; and (*c*) "the main purpose of the creation of the rent and "its transfer to the settlement trustees was the avoidance of the United "Kingdom taxation which would normally accrue on their becoming "resident."

On the basis of these findings the Special Commissioners were of opinion "that the power to determine the lease and to withdraw "properties therefrom gave them a power to enjoy the income of the "settlement trustees within the meaning of Section 18 (3) (*d*), as also "did the power to direct the investment of the rent under clause 2 of

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" the deed within the meaning of paragraph (*e*) ". With regard to paragraph (*c*) the Special Commissioners were of opinion that the power of the trustees to make loans to the brothers Vestey did not amount to the conferring of a benefit on them, conceiving themselves bound by the decision of this Court in the *L. B.* (*Holdings*) case(1). Since the hearing before the Special Commissioners that decision has been reversed by the House of Lords, and I have earlier referred to the language used in the case by Lord Thankerton, [1946] 1 All E.R., at page 603(2).

The taxpayers appealed from the decision of the Special Commissioners to Macnaghten, J., who took the view that, since immediately after the execution of the lease the Paris trustees were bare trustees for the brothers Vestey of their right to receive payment of the rent, it followed that, at that time, the brothers Vestey had power to enjoy their income within the general terms of Sub-section (1), and that it was *nihil ad rem* that one day later new trusts were declared affecting the rents as and when received by the Paris trustees, even though under such new trusts it could be said that the brothers Vestey took no interest or benefit whatever in the income.

In this Court it has in substance been conceded by the Crown that the relevant questions must be answered, not in reference to the date of the " transfer ", but in reference to each relevant year of assessment. At an early stage of the hearing the Solicitor-General intimated that he would seek to support the conclusion of Macnaghten, J., mainly by relying on paragraphs (*d*) and (*e*) of Sub-section (3), but also " to some extent " in reliance on paragraph (*c*). As the case developed the Solicitor-General sought to base himself on all five paragraphs (*a*) to (*e*), inclusive. He also formally submitted, but did not argue, that he could rely, as Macnaghten, J., relied, on the terms of Sub-section (1) without reference to the definitions in Sub-section (3); nor did he press his argument on paragraph (*a*) of that Sub-section. In the circumstances it is clear, in my judgment, that the Crown, if it is to succeed, must succeed on one or more of the paragraphs (*b*), (*c*), (*d*) and (*e*) in Sub-section (3).

In considering the application of each of these paragraphs, the general direction of Sub-section (4) is to be borne in mind—the substantial result and effect must be regarded and all benefits shall be taken into account irrespective of their " nature " or form.

It is also to be noted in regard to the appeal under the 1936 Act (unlike the appeals under the 1938 Act) that considerable stress has been laid by Sir Patrick Hastings and Mr. Tucker (as they are entitled to do) on the individual position of each brother, and it is one of their main criticisms of the conclusions of the Special Commissioners that the Special Commissioners have wholly failed to distinguish at any stage between the two Vesteys but have treated them as if they were joint taxpayers.

Bearing these matters in mind I have reached the conclusion that the Crown fails to bring the case fairly within the terms of paragraph (*b*) of the Sub-section. It is, in the first place, to be noted that the terms of paragraph (*b*) are by way of definition of the phrase in Sub-section (1), " has power to enjoy ", etc. In the case of this, as of each of the paragraphs in Sub-section (3), Sub-section (1) must be read substituting for the

(1) 28 T.C. 1. (2) *Ibid.*, at p. 34.

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formula " has power " etc., in that Sub-section the language of the paragraph under discussion (see, e.g., per Lord Greene, M.R., in the *Lord Howard de Walden* case, 25 T.C., at page 133). It has therefore to be shown, in order to bring the case within paragraph (*b*), that the operation of the receipt of the income to increase the value to the individual of any assets, etc., is " by virtue of " some rights acquired by him by means of the transfer.

By virtue of what rights is the alleged effect attained ? In the absence of any finding of fact by the Special Commissioners the only possible answer, as I understand it, is this: Assuming that the " asset " is Lord Vestey's " right " jointly with his brother to direct the application of that fund for his benefit by way of loan or his power to appoint the income of William's fund to his widow, then it is by virtue of these same " rights " that their value to him is increased. Mr. Tucker argued that such a conclusion is an absurdity and that, therefore, the Crown has failed to prove the necessary premise to the application of paragraph (*b*). The result is I think awkward, but on the view which I take it is not necessary for me to express any conclusion upon it, and I defer dealing further with the problem of assimilating the language of the several paragraphs in Sub-section (3) with that of Sub-section (1) until I come to the claim raised under paragraph (*c*). For, as regards paragraph (*b*), I am not satisfied that there are in truth any assets held by Lord Vestey or for his benefit the value of which to him is increased by the receipt of income. The expression " assets " is defined by Sub-section 5 (*b*) to include property or rights of any kind. But it is, in my judgment, important to observe that in Sub-section (3) a distinction appears to be drawn between " rights " and " powers " and, further, that where it is intended to cover the case of a privilege the enjoyment of which depends upon the co-operation of another, the language used is, " with or without the consent of any other " person "—see Sub-section 3 (*d*). So far as Lord Vestey's powers of appointment under clauses 4 and 11 are concerned, I do not, therefore, think that they can properly be comprehended in the phrase " assets held " by him or for his benefit "; and in these cases there remains the further difficulty whether in any case the value of such " powers " to him can be said to be increased. I have further reached the conclusion that the formula in question is not apt to cover the powers enjoyed by Lord Vestey (but only during the material years in conjunction with his brother) to direct the application of the rents and settled fund in the way of loans to himself or his brother or both. Such powers might well, I think, in some contexts be referred to, though somewhat loosely, as " rights ", as might equally such special powers of appointment and powers of removing or appointing new trustees as are found elsewhere in the trust deed. I think, indeed, that the word " rights " in Sub-section (1), occurring in the phrase " has acquired any rights by virtue of which ", must be construed to include some powers. But having regard to the distinction drawn in Sub-section (3) between rights and powers, I do not think the joint power of the two brothers to direct the application of income is any more a right held by one of them or for the benefit of one of them than the other powers I have mentioned, or that a power acquires the quality of a right because the donee of the power may benefit under an exercise of it. Moreover,

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though a right may, in some circumstances at any rate, be no less a "right" because it is enjoyed jointly and not severally, I think in the present case and in the present context the words "held by him or for "his benefit" make it impossible to treat the power of the two brothers jointly to direct the application of the rent, etc., as a right held by each or for the benefit of each.

Though much argument was advanced to us upon the meaning of these few material words, a conclusion upon them in the end must depend upon the impression made by them, in the light of their context, upon one's mind; and though I reach my conclusion with diffidence, having regard to the different view taken by my brethren, there are here, in my judgment, no assets held by or for the benefit of either brother within the meaning of paragraph (*b*). I therefore have come to the conclusion that paragraph (*b*) of the Sub-section cannot be applied.

Paragraph (*c*) presents two alternatives by reason of the phrase "receives or is entitled to receive". The second alternative can, in my judgment, be shortly disposed of, for I do not think that, according to the terms of the deed of trust, Lord Vestey alone can be said to be *entitled* to receive any income or other moneys. The case is, however, in my judgment, much more difficult as regards the first alternative. In this connection it is necessary to examine somewhat further the facts as regards the disposition of the sums of rent by the Paris trustees, and as regards the moneys which in fact came to the hands of the brothers Vestey. These matters are dealt with in paragraph 8 of the Case, and we have been particularly referred to certain of the documents there mentioned, namely, the exhibits G(1), (2), (3) and (5). From this material it is clear that the Paris trustees in fact applied substantial sums out of the rents which they received in making advances to a company known as the Western United Investment Co., Ltd. (incorporated in the year 1918), which acted as bankers to the Vesteys and the various businesses which they controlled, the Paris trustees having also acquired the whole of the 1,000,000 ordinary shares of that company. (The only other issued shares of that company were four management shares held by the brothers Vestey and their sons.) The Western Company in its turn advanced substantial sums to each of the two brothers, as to part on personal account, and as to the remainder in respect of repairs and other similar charges for which they were responsible as between themselves and the Union Cold Storage Company.

The financial years of the Paris trustees and of the Western Company did not correspond. The Special Commissioners, in the paragraph of the Case to which I have referred, drew attention to this circumstance, but stated nevertheless that the figures could be "reconciled". Some argument turned upon the proper meaning to be attached to this phrase. In my view it cannot properly be interpreted as indicating that the sums advanced to the brothers Vestey can be traced to and identified with the sums advanced to the Western Company by the Paris trustees. In any case it does not seem to me that such an identification could be reasonably expected. I have also referred earlier to the fact that there is no finding and no evidence of any direction in writing by the brothers Vestey. Nevertheless, when

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regard is had to what I take to be the obvious purpose of the whole scheme, viz., that the sums of rent should be in substance at the disposal of the brothers Vestey for their business and other general purposes, and when regard is had also to the powers of the brothers Vestey to direct the Paris trustees under clause 2 of the trust deed and to remove them under clause 19, I should not find, I think, great difficulty in drawing the inference from the material before us, if this were the only inference required to be drawn, that the moneys received in fact during the material years by the two brothers were so received out of moneys made available for the purpose by the transfers and operations associated therewith, as defined by Sub-section (2) of the Section. For it was conceded by Mr. Tucker that the advances made by the Paris trustees to the Western Company would be within the definition of associated operations. And it seems to me, in the light of what I take to be the manifest object of the scheme, that to some extent at least the advances to the brothers Vestey were made practicable, or their maintenance made practicable, by reasons of the fact that the Western Company received from the Paris trustees the large sums that it did.

There remains, however, the further difficulty in the way of the Crown's claim to tax under this paragraph, the same difficulty which arose under paragraph (*b*): By virtue of what rights acquired by reason of the transfer were these moneys received? The answer, if favourable to the Crown, must be—by virtue of the powers of direction and removal to which I have already referred, or to the general cumulative effect of the rights and powers enjoyed under the scheme (" by reason of the transfer ") by the two brothers and each of them. Can this further inference also be drawn, in the absence of any finding by the Special Commissioners and in the absence of any evidence before us of the course of dealing during the years prior to the years of assessment? It is, I confess, tempting so to do, but I have come to the conclusion that there is, in all the circumstances, too much conjecture involved in a matter where by the express terms of a taxing statute specific conditions are imposed upon the subject's liability. I think, therefore, that the proper course would be to remit the case to the Special Commissioners in order that they should consider further the evidence available, and find as facts, aye or nay, whether (1) the moneys received by each of the brothers were received out of moneys which were available for the purpose as specified in paragraph (*c*) of Sub-section (3), and (2) if so, whether such receipts were had by virtue of any rights acquired by each brother by means of the transfer, alone or in conjunction with associated operations, as specified in Sub-section (1).

It is, no doubt, true that in assimilating with the words of Sub-section (1) the terms of each of the paragraphs (*a*) to (*e*) in Sub-section (3), the phrase " has acquired any rights by virtue of which " may present difficulties, and it is I think true that even apart from Sub-section (4) the phrase must be construed broadly, and certainly not in such a way as to render the Sub-section in conjunction with any of the paragraphs in Sub-section (3) practically futile. I therefore think that in the context of Sub-section (1) the word " right " must include some powers. It is to be observed that these five paragraphs of Sub-section (3) cover two distinct

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types of case, viz., (1) where the individual has some right or power to enjoy benefits, and (2) where the individual in fact enjoys benefits. It is said, with force, that the second class of case (which covers the alternative under paragraph (*c*) with which I am concerned) fits ill with at least a close or literal interpretation of the formula "has acquired any rights by "virtue of which". In my judgment the answer in any given case may either be one depending on the legal effect of the instrument effecting the "transfer of assets" or the operations associated therewith, or may be one of fact or inference of fact to be drawn from all the circumstances proved in the case. *Prima facie* the first answer will be applicable in the first class of case, i.e., where the individual has some right or power to enjoy benefits, and the second answer will be applicable to the second class of case, i.e., where the individual in fact enjoys benefits.

The case of *Lord Howard de Walden* v. *Commissioners of Inland Revenue*, 25 T.C. 121, already mentioned, was referred to in the argument, and it was said that that case is an authority for the view that the necessary inference should in this case be drawn at least in the application of paragraph (*b*). But I am not satisfied that this is so. The point is not expressly dealt with in the judgment in that case, and according to the statement of facts set out on page 127 of the report, the Special Commissioners expressed the opinion in paragraph 6 of their findings that "the Appellant . . . acquired rights by virtue of which he has power to "enjoy", etc. It is the absence of any such finding in the present case which, in my judgment, renders the formulation of the Crown's claim in the present case defective. Accordingly, I would, as I have stated, refer the matter back to the Special Commissioners for their further findings, and in the absence of such evidence I have been unable to agree that the claim of the Crown under this paragraph is entitled to succeed.

I should add that there is some reference in the Stated Case to certain sums alleged by the Crown to have been borrowed by the two brothers during the relevant years direct from the Paris trustees. But there is no finding in respect to these sums in the Case that they were in fact borrowed or that the receipt of them by the two brothers was attributable to any rights acquired by either of them by reason of the transfer. I do not, therefore, think that any reliance can be placed upon these alleged borrowings for the purpose of justifying the assessments under paragraph (*c*).

I turn accordingly next to paragraph (*d*), upon which paragraph, as already stated, the Special Commissioners justified the Crown's claim. But, save to the extent of the income of William's fund and (subject to the limitation already mentioned) Edmund's fund by reason of the terms of clause 11 of the trust deed (with which I deal separately hereafter), I am unable to agree, as a matter of law, with the conclusions of the Special Commissioners. The claim under this paragraph is at first sight attractive by reason of the express reference to powers, and also to the formula "with "or without the consent of any other person", noticeably lacking from the other paragraphs. But I cannot agree that the powers of revocation and withdrawal can have the effect attributed to them by the Special Commissioners, for upon the exercise of such powers the income of the property transferred, in fact and according to the Special Commissioners' own find-

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ings, ceased to exist. I am also gravely doubtful whether the joint power of the two brothers to direct investment can be fairly construed as a power belonging to each of them with the consent of the other, though I agree with the Solicitor-General that the point involved in the present case is very different from that considered by Atkinson, J., in the case of *Wolfson* v. *Commissioners of Inland Revenue*, [1947] 2 All E.R. 150 (31 T.C. 142). In any case, however, I do not for myself think that a power to direct loans of the income falls within the formula "beneficial enjoyment" which is used in this paragraph.

On the other hand, I am of opinion that the Crown is entitled to succeed under this paragraph to the limited extent already defined as regards the income of William's fund and Edmund's fund which the two brothers respectively retained a power to appoint by will under clause 11 of the trust deed (but in the case of Edmund, up to 31st March, 1937, only) in favour of their widows. This result flows, in my judgment, from the effect of the definition in Sub-section (5) (*a*). I was at first disposed to think that the word "individual" at the beginning of the paragraph must be construed as meaning either that individual or his wife, and that the word "himself" must mean the same person as the individual, i.e., either that individual or his wife as the case might be. But I was persuaded by Mr. Stamp that that view involved an undue restriction of the language in the definition Sub-section, and I think that the right answer is that, so far as the present case is concerned, the words "or his wife" in parenthesis should be inserted both after the word "individual" and after the word "himself". In the result, I conclude that, to take the case of Lord Vestey, he had in each of the two years in question the power by virtue of a "right" acquired by him by reason of the transfer of assets, viz., under clause 11 of the trust deed, power to appoint in favour of his widow (that is, following *Gaunt's* case[1], his wife) the beneficial enjoyment for her life, or any less period, the income of William's fund. The result is that such income is properly to be regarded as Lord Vestey's income in each of the two years. On the other hand — and Mr. Stamp, at any rate, was prepared to concede as much — such right does not, upon my reading of this paragraph with Sub-section (1), carry with it any further right to treat as Lord Vestey's income any other income of the Paris trustees. In my judgment there is nothing in the *Lord Howard de Walden* case[2] and the later case of *Congreve* v. *Commissioners of Inland Revenue*, [1947] 1 All E.R. 168 (30 T.C. 163), to compel me to a different conclusion. I add that, upon the general effect of those two cases, I agree with what has been said upon them by Somervell, L.J.

There remains, finally, paragraph (*e*), upon which the Special Commissioners also reached a conclusion in favour of the Crown. Here again, however, I find myself unable to accept their view. I have already observed that the formula "with or without the consent of any other person", which is found in paragraph (*d*), is omitted from this paragraph. In the circumstances it is sufficient for me to say that, in my judgment, and notwithstanding the use of the words "is able" on which the Solicitor-General relied, it cannot fairly be said that either of the two brothers,

(1) 24 T.C. 69. (2) 25 T.C. 121.

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acting alone, was at any material date in a position to " control the applica- " tion " of the rents received by the Paris trustees. So far as the special power under clause 11 is concerned the answer may well be otherwise, but as I have already formed the view that the income of William's and Edmund's fund (subject always to the limitation of date as to the latter) is caught under the preceding paragraph, it is unnecessary to deal with it again under paragraph (*e*).

Somervell, L.J.—Now, Mr. Scrimgeour and Mr. Stamp, I did not actually say what was to happen with regard to the assessments because we were not quite clear. In the 1938 case we have decided that the rent, the income of the settled fund, and *quoad* William, the income of William's fund, are assessable. That may more than cover the assessments which have been made or it may less than cover them. The form of the Order depends upon working it out. Before I ask you to say anything — it may be you are quite clear about it — it may be that both sides would like an opportunity of working out this matter. It is not urgent; I daresay you will be asking to go higher. If there is any dispute it could be mentioned at the beginning of next term.

Mr. Scrimgeour.—I think that would be a convenient course if your Lordship would sanction it.

Mr. Stamp.—When we have read and digested the judgments we shall all be in a better position to find out rather than express an opinion now.

Somervell, L.J.—I think so. I am not very clear, and I do not think it is clear on the Cases, what income was included in the assessments.

Mr. Scrimgeour.—I think probably both cases may have to go back to have the amounts adjusted, but I think both of us would like to have an opportunity of considering the judgment.

Somervell, L.J.—We can deal today with costs. I think in the first four appeals the Crown has succeeded.

Mr. Scrimgeour.—Yes.

Somervell, L.J.—The appeals will be allowed with costs, and the cross-appeals dismissed with costs, and on the fifth appeal you fail by a majority and, therefore, that will be dismissed.

Mr. Scrimgeour.—I do not think I can do other than respectfully agree that is the general result. I do not know whether your Lordships would think it convenient at this stage to deal with the question of leave to appeal. I am instructed to ask for leave to appeal in both cases. Your Lordships will, of course, recognise not only that the figures are large, but that there has been in both cases a certain difference of judicial view.

Somervell, L.J.—Yes. Mr. Stamp, do you resist this ?

Mr. Stamp.—No, I cannot resist it.

Somervell, L.J.—I took the opportunity of asking Tucker, L.J., who cannot be here, as to his view, and he agreed that there should be.

Mr. Stamp.—In case there is any question of a cross-appeal, it will apply to both sides?

Somervell, L.J.—Yes, it will apply to both sides.

Mr. Stamp.—If your Lordship pleases.

Appeals having been entered against the decisions in the Court of Appeal, the cases came before the House of Lords (Lords Simonds, Normand, Morton of Henryton and Reid) on 7th, 9th, 10th, 11th, 14th, 15th, 16th and 17th February, 1949, when judgment was reserved. On 6th May, 1949, judgment was given unanimously against the Crown, with costs, in all three cases.

Mr. J. Millard Tucker, K.C., Mr. J. S. Scrimgeour, K.C., and Mr. F. Heyworth Talbot appeared as Counsel for Lord Vestey's executors and Sir Edmund Vestey, and the Solicitor-General (Sir Frank Soskice, K.C.), Sir Andrew Clark, K.C., Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

Consideration of report from the Appellate Committee

Lord Simonds.—My Lords, I beg to move that the report of the Appellate Committee be now considered.

Question put:

That the report of the Appellate Committee be now considered.

The Contents have it.

Lord Simonds.—My Lords, I have to inform the House that the Appellate Committee have considered these appeals and have reported that in their opinion the appeals should be allowed.

My Lords, the several appeals and cross-appeals which your Lordships have to consider raise questions of some difficulty, and though I have had the privilege of reading the opinion which my noble and learned friend Lord Morton of Henryton is about to deliver, and agree with his reasons and conclusions, I think it right to state in my own words why I do not think that the judgment of the Court of Appeal can stand. I will not however repeat the facts, which are fully narrated by him.

The determination of these appeals involves a consideration of certain Sections of two Acts of Parliament which were designed to bring within the ambit of taxation to Income Tax and Sur-tax income which would otherwise escape that burden. For that reason and because the ways of those who would avoid liability to tax are often devious and obscure, the Sections are framed in language of the widest and most general scope, and in the case of one of the Acts (I refer to Section 18 (4) of the Finance Act, 1936) the operative Sub-sections are reinforced by a provision which appears to exhort the assessing authority, and presumably the Court, to let the

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balance, wherever possible, be weighted against the taxpayer. But, this notwithstanding, I think that it remains the taxpayer's privilege to claim exemption from tax unless his case is fairly brought within the words of the taxing Section, and it is in this light that I examine the applicability of Section 18 of the Finance Act, 1936, and Section 38 of the Finance Act, 1938, to the circumstances of the late Lord Vestey and his brother Sir Edmund Vestey.

My Lords, I do not doubt that the two deeds of 29th December and 30th December, 1921, of which you have heard so much, were parts of a single design. By the former document, which I call "the lease", the Vestey brothers demised or agreed to procure the demise to the Union Cold Storage Co., Ltd., a company of their own creation, of properties, cattle lands, freezing works and other assets situate in divers parts of the world. The term was for 21 years from 10th April, 1921, determinable by either party upon six months' notice. The rent was £960,000 per annum reducible in certain events, and it was payable not to the lessors but to three gentlemen residing in Paris whom I will call "the Paris trustees". The lease contained a number of usual covenants and one unusual provision by which the lessors were authorised to withdraw properties from the lease, the rent in that case being proportionately reduced.

By the second document, which I call "the deed of trust", the Vestey brothers as settlors declared the trusts upon which the Paris trustees were to hold the rent payable under the lease as and when received by them. These trusts are of a curiously elaborate character, but in general outline they follow the usual form of a family trust in conformity with the premise that the settlement is made in consideration of the natural love and affection of the settlors for the beneficiaries. It is sufficient at this stage to say that no beneficial interest in the ordinary sense of that expression is reserved to the settlors, but they have (*a*) a special power of appointment in favour of issue, and (*b*) a special power of appointment in favour of a widow. The latter of these powers gives rise to a question that I will mention later.

By means of these documents the Vestey brothers obtained immunity from tax in respect of the very large income which was ultimately derived from the rent payable under the lease up to at least the year 1936. The question is whether Section 18 of the Finance Act of that year, or alternatively Section 38 of the Act of 1938, was so framed as to make them liable for all or any part of it.

I find it convenient, following the course taken by the Court of Appeal, to refer first to Section 38 of the later Act. There the first question arises under Sub-section (2) of the Section, and the argument for the Crown is as follows. The lease and the deed of trust (I ignore any other documents) together form the settlement for the purpose of the Section. They point to the wide definition of "settlement" in Section 41 (4) (*b*): "The "expression 'settlement' includes any disposition, trust, covenant, agree- "ment or arrangement". The whole thing, they say, is an arrangement; therefore it is a settlement. Next, they say, the lease is part of the arrangement, therefore it is "a provision of the settlement". Therefore

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the power, vested in lessors or lessee, to determine the lease is a power to determine a provision of the settlement. And finally, when this has been done, the settlors will or may become beneficially entitled to the whole or part of the property then comprised in the settlement.

This view, which commended itself to the majority of the Court of Appeal but not to Evershed, L.J., is not in my view tenable in face of the decision of this House in *Chamberlain's* case, 25 T.C. 317. True it is, that as was there observed, each case must be judged on its own facts, but I think that the principle of that decision clearly is that the steps which are taken towards a settlement are not to be confused with the settlement itself and (what is all-important to the present case) that the "property comprised in the settlement" is that property alone in respect of which some beneficial interest is created. Applying this principle, which, apart from authority that constrains me, commends itself to my reason, I find that the only property comprised in the settlement is the rent payable under the lease to the Paris trustees with the investments and accumulations of income arising from it. If so, no person has power to determine the settlement or any provision thereof in such manner that the settlors will become entitled to the property comprised in the settlement or any part of it, and the Sub-section is not applicable. I may add that in any view I should be reluctant to do such violence to the ordinary meaning of words as to hold that to determine a lease is "to revoke or otherwise "determine a settlement or any provision thereof".

I turn next to Sub-sections (3) and (4) of Section 38. Here the question is whether Lord Vestey (or Sir Edmund Vestey, but for convenience I will take Lord Vestey) had during any year of assessment "an interest in "any income arising under or property comprised in a settlement". He must be deemed to have had such an interest "if any income or property "which may at any time arise under or be comprised in that settlement "is, or will or may become, payable to or applicable for the benefit of the "settlor or the wife or husband of the settlor in any circumstances what-"soever". Here are very wide words. But apart from the question of the special power of appointment in favour of a widow which I leave for later consideration, Counsel for the Crown do not, I think, suggest that Lord Vestey had any interest within the meaning of the Sub-section except that to which I now refer. In doing so I would observe that this is a matter which is of equal importance to a consideration of Section 18 of the Finance Act, 1936.

The alleged "interest" of Lord Vestey upon which Counsel for the Crown rely arises in this way. Under the deed of trust the Paris trustees are bound to invest the rent received by them "at the direction in writing "of the authorised persons or a majority thereof and in the event of an "equality of voting by such authorised persons at the Trustees' discretion" in their names or under their control "in or upon stocks funds shares "securities or other investments of whatever nature and wheresoever "... or upon personal credit or upon loans to any Company or Companies "wheresoever domiciled and with or without security". The expression "authorised persons" is defined earlier in the deed. It means the settlors during their joint lives and the survivor of them during his life and after

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the death of such survivor the following four persons, namely (*a*) the two eldest of the beneficiaries of 25 years of age and upwards for the time being entitled to share in the fund therein called William's fund but preferring males to females as therein mentioned, and (*b*) such two persons as Sir Edmund might appoint during his lifetime or by his will and in default of such appointment Percy Charles Vestey and Ronald Arthur Vestey and in the case of the death of either of such authorised persons such person as the survivor for the time being should appoint by deed writing or will to fill the vacancy, Sir Edmund expressing the opinion that it was advisable to select a member of his family to fill such vacancy provided that the person making such appointment considered such member of the family fit for the position. There is finally a proviso that if the authorised persons, being more than two in number, cannot agree, the trustees are to act on the direction of the majority, but in case of equal voting by the authorised persons they are to exercise their own discretion. I have cited at length this definition of " authorised persons " for it may well have some bearing in considering what is the nature of the right or power entrusted to them.

The first question here for consideration is, what is the nature of the right to direct investment which is vested in the authorised persons. On behalf of the Crown it is urged that it is not a fiduciary power or right but a right exercisable by the authorised persons for their own benefit, so that they can require the trustees to invest the trust funds by way of loan to themselves or any company in which they are interested, at any rate of interest, whether or not such an investment is or is intended to be for the benefit of the trust estate. It is therefore in this view some kind of beneficial interest albeit a kind, I think, hitherto unknown to the law.

So far as Section 38 (3) and (4) is concerned, I observe that even if the argument for the Crown so far prevails, it must still be established that by reason of the settlor's right to direct investment the income or property arising under or comprised in the settlement is " payable to or " applicable for the benefit of the settlor ". I am clearly of opinion that it is not. I think that these words contemplate an out-and-out parting with the trust property or income by payment to the settlor in money or money's worth; they are as familiar words as any in the conveyancing art. Investment is the very antithesis of this, for it contemplates the retention of something as part of the trust property. I think, therefore, that in any case the claim of the Crown upon this head under Section 38 (3) and (4) must fail. But as I have said, the nature of this right to direct investment is of crucial importance upon Section 18 of the Finance Act, 1936, also, and this is the moment to pursue it.

My Lords, I cannot bring myself to regard this right as anything but a fiduciary right, and if so, it appears to me to follow that it is not to be regarded as conferring any kind of benefit upon its holders. I do not ignore the surrounding circumstances, upon which so much reliance was placed; I am content to bear in mind what happened after 1921, though such events can have no bearing upon the deed of that year. But if I ask how any Court of Equity would regard this power, it seems to me that the only answer must be that it is a fiduciary power to be exercised with a single eye to the benefit of the beneficiaries. Let me suppose that the

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authorised persons, who may for this purpose be either the Vestey brothers or those who later answer that description (since the character of the power will not vary with those who exercise it) direct the trustees to invest the trust funds by way of loan to themselves at a low rate of interest without security, and that the trustees, regarding such an investment as very precarious, apply to the Court and ask whether they must comply with the direction. In such a case it would, as it appears to me, be an irrelevant plea by the authorised persons that the right to direct investment was merely a part of a scheme for avoiding liability to Income Tax. The Court could see nothing but a settlement with a wide power of investment of the trust funds and a mandate to the trustees to invest at the direction of certain persons. Nothing short of the most direct and express words would, I think, justify a construction which would enable those who exercised the power of direction to disregard the interests of the beneficiaries. If it is said that such a construction defeats the general intention of the scheme, I would reply that it may be that those who framed it dug a pit for themselves and have assumed a duty where they thought to acquire a right. Concluding then that this power to direct investment is a fiduciary power and that it is not an "interest" within Section 38 of the Finance Act, 1938, I turn now to Section 18 of the Finance Act, 1936.

It is not claimed that the transactions that I have outlined were effected mainly for some purpose other than the purpose of avoiding liability to taxation. The operation of Section 18 (1) is therefore not excluded by the proviso to that Sub-section and it is necessary to examine its language somewhat closely.

In the first place it is necessary to remember that though your Lordships are for convenience dealing with the cases of Lord Vestey and Sir Edmund Vestey together, each appeal is a separate one and the case of each taxpayer is to be considered as if he alone were concerned. I therefore approach this Section as if Lord Vestey were "the individual" concerned and I use that expression because I find it in the Section. The question then is whether by means of such a transfer as is referred to in the opening words of the Section, either alone or in conjunction with associated transactions, Lord Vestey "acquired any rights by virtue of "which" he had within the meaning of this Section the "power to enjoy" which in the Section is elaborately defined. It is the essential condition of the Section being brought into operation that he, the individual, Lord Vestey, should have acquired "rights by virtue of which, etc." It was at this stage that Mr. Tucker for the Appellant urged that Lord Vestey could not be said to have "acquired" any rights at all. He distinguished, if I followed his argument, between the reservation and the acquisition of a right and contended that whatever right Lord Vestey had, he had by way of reservation out of what passed by the transfer and associated operations. This is in my opinion an artificial and inaccurate way of regarding the transaction. The true view is that after Lord Vestey had joined in the transactions that I have described any rights that he had, whether enforceable against the trustees or against the settled property, were derived from the settlement, and his interest, whatever it might be, was acquired by virtue of those rights. I do not however dissent from Mr. Tucker's further

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argument (it is indeed implicit in what I have already said) that Section 18 (1) can only operate if it can be predicated of the individual, Lord Vestey, that it is by virtue of some right that he has the power to enjoy income as defined in one or other of the paragraphs of Section 18 (3). I agree that the blending of the governing words with the words of the paragraphs leads to clumsy phraseology, but they are the governing words and cannot be disregarded. It must be asked then what relevant right or rights Lord Vestey acquired. Let me make my meaning clear by an illustration. In the view which I take, Section 18 could have no operation in a case where a settlor in defiance of the terms of the settlement violently resumed possession of the settled property.

I recur then to that right upon which alone (apart from the special power of appointment in favour of a widow) the Solicitor-General appeared to rely, namely the right to direct investment. At once, as it appears to me, the difficulty arises that Lord Vestey as an individual acquired no individual right. I agree with my noble and learned friend Lord Morton of Henryton in thinking that here the Interpretation Act cannot be invoked to convert singular into plural. The context does not admit of it. Just as it is the income of an individual that is being assessed so it is the right of that individual that must be regarded. Whatever view, then, is taken of the right to direct investment, that was not a right of Lord Vestey alone and it cannot be said that by virtue of that right he is brought within the Section.

I would not however dispose of this appeal finally on that short ground. Four other aspects of this case were fully argued and deserve consideration. I shortly consider each in turn of the paragraphs of Sub-section (3).

With regard to (*a*) there was some discussion whether the Crown had before the Commissioners or in the Courts below relied on this paragraph. I cannot find that it was specifically dealt with in any of the judgments and the House has not the advantage of the considered opinion of the learned Judge or Lords Justices upon it. This is the more to be regretted as the opening words of the paragraph emphatically indicate that the question is one of that "the income is in fact so dealt with", etc. If therefore reliance is placed upon it there should be an explicit finding of fact. There is not any such finding. If there was, then assuming that there was any evidence to support it the only question of law would be whether it was by virtue of any right that the income was in fact so dealt with. I find it convenient to deal finally with this matter when I consider paragraph (*c*).

The consideration of paragraph (*b*) can be short. I will assume that a right to direct investment might come within the extended meaning of "asset" as defined by Section 18 (5) (*b*), if it could be held that the right was not fiduciary. But holding as I do that it is fiduciary and exercisable with a single eye to the interests of the beneficiaries, I find it impossible to say that the receipt of the income, i.e. the receipt of the rent by the Paris trustees, operates to increase its value to Lord Vestey, though it may add to his responsibility. Paragraph (*b*) therefore is excluded.

Paragraph (*c*) opens with the words "the individual receives or is

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"entitled to receive" and it is, I think, important to remember that both alternatives are subject to what I have called the governing words. It must be by virtue of some right that the individual either "receives" or is "entitled to receive". Here too reliance is placed by the Crown on the right to direct investment. It follows from what I have said that the individual, Lord Vestey, is in this respect "entitled" to receive nothing. Nor, if he in fact receives anything, does he receive it by virtue of any right. But there is another grave difficulty here in the way of the Crown and I now refer to a matter which I reserved in my consideration of paragraph (*a*). Let it be assumed, contrary to my opinion, that it is immaterial whether Lord Vestey has any rights so long as he in fact has "power to enjoy any income". Then whether it is sought to bring the case within (*a*) or (*c*), there must be a clear and explicit finding of fact. The learned Solicitor-General claimed that in the Case Stated there was such a finding either express or implicit and, alternatively, asked that the case should be remitted to the Special Commissioners for further findings. My Lords, I am clearly of opinion that there is no such finding in the Case Stated. If it is a condition of the taxpayer's liability that certain facts should be proved, nothing is more necessary, nor anything more easy, than that there should be a clear and explicit finding. I will not examine the Case Stated in detail. I agree with Evershed, L.J., that the facts which would satisfy the conditions of either of those paragraphs are not found. It may be that they are not found because the Special Commissioners did not feel justified in finding them. Ought the case then to be remitted for further findings? I think not. It was open to the parties, when the case was settled, to obtain a more explicit statement, if indeed the Special Commissioners thought that the circumstances warranted it. After this lapse of time, especially as one of the Commissioners who stated the Case has ceased to hold that office, I do not think that your Lordships would be justified in remitting the case.

I turn then to paragraph (*d*). Here the individual, Lord Vestey, is liable if he has power, by means of the exercise of any power of appointment or power of revocation or otherwise, to obtain for himself, whether with or without the consent of any other person, the beneficial enjoyment of the income. Once more it is the right to direct investment that is relied on. But it appears to me that, apart from all other difficulties, to say of a man who may direct that the trust income should be invested in a loan to himself that he has the beneficial enjoyment of that income is a misuse of language which not even Sub-section (4) would justify.

So also with paragraph (*e*). Here Lord Vestey is liable if it can be said of him that he is able in any manner whatsoever, and whether directly or indirectly, to control the application of the income. But leaving aside the fact that by himself Lord Vestey can do nothing, a right to direct investment is not a control of the application of the income. The latter words point to an out-and-out disposal of the income for the benefit of some person or persons and are wholly inappropriate to an investment by way of loan. I agree too with my noble and learned friend Lord Morton of Henryton that the words of this paragraph are not apt to cover a special power of appointment in favour of a class of persons which includes neither the holder of the power nor his wife.

(Lord Simonds.)

I have so far ignored one aspect of the case which in any view has only a limited operation. I refer to the special power of appointment in favour of a widow. This concerns Lord Vestey only. The question here is whether for the purpose of either Section 18 of the Finance Act, 1936, or Section 38 of the Finance Act, 1938, "wife" includes "widow". Upon this point the Courts below followed, as they were bound to do, the previous decision of the Court of Appeal in *Commissioners of Inland Revenue* v. *Gaunt,* [1941] 1 K.B. 706; 24 T.C. 69, and held that the one word included the other. My own opinion has fluctuated, but as I understand that your Lordships are agreed in thinking that for the reasons given by my noble and learned friend Lord Morton of Henryton the decision in *Gaunt's* case was wrong, I will not occupy time by expressing my own doubts.

The Appellants, the executors of Lord Vestey, raised a further point. They contended that no assessment could validly be made on them as executors under Section 18 of the Finance Act, 1936. Upon this question too the Courts below were bound by the previous decision in *Cottingham's Executors* v. *Commissioners of Inland Revenue,* 22 T.C. 344. I do not think it necessary to say more upon this point than that that case was clearly rightly decided.

In the result I am of opinion that the appeals of the executors of Lord Vestey and of Sir Edmund Vestey must be allowed with costs and the cross-appeals of the Crown dismissed, and I move accordingly.

My Lords, I must conclude by saying this: In the hearing of this appeal your Lordships were assisted by our late lamented colleague Lord du Parcq, who had written and left behind him a speech which, had he been here, he would have delivered. It would not be proper for me to say more about it than this, which I am happy to be able to say: that Lord du Parcq agreed in the conclusions to which your Lordships have come.

Lord Normand.—My Lords, I have had the advantage of reading in print the judgment which will be delivered by my noble and learned friend Lord Morton of Henryton. I agree with the conclusions which he has reached on all the questions at issue in these appeals and in general with the reasons on which they are founded. It will therefore not be necessary for me to enter into a detailed consideration of each Section and Subsection of the relevant statutes, or to repeat or summarize the facts of the case. Since, however, I am unfortunate enough to disagree with the decisions of the Courts below it is proper that I should express my opinion on some of the more fundamental differences of construction which are involved.

The first and most fundamental question concerns the proper approach to the construction of the statutory provisions dealing with attempts to evade taxation and of the documents by which a transfer of assets is effected within the meaning of Section 18 of the Finance Act, 1936, or of the documents included in a "settlement" within the meaning of Section 38 of the Finance Act, 1938. The hypothesis of both Sections is that the documents to be construed are the instruments of a scheme of tax avoidance, and the purpose of each Section is to subject to taxation the income

(Lord Normand.)

in each year of assessment which would, but for the Section, have escaped taxation through the operation of the scheme. But each Section has its own specialities which may be relevant. Section 18 (4) requires that regard shall be had to "the substantial result and effect of the transfer and any "associated operations" in determining whether the individual assessed "has power to enjoy income"; and the "settlements" aimed at by Section 38 of the 1938 Act are widely defined by Section 41 (4) (*b*) so as to include "any disposition, trust, covenant, agreement or arrangement". It is this definition in its relation to Section 38 that has in the past given rise to the general problems of construction which I am now discussing and it will therefore be convenient to deal with them primarily in relation to that Section.

It was a possible view that the intention of Section 38 was that the Court should first determine what was the whole "arrangement" devised with the object of avoiding tax, and having done so should then treat all assets transferred or leased or affected by any document forming part of the "arrangement" as "property comprised in the settlement". That was the view taken by the Court of Session in *Morton's* case 1941 S.C. 467; 24 T.C. 259. In that case the Court held that the "arrangement" included the agreement of a husband and wife to transfer their assets to a company, the formation of the company, the company's memorandum and articles, the transfer of the assets to the company in return for an allotment of preference shares to the husband and wife and of ordinary shares to a son and to trustees, and the deeds of trust by which these trustees were directed to pay the income arising from the shares to daughters of the settlors. The majority of the Court next held that as that was the arrangement (and by definition the "settlement") the "property comprised in the settlement" was the assets transferred by the settlors to the company. Lord Moncrieff dissented. He held that "settlement" remained the dominant word and that a settlement meant "the charging of the property of the settlor with "rights constituted in favour of others". From that it followed that the "property comprised in the settlement" could only be the shares transferred by the settlor to the trustees and held by them under trust for the payment of the income to the settlor's daughters. That case did not go further. In *Chamberlain's* case, 25 T.C. 317, the Court of Appeal took the same view, as I read the judgment, as the majority of the Court of Session had taken in *Morton's* case, but this House reversed the decision and construed "settlement" in relation to the words "property comprised in the settle-"ment" as Lord Moncrieff had construed it in *Morton's* case. Lord Macmillan indeed expressly adopted Lord Moncrieff's words above cited, which are the very pivot of his dissent. There were additional grounds on which the judgment of this House was based but the rule to be deduced from the case is that the property comprised in the settlement is that and that only in respect of which some beneficial right is created in favour of beneficiaries under the settlement. I think also that it is implicit in the judgment of this House that documents which form part of an "arrange-"ment" within the meaning of Section 41 (4) (*c*) of the Finance Act, 1938, are to be construed as they would be if they were unconnected with a purpose of tax avoidance.

(Lord Normand.)

If I am correct in my understanding of *Chamberlain's* case (1) it will follow in the present case that even if the lease and the deed of settlement may both be properly treated as components of the "arrangement", yet the property "comprised in the settlement" is the property settled by the deed of settlement, that is the rents under the lease, and not the property or properties which were the subjects of the lease. And from that it will follow that there can be no liability under Section 38 (2), for the only power to revoke in the case is a power to revoke the lease, and the exercise of that power would merely end the payment of the rent without conferring on the settlors any rights in the property comprised in the settlement or in the income arising from it.

I have not yet mentioned the words "in any circumstances whatsoever" (Section 38 (4)), for as it happens all the questions, numerous as they are, in these appeals can be decided without reference to them, and their precise meaning and effect were not the subject of close debate. All I will say of them is that they do not affect the construction of the documents constituting an "arrangement", for they apply only to the effect of such documents after they have been construed.

In these matters of construction no distinction can be drawn between Section 38 and Section 18. In Section 18 the direction that regard shall be had "to the substantial result and effect of the transfer and any associated operations" does not in my view authorise any laxity in construing any of the documents by which the transfer or the associated operations are effected. The Court must first determine the meaning and effect of the documents before this provision is applied and it must then consider whether their effect, though in form not beneficial to the settlor, is so in substance. The contrast is between substance and form, so if it can be shown in the present case that the effect of the transfer and the associated operations is to vest a benefit in (for example) a company over which the settlor has complete control, the Court may then say that, though in form the company benefits, in substance the company and the settlor are one and the settlor therefore benefits. But the Court cannot take this last step unless it is shown that the settlor has himself the legal control and no reliance must be placed on his influence over others who are not in law bound to follow his directions. This is of importance in relation to the power to direct the investment of the rents received by the trustees. It was argued on clause 18 (3) (*c*) for example that the settlors as "authorised persons" might direct the trustees to lend to the Western company at a commercial rate of interest and that money in the hands of the Western company was substantially money in the pockets of the settlors. But this argument, assuming all other objections overcome, fails because the settlors did not between them hold a majority of the management shares of Western. It is perhaps not wholly superfluous to say that nothing in either Section 18 or Section 38 authorises resort to extrinsic evidence to ascertain intention or warrants an assumption that breach of trust will be committed or tolerated.

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(1) 25 T.C. 317.

(Lord Normand.)

In supplement of these observations on construction I would add that one must be on one's guard against reading the two Sections so as to cover something which the language cannot without torture be made to cover. For example, it is I think impossible without abuse of the words to describe a fiduciary power to direct investment as an asset, or to say that by virtue of such a power the donee is "able in any manner to obtain for himself "the beneficial enjoyment of the income of the trust" or "to control the "application of the income". Even if the power is not fiduciary and if the donee may use it to direct a loan to be made to himself, the words "receive or entitled to receive" or "beneficial enjoyment of the income" or "application of the income" or "payable or applicable for the benefit "of the settlor" do not appear in the context of Section 18 to have been intended to refer to loans. It was argued for the Appellants that Section 40 of the Finance Act, 1938, is the Section appropriate for dealing with loans made to settlors. For this there may be much to be said, though it is not necessary to decide in these appeals what is the true ambit of Section 40. But it is at all events true that the provisions of Section 40 are very much more tender to the assessee than the provisions of Sections 18 or 38 and I find it difficult to understand why a loan should be more rigorously dealt with if it is within either Section 18 or Section 38 than "a capital "sum paid directly" to the settlor under Section 40. Parliament in its attempts to keep pace with the ingenuity devoted to tax avoidance may fall short of its purpose. That is a misfortune for the taxpayers who do not try to avoid their share of the burden and it is disappointing to the Inland Revenue, but the Court will not stretch the terms of taxing Acts in order to improve on the efforts of Parliament and to stop gaps which are left open by the statute. Tax avoidance is an evil, but it would be the beginning of much greater evils if the Courts were to overstretch the language of the statute in order to subject to taxation people of whom they disapproved.

On the question whether the power to direct investments is fiduciary (clause 2 of the trust deed), I feel no doubt. It is a power to direct the investment of a fund which is subject to a properly constituted trust. If the settlors or their successors as "authorised persons", who might eventually be strangers to the Vestey family and its interests, were to claim to exercise this power for their own advantage and without consideration for the interests of beneficiaries, they would I think receive short shrift from a Court of Equity.

The next question is raised by Section 18 (5) (*a*) which provides that "a reference to an individual shall be deemed to include the wife or hus-"band of the individual"; by the references to the "wife or husband of "the settlor" in Section 38 (2); and by the provision in Section 38 (4) that for the purpose of Section 38 (3) "the settlor shall be deemed to have an "interest in income arising under or property comprised in a settlement, "if any income or property which may at any time arise under or be "comprised in that settlement is, or will or may become, payable to or "applicable for the benefit of the settlor or the wife or husband of the "settlor in any circumstances whatsoever". Under clause 11 of the settle-

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ment Sir William Vestey and Sir Edmund Vestey had power respectively by will or codicil to create an interest in William's fund or Edmund's fund respectively by directing payments to be made thereout in favour of the widow of the appointer for her life or any shorter period. Is this power of appointment a power to appoint in favour of the "wife" of the appointer, within the meaning of the enactments referred to? It was held in *Gaunt's* case [1941] 1 K.B. 706; 24 T.C. 69, by the Court of Appeal, reversing Lawrence, J., as he then was, that the word "wife" in Section 38 (4) includes a widow. The ground of judgment of Lawrence, J., was that the object of the statute was to prevent the settlor from getting the benefit of a provision during his lifetime. Clauson, L.J., as he then was, said in the Court of Appeal, at page 713 (1): "The question is, who are "the people whose interests in the fund under the settlement, or under a "possible substitution for it under the power of revocation, are of such a "character that the legislature thinks that a very remarkable result should "ensue as regards taxability of income? When one realizes that that is "the point of it, there does not seem to be any sense whatever in making "the matter depend upon the possibility of a lady obtaining a benefit in "her husband's lifetime. One does not see why the position should be any "different because the benefit that she is to get is to be after her husband's "death than if it is to be before her husband's death. The husband's "death seems to have no relevance. *Prima facie*, therefore, one would "suppose that the word 'wife' means that which is its true natural meaning, "a lady who, during the latter part of the joint lives of herself and a man, "has been the wife of that man. That is the meaning of the word 'wife'. "It is perfectly true that the word 'widow' is used to express the position "of a lady when her husband has died. In one sense when a woman has "become a widow she is no longer a wife. That is perfectly true. But "the description in this section of her as a wife refers to the lady, and has "nothing to do with the matter of time." Counsel for the Crown relied upon this reasoning, though they modified the statement of it. They said that the wife, if there is one, in the year of assessment is the *persona designata* by the words "the settlor's wife" and if that *persona* may take a benefit within the meaning of any of the relevant provisions at any future time. the requirements of the statute are satisfied. There can therefore, they said, be no *persona designata* if in the year of assessment the settlor is a bachelor or widower, but if the settlor is married a power to appoint in favour of his wife is the equivalent of a power to appoint in her favour as if she were named. I think that this could lead to some strange and unexpected results, but these I pass over.

I respectfully think that the Court of Appeal in *Gaunt's* case(2) and the argument for the Crown in this case leave out of account the important consideration that Sections 18 and 38 are Income Tax sections, and that it is a principle of Income Tax law, embodied in Rule 16 of the General

(1) 24 T.C. at p. 74. (2) 24 T.C. 69.

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Rules, that for Income Tax purposes a husband and wife living together are one. I see no reason to doubt that the purpose of the provisions in Section 38, by which a benefit for the wife or husband of the settlor falls to be treated as a benefit for the settlor, was to give effect to this principle not only in cases where the income is enjoyed by the settlor or his wife in the year of assessment but also in those cases in which the settlement provides a postponed enjoyment of the income either by the settlor or by his wife in his lifetime. The same considerations apply *mutatis mutandis* to the provisions of Section 18. I do not agree that the "wife of the "settlor" in the year of assessment is treated as a *persona designata*, but even if it were so the question would still remain whether the interest of the *persona designata*, if it only takes effect after her marriage has been dissolved, is obnoxious to the provisions of these Sections.

My Lords, upon what remains of the questions to be decided I have already said that I agree with my noble and learned friend Lord Morton of Henryton. I will therefore not detain your Lordships further than to say that I agree that the appeals should be disposed of as has been proposed by my noble and learned friend on the Woolsack.

Lord Morton of Henryton.—My Lords, the first two appeals before your Lordships' House are original appeals by taxpayers and cross-appeals by the Crown from two Orders of the Court of Appeal dated 30th July, 1947. The Orders of the Court of Appeal were made upon original appeals by the Crown and cross-appeals by the taxpayers from two Orders of the King's Bench Division (Macnaghten, J.,) dated 4th November, 1946.

Lord Vestey's executors and Sir Edmund Vestey appealed to the King's Bench Division on two separate Cases stated by the Special Commissioners, one of which raised questions as to the liability of Lord Vestey and of his brother, Sir Edmund Vestey, to Sur-tax and the other raised questions as to their liability to Income Tax, in respect of rent payable to trustees under a lease dated 29th December, 1921, and in respect of income arising from the investment and accumulations of such rent under a voluntary deed dated 30th December, 1921.

The claims to tax arising on the first two appeals are claims based only upon the provisions of Section 38 of the Finance Act, 1938. Claims to tax against the same taxpayers in respect of similar income for earlier years, based upon Section 18 of the Finance Act, 1936, are the subject of the third appeal, which arises out of a third Case stated by the Special Commissioners.

There are three distinct statutory provisions upon which claims to tax against each taxpayer are based: (*i*) those contained in Section 18 of the Finance Act, 1936, (*ii*) those contained in Sub-section (2) of Section 38 of the Finance Act, 1938, and (*iii*) those contained in Sub-sections (3) and (4) of the last-mentioned Section.

The claims under Section 38 of the Finance Act, 1938, and those under Section 18 of the Finance Act, 1936, so far as they relate to the same years of assessment, are alternative claims.

(Lord Morton of Henryton.)

The effect of the judgments in both Courts below in the present appeals, stated briefly, is to affirm the liability to tax of each taxpayer under Section 18 of the Finance Act, 1936, in respect of all the income in question, but to affirm liability under Section 38 of the Finance Act, 1938, in respect of part only, the decision of the Court of Appeal under Section 38 being more favourable to the Crown than that of Macnaghten, J. The cross-appeals of the Crown to this House are directed against the decision of the Court of Appeal so far only as it restricted the liability under Section 38 of the Finance Act, 1938, and are addressed to establishing liability under that Section in respect of all the income in question.

The relevant facts are fully set out in the three Cases Stated, all of which are dated 14th September, 1945, and I shall only go into the history of the matter so far as is necessary for the purpose of stating my views upon the various questions which arise for decision in your Lordships' House.

By a lease (hereafter called "the lease") dated 29th December, 1921, and made between Lord Vestey, then Sir William Vestey, Baronet, and Sir Edmund Vestey, Baronet, of the first part, the Union Cold Storage Co., Ltd. (a company having its registered office in England and hereafter called "Union") of the second part, and three persons residing in Paris named Kennerley Hall, Drabble and Stirling (hereafter called "the Paris trustees") of the third part, the Vesteys demised or agreed to demise certain properties situate abroad to Union for a term of 21 years from 10th April, 1921.

Clause 3 of the lease is of an unusual kind and should be set out in full: "The Lessees shall pay therefor to the said Kennerley Hall, Drabble "and Stirling (whose receipt only shall be a good discharge of the same) "yearly during the said term hereby granted and so in proportion for any "less time than a year the rent of £960,000 to be paid to the said Kenner- "ley Hall, Drabble and Stirling by quarterly instalments on the 1st day of "January the 1st day of April the 1st day of July and the 1st day of "October in each year . . . Provided Always And It Is Hereby Agreed "that if on making up at the end of each financial year ending on the 31st "December the accounts of the Lessees (as to which the certificate of the "Auditors for the time being of the Lessees shall be final and binding) it is "found that in respect of the then past financial year the result of the "Lessees operations after providing for the rent hereinbefore reserved shall "be insufficient to enable the Lessees to pay the aggregate of the following "sums namely the interest on the debentures or debenture stock issued by "the Lessees for the time being outstanding and the interest on the amount "owing on all specific mortgages heretofore or hereafter created by the "Lessees and for the time being outstanding the dividend at the fixed rate "of interest on all the preference shares issued by the Lessees for the time "being outstanding a dividend at the rate of 10 per cent per annum at "least on the ordinary shares issued by the Lessees for the time being "outstanding then the rent aforesaid for such financial year shall be abated "to the extent of the deficiency so ascertained and any rent already paid "by the Lessees in respect of that particular year shall be repaid to them

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" by the said Kennerley Hall, Drabble and Stirling to the extent of the " rebate necessary."

It is to be noted that the rent was not to be paid to the lessors, but to the Paris trustees and that the rent payable was related to the annual profits of Union in the manner and to the extent mentioned in the clause just quoted.

Clause 4 contained covenants by Union for themselves and their assigns with the lessors (and as a separate covenant with the Paris trustees as regards the covenant for payment of the said yearly rent) that Union would during the continuance of the term granted by the lease pay to the Paris trustees the said yearly rent and would during the said term pay and discharge all rates, taxes and other outgoings payable in respect of the demised premises or the owner or the occupier in respect thereof.

The lease contained provisions of a usual kind as to repair, insurance and other matters, and a power for either the Vesteys or Union to determine the lease on six months' notice in writing. It also contained the following power of withdrawal: " Provided Further that the Lessors may at any time " during the term hereby granted on giving to the Lessees six calendar " months previous notice in writing expiring on one of the aforesaid " quarterly days withdraw any part or parts of the premises hereby demised " from this demise in which case the rent hereinbefore reserved to the said " Kennerley Hall, Drabble and Stirling shall as from the date of such with- " drawal be reduced by such amount as shall be agreed upon between the " Lessors and Lessees and as from the date of such withdrawal the pro- " visions hereof shall cease to apply to the premises so withdrawn but as " regards the remainder of the said demised premises shall continue in full " force and effect subject to the reduction of the said rent as hereinbefore " provided ". On a number of occasions the Vesteys exercised this power of withdrawal by withdrawing a number of properties originally comprised in the lease. Save in one case they substituted other properties.

Certain subsidiary documents were executed by the Vesteys for the purpose of more effectively vesting in Union, for the term of the lease, certain properties agreed to be demised whereof the Vesteys did not hold the legal estate. Nothing turns upon these documents, which may be treated as part of the lease for the purposes of the present appeals.

It is common ground between the parties that if no further document had been executed the Paris trustees would have received the rent under the lease as bare trustees for the Vesteys, who were beneficially entitled thereto in equal shares.

On 30th December, 1921, a document which may conveniently be called " the trust deed " was made between the Vesteys of the one part and the Paris trustees of the other part. The lease was recited and it was also recited that the Vesteys " executed and granted the said Lease reserving " the rent thereunder to the Trustees to the intent that such rent as and " when received by the Trustees shall be held by them upon the trusts and " with and subject to the powers and provisions hereinafter expressed and

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"declared". The trust deed was expressed to be made "in consideration "of the natural love and affection of the settlors for the beneficiaries here- "inafter referred to and for divers other good causes and considerations", and it was thereby agreed that the Paris trustees should hold "all rent or "sums of money payable to them in accordance with the terms and during "the continuance of the said Lease and which they may receive subject "to any refund or rebate they may be liable to make thereon to the Lessees "(all of which are hereinafter called 'the settled fund') and the invest- "ments for the time being representing the same and the accumulations "thereof" upon the trusts and with and subject to the powers and provisions therein set forth.

Clauses 1 and 2 of the trust deed are so important that they must be set out in full.

Clause 1. "The expression 'authorised persons' used herein means "the Settlors jointly during their lives and the survivor of them during his "life and after the death of such survivor the following four persons "(namely) (*a*) the two eldest of the beneficiaries of 25 years of age and "upwards for the time being entitled to share in William's Fund hereunder "but preferring males to females so that no such female beneficiary shall "be included amongst the authorised persons so long as there are two male "beneficiaries of that age and (*b*) such two persons as the said Sir Edmund "Hoyle Vestey may appoint during his lifetime or by his Will and in "default of such appointment Percy Charles Vestey and Ronald Arthur "Vestey and in the case of the death of either of such authorised persons "such person as the survivor for the time being shall appoint by deed "writing or Will to fill the vacancy the said Sir Edmund Hoyle Vestey "expressing the opinion that it is advisable to select a member of the "family of the said Sir Edmund Hoyle Vestey to fill such vacancy provided "that the person making such appointment considers such member of the "said family is fit for the position Provided that if the authorised persons "being more than two in number cannot agree the Trustees shall act on "the direction of the majority but in case of equal voting by the authorised "persons the Trustees shall exercise their own discretion."

Clause 2. "The Trustees shall receive the aforesaid rent payable to "them in accordance with the terms and during the continuance of the "said Lease (subject to any refund or rebate they may be liable to make "thereunder to the said Lessees as aforesaid) and shall capitalise the same "until the expiration of 20 years from the death of the last surviving "grandchild now living of the Settlors (hereinafter referred to as 'the "'time of distribution') by investing the same subject as hereinafter pro- "vided in or upon any of the investments and in manner hereby authorised "that is to say The Settled Fund shall (at the direction in writing of the "authorised persons or a majority thereof and in the event of an equality "of voting by such authorised persons at the Trustees' discretion) be "invested in the names or under the legal control of the Trustees in or "upon stocks funds shares securities or other investments of whatever "nature and wheresoever (but where involving liability only with the con-

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"sent of the Trustees) or upon personal credit or upon loans to any "Company or Companies wheresoever domiciled and with or without "security and with the like power of varying such investments from time "to time to the intent that the said Trustees shall (subject to such direction "as aforesaid) have the same full and unrestricted powers of investing and "transposing the investments of the settled fund in all respects as if they "were absolutely entitled thereto beneficially."

There is no evidence that any direction in writing was ever given by the Vesteys to the Paris trustees in regard to the investment of the rent or the settled fund.

The effect of subsequent clauses of the trust deed may be briefly summarised as follows. They provided, *inter alia*, for (*a*) the division of the residue of the income arising from the settled fund when invested, after meeting certain costs, etc., until the time of distribution, into two parts, called respectively "William's Fund" and "Edmund's Fund", and (*b*) for the accumulation and investment as therein mentioned of William's fund and Edmund's fund respectively until the respective deaths of William and Edmund or for 21 years from the date of the deed whichever might be the earlier date, when the two funds with the accumulations thereof (respectively described as "William's Accumulated Fund" and "Edmund's "Accumulated Fund") should be held in trust for the benefit of the children or remoter issue (and their wives and widows) of William and Edmund as William and Edmund might respectively from time to time by deed revocable or irrevocable or will or codicil appoint (but so that no appointment either of a lump sum or of any specific investments should be made otherwise than in the shape of a capital payment). In default of and subject to any such appointment the funds were to be divided as therein mentioned among the lineal descendants of William and Edmund respectively.

The Vesteys had no power to give any directions as to the investment of any sums other than the rent coming to the hands of the Paris trustees.

Clause 11 of the trust deed reserved a power to William and Edmund respectively, notwithstanding anything contained in the deed, to appoint by will or codicil any interest in William's fund or Edmund's fund in favour of "the widow of the appointor" for her life or any shorter period.

By clauses 17 and 19 of the trust deed the "authorised persons" were given power to fix the remuneration of the trustees, to remove trustees from their office and to appoint other trustees in their place.

In exercise and by virtue of the relevant power given or reserved to them by clause 4 of the deed or any other relevant powers the Vesteys made the following appointments:—

(I) By deed dated 26th November, 1935, William irrevocably appointed and directed that the Paris trustees should, from and after 1st April, 1942, or the earlier determination of the lease, hold the whole of William's share, William's fund and William's accumulated fund, both capital and income, and also any part of the rent mentioned in clause 2 of the trust deed which might belong or might have originally belonged to him and might

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not be effectively disposed of by inclusion in the said funds in trust for his eldest son if then living and in default in trust for that son's son.

(II) By deed dated 31st December, 1935, Edmund irrevocably appointed and directed that the Paris trustees should, from and after 1st April, 1942, or the earlier determination of the lease, hold the whole of Edmund's share, Edmund's fund and Edmund's accumulated fund, both capital and income, including all income accruing in the meantime (except as hereinafter provided) and also any part of the rent not effectively disposed of by inclusion in the said funds, in trust for his third son if then living, and in default in trust for such son of his third son as should first or alone attain the age of 21 years. Except and provided that the said deed should not appoint or affect the investments, moneys and properties which on 31st October, 1935, represented Edmund's fund and Edmund's accumulated fund.

(III) By deed dated 31st March, 1937, Edmund irrevocably appointed the investments and property left unappointed by the last-mentioned deed in trust for his third son as from 1st June, 1937, if then living, and in default in trust for his elder daughter, and wholly released and extinguished in respect of all funds and income the power to appoint an interest therein in favour of his widow if and so far as such power had not already been extinguished.

The Vesteys in exercise of the special powers of appointment reserved to them by the deed and of all other relevant powers, appointed a number of capital sums in favour of their children or children's issue, but these appointments (of which particulars are set out in the Cases Stated) are not material to any of the issues raised in the appeals.

The events leading up to the execution of the lease and the deed of trust, including the history of Union and of another company, the Western United Investment Co., Ltd. (hereafter called "Western"), are conveniently set out in the Cases Stated and in the printed Case before your Lordships' House in the case, *Union Cold Storage Co., Ltd.* v. *Adamson*, 16 T.C. 293, which is incorporated by reference in the Cases Stated. It is sufficient for the present purpose to state the following facts. Western was incorporated on 26th August, 1918, with a capital of £1,000,004 divided into 1,000,000 ordinary shares of £1 each and four management shares of £1 each. At all material times the four management shares, which gave the holders complete control but no beneficial interest in profits or assets, were held by Lord Vestey and his son and Sir Edmund and his son. By certain transactions which need not be set out in detail, Western came to own the whole of the ordinary shares in Union, and by 28th November, 1930, the Paris trustees had come to own the whole of the ordinary shares in Western. Western acted as bankers and financial agents for Union, the Paris trustees and the Vesteys. The Cases Stated set out in some detail certain dealings between the Paris trustees and Western and between Western and the Vesteys, but on the view which I take of the case these dealings are not material to the decision of the matters now before your Lordships.

My Lords, I have already said that certain of the assessments now in question were made under Section 18 of the Finance Act, 1936, while others

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were made under Section 38 of the Finance Act, 1938. The relevant Sections must now be quoted. The former Section is in the following terms:—

"18. For the purpose of preventing the avoiding by individuals "ordinarily resident in the United Kingdom of liability to income tax by "means of transfers of assets by virtue or in consequence whereof, either "alone or in conjunction with associated operations, income becomes pay- "able to persons resident or domiciled out of the United Kingdom, it is "hereby enacted as follows:—

"(1) Where such an individual has by means of any such transfer, "either alone or in conjunction with associated operations, acquired any "rights by virtue of which he has, within the meaning of this section, "power to enjoy, whether forthwith or in the future, any income of a "person resident or domiciled out of the United Kingdom which, if it were "income of that individual received by him in the United Kingdom, would "be chargeable to income tax by deduction or otherwise, that income shall, "whether it would or would not have been chargeable to income tax apart "from the provisions of this section, be deemed to be income of that "individual for all the purposes of the Income Tax Acts.

"Provided that this subsection shall not apply if the individual shows "in writing or otherwise to the satisfaction of the Special Commissioners "that the transfer and any associated operations were effected mainly for "some purpose other than the purpose of avoiding liability to taxation.

"(2) For the purposes of this section an associated operation means, "in relation to any transfer, an operation of any kind effected by any "person in relation to any of the assets transferred or any assets represent- "ing, whether directly or indirectly, any of the assets transferred, or to the "income arising from any such assets, or to any assets representing, "whether directly or indirectly, the accumulations of income arising from "any such assets.

"(3) An individual shall, for the purposes of this section, be deemed "to have power to enjoy income of a person resident or domiciled out of "the United Kingdom if—

"(*a*) the income is in fact so dealt with by any person as to be "calculated, at some point of time, and whether in the form of income "or not, to inure for the benefit of the individual; or

"(*b*) the receipt or accrual of the income operates to increase "the value to the individual of any assets held by him or for his "benefit; or

"(*c*) the individual receives or is entitled to receive, at any time, "any benefit provided or to be provided out of that income or out of "moneys which are or will be available for the purpose by reason of "the effect or successive effects of the associated operations on that "income and on any assets which directly or indirectly represent that "income; or

"(*d*) the individual has power, by means of the exercise of any "power of appointment or power of revocation or otherwise, to obtain

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"for himself, whether with or without the consent of any other person, "the beneficial enjoyment of the income; or

"(*e*) the individual is able in any manner whatsoever, and "whether directly or indirectly, to control the application of the "income.

"(4) In determining whether an individual has power to enjoy income "within the meaning of this section, regard shall be had to the substantial "result and effect of the transfer and any associated operations, and all "benefits which may at any time accrue to the individual as a result of the "transfer and any associated operations shall be taken into account irres-"pective of the nature or form of the benefits.

"(5) For the purposes of this section—

"(*a*) a reference to an individual shall be deemed to include the "wife or husband of the individual;

"(*b*) the expression 'assets' includes property or rights of any "kind, and the expression 'transfer,' in relation to rights includes the "creation of those rights;

"(*c*) the expression 'benefit' includes a payment of any "kind . . . "

"(6) The provisions of the Second Schedule to this Act shall have "effect for the purpose of carrying this section into effect and otherwise "for supplementing the provisions of this section, and this section is referred "to in that Schedule as 'the principal section.'

"(7) The provisions of this section shall apply for the purposes of "assessment to income tax for the year 1935-36 and subsequent years, and "shall apply in relation to transfers of assets and associated operations "whether carried out before or after the commencement of this Act:

"Provided that, for the year 1935-36, no income shall be charged to "tax at the standard rate by virtue of the provisions of this section, but "sur-tax shall be assessed and charged as if any income which would, but "for this proviso, have been charged as aforesaid had in fact been so "charged."

The Second Schedule contains provisions not necessary to be quoted, in regard to relief against double taxation, deductions and reliefs and other matters.

Section 38 of the Finance Act, 1938, so far as material, is as follows:—

"38.—(1) If and so long as the terms of any settlement are such that—

"(*a*) any person has or may have power, whether immediately "or in the future, and whether with or without the consent of any other "person, to revoke or otherwise determine the settlement or any pro-"vision thereof and, in the event of the exercise of the power, the "settlor or the wife or husband of the settlor will or may cease to be "liable to make any annual payments payable by virtue or in conse-"quence of any provision of the settlement; or

"(*b*) the settlor or the wife or husband of the settlor may, "whether immediately or in the future, cease, on the payment of a "penalty, to be liable to make any annual payments payable by virtue "or in consequence of any provision of the settlement;

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"any sums payable by the settlor or the wife or husband of the "settlor by virtue or in consequence of that provision of the settle- "ment in any year of assessment shall be treated as the income of "the settlor for that year and not as the income of any other person:

"Provided that, where any such power as is referred to in para- "graph (*a*) of this subsection cannot be exercised within the period "of six years from the time when the first of the annual payments so "referred to becomes payable, and the like annual payments are "payable in each year throughout that period, the said paragraph (*a*) "shall not apply so long as the said power cannot be exercised.

"(2) If and so long as the terms of any settlement are such that—

"(*a*) any person has or may have power, whether immediately "or in the future, and whether with or without the consent of any "other person, to revoke or otherwise determine the settlement or any "provision thereof;

"(*b*) in the event of the exercise of the power, the settlor or the "wife or husband of the settlor will or may become beneficially "entitled to the whole or any part of the property then comprised in "the settlement or of the income arising from the whole or any part "of the property so comprised; and

"any income arising under the settlement from the property comprised in "the settlement in any year of assessment or from a corresponding part of "that property, or a corresponding part of any such income, as the case "may be, shall be treated as the income of the settlor for that year "and not as the income of any other person:

"Provided that, where any such power as aforesaid cannot be exer- "cised within six years from the time when any particular property first "becomes comprised in the settlement, this subsection shall not apply to "income arising under the settlement from that property, or from property "representing that property, so long as the power cannot be exercised.

"(3) If and so long as the settlor has an interest in any income "arising under or property comprised in a settlement, any income so arising "during the life of that settlor in any year of assessment shall, to the extent "to which it is not distributed, be treated for all the purposes of the Income "Tax Acts as the income of the settlor for that year, and not as the income "of any other person:

"Provided that—

"(*a*) if and so long as that interest is an interest neither in the "whole of the income arising under the settlement nor in the whole of "the property comprised in the settlement, the amount of income to "be treated as the income of the settlor by virtue of this subsection "shall be such part of the income which, but for this proviso, would "be so treated as is proportionate to the extent of that interest; and

"(*b*) where it is shown that any amount of the income which is "not distributed in any year of assessment consists of income which "falls to be treated as the income of the settlor for that year by virtue "of either of the last two foregoing subsections, that amount shall be "deducted from the amount of income which, but for this proviso, "would be treated as his for that year by virtue of this subsection.

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"(4) For the purpose of the last foregoing subsection, the settlor "shall be deemed to have an interest in income arising under or property "comprised in a settlement, if any income or property which may at any "time arise under or be comprised in that settlement is, or will or may "become, payable to or applicable for the benefit of the settlor or the "wife or husband of the settlor in any circumstances whatsoever . . ."

"(7) The foregoing provisions of this section shall apply for the "purposes of assessment to income tax for the year 1937-38 and subse- "quent years and shall apply in relation to any settlement, wherever made "and whether made before or after the passing of this Act:

"Provided that —

"(*a*) for the year 1937-38 no income shall be charged to tax at "the standard rate by virtue of this section, but surtax shall be "assessed and charged as if any income which would, but for this "proviso, have been charged as aforesaid had in fact been so "charged; and

"(*b*) for the purpose of granting relief from tax at the standard "rate in respect of any income which for the year 1937-38 is treated "as the income of a settlor by virtue of subsection (1) or subsection "(2) of this section but would be treated as the income of some other "person but for that subsection, that income shall be treated as the "income of that other person".

It is necessary also to set out Section 40 and part of Section 41.

"40.—(1) Any capital sum paid directly or indirectly in any relevant "year of assessment by the trustees of a settlement to which this section "applies to the settlor shall —

"(*a*) to the extent to which the amount of that sum falls within "the amount of income available up to the end of that year, be treated "for all the purposes of the Income Tax Acts as the income of the "settlor for that year;

"(*b*) to the extent to which the amount of that sum exceeds the "amount of income available up to the end of that year but falls "within the amount of the income available up to the end of the next "following year, be treated for the purposes aforesaid as the income "of the settlor for the next following year;

"and so on.

"(2) For the purpose of the last foregoing subsection, the amount of "income available up to the end of any year shall, in relation to any "capital sum paid as aforesaid, be taken to be the aggregate amount of "income arising under the settlement in that year and any previous relevant "year which has not been distributed, less —

"(*a*) the amount of any other capital sums paid to the settlor "in any relevant year before that sum was paid; and

"(*b*) so much of any income arising under the settlement in that "year and any previous relevant year which has not been distributed "as is shown to consist of income which has been treated as income "of the settlor by virtue of subsection (1) or subsection (2) of section "thirty-eight of this Act; **and**

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"(*c*) any income arising under the settlement in that year and "any previous relevant year which has been treated as the income of "the settlor by virtue of subsection (3) of section thirty-eight of this "Act; and

"(*d*) any sums paid by virtue or in consequence of the settle- "ment, to the extent that they are not allowable, by virtue of the last "foregoing section, as deductions in computing the settlor's income for "that year or any previous relevant year; and

"(*e*) an amount equal to tax at the standard rate on—

"(i) the aggregate amount of income arising under the settle- "ment in that year and any previous relevant year which has not "been distributed, less

"(ii) the aggregate amount of the income and sums referred "to in paragraphs (*b*), (*c*) and (*d*) of this subsection.

"(3) For the purpose of this section, any capital sum paid to the "settlor in any year of assessment by any body corporate connected with "the settlement in that year shall be treated as having been paid by the "trustees of the settlement in that year.

"(4) Where the whole or any part of any sum is treated by virtue of "this section as income of the settlor for any year, it shall be treated as "income of such an amount as, after deduction of tax at the standard rate "for that year, would be equal to that sum or that part thereof.

"(5) This section applies to any settlement wherever made and "whether made before or after the commencement of this Act, and in this "section —

"(*a*) the expression 'capital sum' means—

"(i) any sum paid by way of loan or repayment of a loan; and

"(ii) any other sum paid otherwise than as income, being "a sum which is not paid for full consideration in money or "money's worth;

"but does not include any sum which could not have become payable "to the settlor except in one of the events specified in the proviso to "subsection (4) of section thirty-eight of this Act;

"(*b*) the expression 'relevant year' means any year of assess- "ment after the year 1937-38;

"(*c*) references to sums paid to the settlor include references to "sums paid to the wife or husband of the settlor."

"41 . . . (4) For the purposes of this Part of this Act— . . .

"(*b*) the expression 'settlement' includes any disposition, trust, "covenant, agreement or arrangement, and the expression 'settlor' in "relation to a settlement means any person by whom the settlement "was made".

The statement supplied by Counsel to your Lordships, which I shall now set out, shows in a convenient form the assessments made under the provisions of Section 38 of the Finance Act, 1938, and Section 18 of the Finance Act, 1936, and the figures as adjusted by the Special Commissioners on appeal.

Tax-payer	Income Tax or Sur-tax	Year of assess-ment	Assess-ment made under Section 38, Finance Act, 1938	Adjusted by Special Commis-sioners on appeal	Assess-ment made under Section 18, Finance Act, 1936	Adjusted by Special Commis-sioners on appeal
Execu-tors of Lord Vestey	Income Tax	1936-37	—	—	£500,000	£357,171
do.	do.	1937-38	—	—	464,011	464,011
do.	do.	1938-39	£238,750	435,821	435,821	Not determined by Special Commissioners pending final disposal of assessments under Section 38, Finance Act, 1938.
do.	do.	1939-40	320,000	509,635	509,635	
do.	do.	1940-41	218,301	246,298	246,298	
do.	Sur-tax	1936-37	—	—	500,000	385,058
do.	do.	1937-38	292,916	503,800		
do.	do.	1938-39	238,750	502,264		
do.	do.	1939-40	319,766	597,511		
do.	do.	1940-41	218,301	283,802		
Sir Edmund Hoyle Vestey	Income Tax	1936-37	—	—	500,000	435,063
do.	do.	1937-38	—	—	468,257	468,257
do.	do.	1938-39	238,750	421,279	421,279	Not determined by Special Commissioners pending final disposal of assessments under Section 38, Finance Act, 1938.
do.	do.	1939-40	320,000	493,295	493,295	
do.	do.	1940-41	320,000	491,489	491,489	
do.	Sur-tax	1936-37	—	—	500,000	457,239
do.	do.	1937-38	292,916	504,932		
do.	do.	1938-39	238,750	486,902		
do.	do.	1939-40	320,000	581,281		

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My Lords, it often happens that when claims are made by the Crown under Section 18 of the Act of 1936 the taxpayer relies upon the proviso to Section 18 (1) of that Act. Before the Special Commissioners the Vesteys sought to claim the benefit of this proviso, and this claim is dealt with in the following passage taken from the findings of fact in the Cases Stated.

"The benefit of the proviso to Section 18 in its original and amended "form is claimed, and we have been referred to Lord Vestey's evidence in "1919 before the Royal Commission on the Income Tax. It does not "appear that he complained that United Kingdom tax made it difficult for "him to compete against American firms, but only that his profits which "he did not spend or give away were subjected to that tax whilst the "profits of his foreign competitors were not. To avoid United Kingdom "taxation the Vesteys betook themselves abroad from 1915 to 1921. It is "said that, having removed the business from the area of taxation, they "could not in 1921 have had a purpose of avoiding taxation and that the "primary and, indeed, sole object of the lease was to restore the business "back to England. In our view, it was the Vesteys' personal desire to "reside in this country which led to the lease and deed, and the main pur-"pose of the creation of the rent and its transfer to the settlement trustees "was the avoidance of the United Kingdom taxation which would normally "accrue on their becoming resident."

For some fifteen years after 1921 this "main" purpose appears to have been completely achieved. Payments in the nature of income flowed in to the Paris trustees year by year from five sources, the rent paid by Union, the income from William's fund and Edmund's fund respectively, and the income arising from investments representing accumulations of the income of William's fund and Edmund's fund respectively. No part of this income was ever paid away as income, and substantial funds rolled up annually for the benefit of the beneficiaries under the deed of trust. Moreover, Union was successful in the above-mentioned case of *Union Cold Storage Co., Ltd.* v. *Adamson* (1). In that case the Crown tried in vain to convince this House, upon assessments made upon Union for the years 1923-24 and 1924-25, that as the rent payable under the lease was dependent upon the profits made by the company and reducible in the events therein mentioned, and as the tenure by Union of the properties for which the rent was paid was under the control of the Vesteys as lessors, the rent ought to be regarded as a distribution of profits by the company to the Vesteys and not as a deductible expense in computing the profits of the business of the company for Income Tax.

Then came the Act of 1936, followed by the Act of 1938, and the assessments already mentioned, which relate entirely to income received by the Paris trustees by virtue of the lease and the deed of trust. The Vesteys have contended throughout, and now contend, that not one penny of the sums received by the Paris trustees comes under the scope of either Section 18 of the Act of 1936, or Section 38 of the Act of 1938.

The claims of the Crown in the present case depend to a large extent upon three matters: (1) The power of the "authorised persons" to direct

(1) 16 T.C. 293.

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the investment by the Paris trustees of the sums received by them from Union; (2) the contention of the Crown that all the properties comprised in the lease are "comprised in the settlement" within Section 38 (2) (*b*) of the 1938 Act; (3) the power of appointment in favour of a widow contained in clause 11 of the deed of trust. For this reason, before considering in detail the relevant Sections already quoted and their application to the income received by the Paris trustees, it is desirable to consider three questions of construction: (*a*) Is the right or power of the "authorised "persons" under the trust deed to direct how the rent payable by Union shall be invested by the Paris trustees, a power of the kind conveniently described as a fiduciary power, which must be exercised in the best interests of the beneficiaries under the trust deed, or is it a right or power which the authorised persons are entitled to exercise, if they so think fit, in any way which best serves their own interests? (*b*) Is the "settlement" which falls to be considered under Section 38 (2) of the 1938 Act, the trust deed alone or the trust deed together with the lease, and what is the "property "comprised in the settlement" within the meaning of the same Sub-section? (*c*) Does the existence of the power of appointment in favour of the widow of Lord Vestey and Sir Edmund respectively have the effect of bringing any income within the ambit of either of the two Sections in question? When these three questions have been answered your Lordships will have gone a long way towards a solution of the numerous questions argued on these appeals.

In arguing question (*a*), which is a question of construction, Counsel for the Crown sought to pray in aid such matters as the history, prior to and after 1915, of the vast businesses controlled by the Vesteys, the structure and history of the various companies in which they were interested, and the various steps whereby the Vesteys sought to reside in England and yet to avoid, so far as they legally could, the taxation which usually falls upon persons so resident. It is said on behalf of the Crown that clause 3 of the lease (already quoted) put the annual profits of Union into the hands of the Paris trustees, and that the power to direct investments, vested in the "authorised persons", was the means by which the Vesteys were able to obtain out of these profits the cash necessary for financing the businesses which they controlled. It is further said that certain passages in the Cases Stated show that the power was in fact used for this purpose.

My Lords, in my view one must solve this question of construction upon a consideration of the words used in the trust deed, by which alone this right or power is constituted, applying to these words the ordinary principles of construction without regard to the fact that this deed is part of a scheme of tax avoidance. If it appears that there is some latent ambiguity in the deed itself one can seek to resolve it by a consideration of the relevant surrounding circumstances.

It is important to note at the outset that if, as is contended by the Crown, the power to direct is not a fiduciary power, the authorised persons are quite unrestricted in their choice of an investment. They could for instance direct the Paris trustees to lend any instalment of rent to the authorised persons without security at one-half per centum interest per

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annum. They could not, I think, direct the Paris trustees to make such a loan free of interest, for such a loan would no more be an "investment" than would the placing of cash in a stocking, but provided that the directed application of moneys can fairly be described as an "investment", I can see no limit on the powers of the authorised persons if the Crown's contention is correct, nor could Counsel for the Crown suggest any limit.

With this in mind I approach the consideration of the terms of the trust deed. By clause 2 the authorised persons are to select the investments, and the Paris trustees are to hold the funds and make the investments and to exercise their discretion in selecting the investments if the authorised persons are equally divided or (as I think) if no direction is given by the authorised persons. Turning to the other provisions of the deed, one finds that it is made "in consideration of the natural love and affection" of the Vesteys for the beneficiaries, while clause 1 contains careful provision as to the persons who are to be "authorised persons". It is to be observed that the power is not reserved only to the settlors, and two facts are particularly to be noted in regard to Sir Edmund's successors. First, Sir Edmund desires that a member of his family shall be selected "provided "that the person making the appointment considers such member of the "said family is fit for the position". I think this indicates that the person selected is to be someone who can exercise a wise judgment in selecting suitable investments. Secondly, it may happen that two, at least, of the authorised persons may be persons who are not members of the Vestey family and are not beneficially interested in any way. Now it is clear that the nature of this power of direction must be the same throughout the duration of the trust, and I cannot believe that the Vesteys would have entrusted their successors with an arbitrary power or right to direct an investment greatly to the benefit of themselves and greatly to the detriment of the beneficiaries, such as an unsecured loan to the authorised persons at a rate of one-half per centum interest.

To my mind all the indications in the deed are in favour of the view that this power of direction is a fiduciary power. To test the matter further, let it be assumed that the Vesteys or their successors direct the Paris trustees to make an investment of the kind just described, that one of the beneficiaries objects, and that the trustees ask the Court by originating summons whether they are or are not bound to obey this direction. In my view the Court would hold that they were not so bound, and it would hardly avail the Vesteys to contend that as this settlement was part of a scheme to avoid tax they must be deemed to have inserted this power of direction in order to retain a valuable right for themselves. It is not, I think, irrelevant to note that the language used in this deed bears a strong resemblance to the wording of Section 22 (2) of the Settled Land Act, 1882, which was in force at the date when the deed of trust was executed. That Section provides that the investment or other application of capital money by the trustees "shall be made according to the discretion of the tenant for life, "and in default thereof, according to the discretion of the trustees", and it is clear that in giving such a direction the tenant for life is acting in a fiduciary capacity. See Section 53 of the Act of 1882, and (for instance) In re *Sir Robert Peel's Settled Estates,* [1910] 1 Ch. 389, at page 395. It

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seems to me hardly likely that the Vesteys would have used similar words in the deed of trust if they had intended the power in question to be non-fiduciary.

The result is that in my view, on the true construction of the trust deed the power of direction is a fiduciary power, and the authorised persons are not entitled to use it for the purpose of obtaining a benefit for themselves. They must exercise it *bona fide* in what they consider to be the best interests of the beneficiaries. This is not, to my mind, a case of latent ambiguity. I think that the Vesteys could have directed the trustees to lend trust moneys to Western, or even to themselves, but such a direction could only be justifiable if the loan were made at a commercial rate of interest and if the Vesteys honestly thought that it was in the best interests of the beneficiaries. If the trustees were to advance moneys to any company or to either of the Vesteys free of interest they would commit a breach of trust, but there is no finding in any of the Cases Stated that this was ever done.

As to question (*b*), there can be no doubt that the deed of trust is a settlement in the ordinary sense of the word, and I do not dissent from the Crown's contention that the lease and the deed of trust together constitute an "arrangement" within Section 41 (4) (*b*) of the Act of 1938 and are consequently a "settlement" for the purposes of Part IV of that Act. In my view, however, whether one looks for this purpose at the deed of trust alone, or at the deed of trust and the lease together, the only property "comprised in the settlement" at any time was the rent payable by Union under the lease, together with any property resulting from the investment of the rent and from the accumulation of the income arising from such investment.

My Lords, it was contended on behalf of the Crown that all the properties demised or agreed to be demised to Union by the lease were "comprised in the settlement" within the meaning of Section 38. I cannot agree with this contention, and I think it is wholly inconsistent with the decision of this House in *Chamberlain* v. *Commissioners of Inland Revenue*, 25 T.C. 317. In that case Lord Macmillan said at page 331, in reference to the decision of the First Division of the Court of Session in *Commissioners of Inland Revenue* v. *Morton*, 1941 S.C. 467; 24 T.C. 259: "I agree with Lord Moncrieff that the settlement or arrangement must be "one whereby the settlor charges certain property of his with rights in "favour of others. It must comprise certain property which is the subject "of the settlement; it must confer the income of the comprised property "on others, for it is the income so given to others that is to be treated as "nevertheless the income of the settlor." In the present case, immediately before the execution of the lease the Vesteys owned or controlled the properties about to be comprised in the lease. Immediately after the execution of that document the freehold interest remained in the Vesteys subject to the lease; the leasehold interest was vested in Union; and the rent was payable to the Paris trustees who would hold it as bare trustees for the Vesteys. So far no property had been "settled", but it remained in the power of the Vesteys either to settle the freehold interest in the demised

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properties, subject to the lease, or to settle the rent which still belonged beneficially to them. They chose the latter course and settled the rent by deed of trust. It is, in my judgment, quite impossible to say that either the freehold interest which the Vesteys retained, or the leasehold interest which remained the property of Union, was the subject of any settlement or "comprised in" any settlement, having regard to the reasoning of your Lordship's House in *Chamberlain's* case(1). I would add that in my view *Morton's* case(2) can no longer be regarded as good law. I think that in *Chamberlain's* case this House agreed with Lord Moncrieff on the vital point on which he differed from the majority of the First Division in *Morton's* case.

It is convenient to consider at once what is the result of the view which I have just expressed on the Crown's endeavour to bring this case within Section 38 (2) of the Act of 1938. It is contended on behalf of the Crown that as Union on the one hand, and the Vesteys on the other hand, had power to determine the lease, each of these parties had power to revoke or otherwise determine the settlement or a "provision" thereof, within Section 38 (2) (*a*). Clearly they had no power to determine the settlement itself, for even if the lease was determined the trusts declared by the deed of trust concerning rents already accrued would continue undisturbed; and I gravely doubt whether the lease can be regarded as a "provision of the "settlement". However it is unnecessary to resolve this doubt, for even if the Crown can bring this case within Sub-clause (*a*) of Sub-section (2) of Section 38, it clearly does not come within Sub-clause (*b*). Once it is ascertained that only the rent and property derived therefrom is "comprised "in the settlement", it becomes clear that if the lease is determined neither Lord Vestey nor Sir Edmund nor the wife of either of them "will or may "become beneficially entitled to the whole or any part of the property "then comprised in the settlement" or of the income arising therefrom. The determination of the lease would make no difference at all to the position of any of these persons in regard to the property comprised in the settlement or the income thereof; it would merely have the effect that no further rent would reach the hands of the Paris trustees.

Question (*c*) should, in my opinion, be answered in the negative. A different view was taken by the Court of Appeal in *Commissioners of Inland Revenue* v. *Gaunt*, 24 T.C. 69, and the Court of Appeal in the present case naturally followed that decision. *Gaunt's* case has already been criticised by my noble and learned friend Lord Normand. I agree with his criticisms, but out of respect for the Court of Appeal I shall add some observations of my own. For the sake of example I shall take Section 38 (4) of the Act of 1938, and shall disregard for the moment the appointments of 1935 and 1937 already noted. Could it be said, in any of the years of assessment, that any income comprised in the settlement might become payable to the wife (for instance) of William within the meaning of Section 38 (4)? In my view it could not. To my mind, if a payment is to come within the Sub-section it must be made to a lady who answers the description of a wife at the time of payment. No such payment could ever be

(1) 25 T.C. 317. (2) 24 T.C. 259.

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made because no payment could be made until after the death of William; the income then becomes payable not to his wife but to his widow. I do not propose to travel all through the language of Section 38 of the Act of 1938 or of Section 18 of the Act of 1936. I can find no passage in either Section which is inconsistent with the view which I hold. Further, I think that the intention of each reference to a wife of the settlor is reasonably clear. It was thus stated by Lawrence, J., (as he then was) in *Gaunt's* case, at page 72(1), as follows: "On the second point I am of opinion that the "object of the Section is to prevent the settlor getting the benefit of the "trust fund during his lifetime. It is not to prevent his wife enjoying the "trust fund after his death, and I do not think the word 'wife' is apt to "describe the settlor's widow. The income must be capable of being paid "to, or for the benefit of, the wife, which in my opinion means while she "is his wife."

My Lords, I entirely agree with this passage. I think that the treatment of husband and wife by the Legislature for Income Tax purposes rests on the view that any income enjoyed by one spouse is a benefit to the other spouse. It is not surprising, therefore, that in the Sections now under consideration a benefit to the wife of the settlor is treated as being a benefit to the settlor, but it seems to me unlikely that this principle is being extended by these Sections to the widow of the settlor. Further, if for instance Section 38 (4) of the Act of 1938 is to be read as applying to the widow of the settlor there would seem to be no reason why it should not have been extended to the children of the settlor. If it be said that the provision of a benefit for the widow of the settlor benefits the settlor himself because he would naturally desire to make provision for his widow, exactly the same reasoning could be applied to the provision of a benefit for the settlor's children. Finally, although I do not myself think that there is a real ambiguity in the use of the word "wife" throughout these Sections, if there is such an ambiguity it must be resolved in favour of the subject, according to principles which have been laid down many times.

If I had come to a different conclusion on this point it would have been necessary to consider how far the appointments of 1935 and 1937 precluded any appointment thereafter to a widow of either of the Vesteys, but this point does not arise having regard to the view which I have just expressed.

Having determined the answers to these three questions of general importance, I now turn to a more detailed consideration of Section 18 of the 1936 Act.

The opening words are: "For the purpose of preventing the avoiding "by individuals ordinarily resident in the United Kingdom of liability to "income tax by means of transfers of assets by virtue or in consequence "whereof, either alone or in conjunction with associated operations, income "becomes payable to persons resident or domiciled out of the United "Kingdom, it is hereby enacted as follows". It is pointed out by Counsel for the Crown that the Vesteys were individuals ordinarily resident in the United Kingdom in December, 1921, that they carried out a transfer of assets by virtue or in consequence whereof income became payable to per-

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sons resident outside the United Kingdom, namely the Paris trustees, and that these steps were taken by the Vesteys with the object of avoiding liability to Income Tax. That is all true, but it must be borne in mind that the Section only applies to a case which comes within Sub-section (1). If neither of the Vesteys had had any rights or powers of direction or appointment under the deed of trust both of them would have avoided all liability to tax. Your Lordships have simply to consider whether the existence of these rights or powers brings the present case within the ambit of the Section, and for this purpose the provisions of Sub-sections (2), (4) and (5) must be borne in mind throughout. It is first necessary to consider whether Lord Vestey had at any relevant time, by means of any such transfer as is described in the opening words of Section 18 (either alone or in conjunction with associated operations) acquired any rights by virtue of which he had, within the meaning of Section 18, power to enjoy (whether forthwith or in the future) any income of the Paris trustees. It is necessary to consider separately the case of each of the two Vesteys. They have been assessed separately, and in my view it is necessary to inquire in the case of each of them, whether he was at the material time "an individual" in the position described in Sub-section (1). I have not of course overlooked the fact that by reason of Section 1 of the Interpretation Act, 1889, the word "individual" in Sub-section (1) would be construed as including the plural unless the contrary intention appears, but in considering whether any income is to be deemed to be income of a particular individual under Section 18 (1) I feel no doubt that one must have regard only to rights acquired by the same individual, and not to rights acquired by a group of individuals, however small, which includes him. Difficulties would arise from any other construction of Section 18 (1) which are, I think, so apparent that they need not be further discussed.

As a preliminary matter one must inquire whether Lord Vestey acquired any rights at all by virtue of the deed of trust. I think he acquired only two rights, namely, the power of appointment in favour of his widow conferred by clause 11 and the power of appointment in favour of his children or remoter issue or their wives or widows conferred by clause 4.

During the whole of the relevant period Sir Edmund was alive, and the various powers conferred by the trust deed upon the "authorised persons" were powers vested jointly in the two brothers. The words "has acquired" are not followed by any such words as "either alone or jointly with some "other person or persons" and this omission becomes very significant when one observes, by way of contrast, that the words "either alone or in con-"junction with associated operations" are inserted immediately after the words "by means of any such transfer". Compare also Sub-section (3) (*d*), "the individual has power . . . to obtain for himself, *whether with or* "*without the consent of any other person,* the beneficial enjoyment of the "income". I cannot believe that Sub-section (1) would have been in its present form if the Legislature had intended to include among the "rights" mentioned in the Sub-section any rights which the individual held jointly with another person. It may be that the failure of the Sub-section to cover such a joint power opens the door to easy evasion of the provisions of Section 18. If so, it is for the Legislature to fill the gap and not for your

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Lordships to put a strained construction on the words, "Where such an "individual has acquired any rights".

The next question is, did Lord Vestey acquire those two rights by virtue of such a transfer of assets as is mentioned in Sub-section (1), either alone or in conjunction with associated operations? I think he did. Before the lease was executed, Lord Vestey and his brother owned or controlled certain properties. By Sub-section (5) (*b*) of Section 18 the expression "assets" includes property or rights of any kind and the expression "transfer" in relation to rights includes the creation of those rights. By the lease the Vesteys created a right, namely, the right to receive the rent payable by Union. That right was an asset. By the creation of it and by the joint effect of the lease and the deed of trust, income (namely the rent) became payable to the Paris trustees upon the trusts of the deed of trust, and Lord Vestey "acquired" his two powers of appointment by virtue of the deed of trust. It was contended on behalf of the taxpayers that Lord Vestey did not "acquire" these rights but merely "reserved" them when he and his brother transferred assets to which they were absolutely entitled. This contention places too narrow a meaning on the word "acquired". Before the deed of trust was executed none of the various funds mentioned in it existed. After it was executed Lord Vestey possessed two rights or powers of appointment over one of these funds. I think he "acquired" these two rights, which did not exist before, by means of the "transfer of "assets" already described.

The next question is, had Lord Vestey at any relevant time, by virtue of either of his two powers of appointment, "power to enjoy", within the meaning of Sub-section (1), any income of the Paris trustees? In order to answer this question one must turn to Sub-section (3), bearing in mind that that Sub-section merely puts an enlarged meaning on the words "power to "enjoy" and never comes into play unless the circumstances described in the various Sub-clauses of Sub-section (3) arise "by virtue of" the right or rights described in Sub-section (1). I shall first consider these Sub-clauses in relation only to Lord Vestey's power of appointment in favour of his widow. My Lords, I share the difficulty which the Court of Appeal felt in linking up with Sub-section (1) the various Sub-clauses of Sub-section (3), but your Lordships need not, I think, be unduly troubled by Sub-clause (*a*). That Sub-clause depends on a question of fact, and there is no finding of fact by the Special Commissioners on which the Crown can rely. This is not surprising as Sub-clause (*a*) was not relied upon before the Special Commissioners, although the Crown sought to rely upon it before Macnaghten, J., and the Court of Appeal. Your Lordships were asked by the Solicitor-General to remit this case to the Special Commissioners in order that they should arrive at findings of fact under Sub-clauses (*a*) and (*c*), but in all the circumstances of the present case I do not think that this suggestion should be accepted. The Crown had ample opportunities, of which much use was made, to obtain information as to the various dealings between the Paris trustees, Western, Union and the Vesteys, and could have obtained further findings of fact from the Special Commissioners if its advisers had thought fit to do so.

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As to Sub-clause (*b*), the first question is, is the power of appointment conferred on Lord Vestey by clause 11 of the deed of trust an "asset" held by him for his benefit—and I think one must add "or for the benefit "of his wife"—in view of Sub-section (5) (*a*)? My Lords, in my view it is not such an asset, for the short and simple reason that "wife" does not include "widow" and that this power of appointment is held by Lord Vestey only for the benefit or possible benefit of his widow. This being so it is unnecessary to consider whether this power of appointment is an "asset" within the meaning of Sub-clause (*b*) or whether the value thereof will be increased by the receipt or accrual of the rent.

Turning to Sub-clause (*c*), it is sufficient to say that neither Lord Vestey nor his wife received or was entitled to receive at any material time any benefit by virtue of Lord Vestey's power of appointment. Sub-clause (*d*) cannot apply because the only person who can obtain the beneficial enjoyment of any income under this power of appointment is Lord Vestey's widow. I would add that even on the assumption that the joint power to direct investments falls to be considered under this head by reason of the words "with or without the consent of any other person", I do not think that the existence of this joint fiduciary power could possibly be said to enable Lord Vestey to obtain for himself the beneficial enjoyment of any of the income received by the Paris trustees. He could only obtain such beneficial enjoyment by means of a grave breach of trust.

In considering Sub-clause (*e*) one must first ask, what is "the income" there referred to? The answer must be, as regards each year of assessment, "it is the income of the Paris trustees attributable to that year of assessment." Taking as an example the year 1936-37, one must ask, had Lord Vestey power to enjoy (whether forthwith or in the future) any income of the Paris trustees attributable to that year? If so "that income", to quote Sub-section (1), must be deemed to be income of Lord Vestey for the purposes of the Income Tax Acts. Now it is clear that Lord Vestey had no power to enjoy the income of the Paris trustees attributable to the year 1936-37, either forthwith or in the future, in the ordinary sense of the words "power to enjoy", but in view of Sub-clause (*e*) one must go further and inquire whether Lord Vestey was able in any manner whatsoever, and whether forthwith or in the future, and whether directly or indirectly, to control the application of that income. The answer is that his power of appointment under clause 11 did not enable him to do this. No exercise of Lord Vestey's power of appointment under clause 11 could prevent the Paris trustees from dealing with their income for 1936-37 strictly in accordance with the terms of the trust deed, and no income accruing to the Paris trustees during Lord Vestey's life is affected by any exercise of Lord Vestey's power of appointment under clause 11. Your Lordships are not concerned in these appeals with any income accruing to the Paris trustees after Lord Vestey's death.

I now turn to the question whether Lord Vestey's power to appoint in favour of his children or remoter issue or their wives or widows can be brought within any of Sub-clauses (*a*) to (*e*) of Sub-section (3). It is at once apparent that the only Sub-clause which can possibly be material for this purpose is (*e*).

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Even apart from the appointment of 26th November, 1935, I do not think that the existence of this power brought Lord Vestey within this Sub-clause for reasons which will appear later, and as soon as he executed the deed of irrevocable appointment of that date Lord Vestey put the matter beyond all question. It is true that if both of the appointees under that deed had predeceased Lord Vestey his power would have revived, but that event did not happen. It is also true that Lord Vestey might have made a subsequent appointment to take effect only in the event of both of the appointees failing to take a vested interest, but the fact that Lord Vestey might have made such an appointment could not, on any construction of Sub-clause (*e*), render him "able to control the application of the "income" in any year of assessment. Even with the assistance of the words "in any manner whatsoever and whether directly or indirectly", the Sub-clause cannot be stretched to cover such a case.

In considering whether Lord Vestey had power to enjoy income within the meaning of Sub-section (1), read in conjunction with all the Sub-clauses of Sub-section (3), I have borne in mind the terms of Sub-section (4), but I cannot find that the terms of that Sub-section alter in any way the conclusions stated above.

The result is that in my view the attempt of the Crown to render Lord Vestey liable to tax under Section 18 of the Act of 1936 wholly fails. All the reasoning set out above applies equally to the case of Sir Edmund Vestey except that I must deal separately with Sir Edmund's position in regard to Sub-clause (*e*). So far as regards the property which Sir Edmund appointed by the deed of 31st December, 1935, he is in the same position as Lord Vestey. But he excepted from the operation of that deed the investments moneys and properties which on 31st October, 1935, represented Edmund's fund and Edmund's accumulated fund. Thus until he executed his second appointment dated 31st March, 1937, Sir Edmund retained a power to appoint these funds among a limited class of persons in addition to his power to appoint to his widow under clause 11 of the trust deed. It is arguable that Sir Edmund is assessable for the year 1936-37 in respect of the income of these two funds on the ground that he had "power to "enjoy" that income within Section 18 (1) and (3) (*e*), and the point is one of some difficulty. I do not think, however, that this limited power of appointment gave Sir Edmund power "to control the application" of any income, within the meaning of Sub-clause (*e*). He could only make an appointment "in the shape of a capital payment" in favour of one or more of his issue or their spouses and if such a power were intended to be caught by Sub-section (3) I think that it would have been included in Sub-clause (*d*), which deals expressly with powers of appointment. That Sub-clause is, however, limited in its operation to powers which enable the individual to obtain the beneficial enjoyment of income.

My Lords, I cannot help feeling some regret that my opinion as to Section 18 should rest partly on the somewhat narrow ground that the joint power to direct investment possessed by the Vesteys jointly as "authorised persons" is not a right which either Lord Vestey or Sir Edmund, as an individual, acquired within the meaning of Section 18, and at one time I contemplated considering each Sub-clause of Sub-section (3)

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on the assumption that this joint power fell within Sub-section (1). On further reflection, however, I feel that the adoption of this course would only produce a rich crop of *obiter dicta* which might be an embarrassment rather than an assistance to those who may consider this case hereafter. For this reason I shall only say that even if this joint power (which I have already held to be of a fiduciary nature) is a right which "such an indi-"vidual" has acquired within the meaning of Sub-section (1), I am by no means satisfied that the Crown could bring the present case within the terms of any Sub-clause of Sub-section (3). It is of course well settled that a person in a fiduciary position is not entitled so to use his position as to make a profit for himself, and if he does so use his position he is liable to account for the profit so made. The position would have been different in many respects if this House had taken the view that the power in question, on the true construction of the deed of trust, was one which the Vesteys were entitled to use to serve their own ends. In that event it would have been necessary to go into a number of matters which are irrelevant if the power is a fiduciary one.

My Lords, I must now turn again to Section 38 of the Act of 1938. The Crown does not rely on Sub-section (1) and the claim of the Crown under Sub-section (3) is ill-founded, for the reasons which I have already given. As to Sub-section (3) it is clear that this Sub-section can have no application when one has arrived at the conclusion that the property comprised in the settlement only includes the rent and the property derived therefrom. Sub-section (4), however, raises two questions. First, it is said that by reasons of the joint power to direct investments, income arising under or property comprised in the deed of trust might become payable to or applicable for the benefit of either Lord Vestey or Sir Edmund, because the Vesteys might at any time direct trust money to be lent to either of themselves upon the personal credit of the borrower. It is said truly that the fact that the power is a joint one does not affect this argument adversely, by reason of the words "may become . . . in any circumstances whatso-"ever". As to this argument I would first observe that as the power to direct is of a fiduciary nature, any such loan would have to be at a commercial rate of interest. Assuming that such a loan were made, would the money lent be "payable to" the borrower within the meaning of Sub-section (4)? Notwithstanding the words "in any circumstances whatso-"ever", I cannot believe that the words "payable to" were intended to apply to a payment made by way of loan. If these words were read quite literally they would apply if the settlor were merely used as a channel for conveying the money to someone else, or if money were lent to the settlor on a mortgage of his lands. The phrase "payable to or applicable for the "benefit of" is a well-known one, frequently used in settlements where money is either to be paid to a beneficiary who can then use it as he pleases, or is to be applied by trustees in some manner which will benefit the beneficiary. Reading the phrase as a whole I am satisfied that the words "payable to" are directed only to an out-and-out payment with no obligation on the payee to return the money. As to the words "applicable "for the benefit of the settlor", I think that a loan may well benefit a person even if it is made at a commercial rate of interest, as it may tide

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him over a difficult period, but I do not think that if money is so lent it is applied "for the benefit of" the debtor within Sub-section (4).

Section 40 of the 1938 Act goes far to confirm me in the views which I have just expressed. I need not review its provisions in detail, but it would apply to any "capital sum", defined as meaning *inter alia* any sum paid by way of loan, which might be paid directly or indirectly, in any relevant year of assessment, by the Paris trustees to either of the Vesteys. To a limited extent, particularised in the Section, any such capital sum would be treated for all the purposes of the Income Tax Acts as the income of the recipient for that year. It seems to be incredible that the mere possibility of a loan being made should bring upon the settlor the severe consequences set out in Section 38 (4) if the actual making of a loan only brings about the less severe consequences set out in Section 40.

My Lords, I desire to confine my observations on Sub-section (4) to a case such as the present case, where any loan to either settlor must be made at a commercial rate of interest. Any case in which such a loan could be made free of interest can be dealt with as and when it arises.

Lastly, I should mention a contention on behalf of the taxpayers that Lord Vestey's executors could only be assessed in respect of income which was in fact income of Lord Vestey, and not in respect of income which was to be "treated" as his income under Section 38 of the 1938 Act, or "deemed to be" his income under Section 18 of the 1936 Act. This argument rests on the construction of Rule 18 of the General Rules in the First Schedule to the Income Tax Act, 1918. Such income, Mr. Tucker contended, was not income which "arose or accrued" to Lord Vestey within the meaning of Rule 18. In the events which have happened it is unnecessary for Mr. Tucker to rely upon this argument, but it may be put forward in some other case hereafter. This being so, I think it right to say that I cannot accept this argument and that in my view it gives too narrow a meaning to Rule 18. The same argument could have been advanced in *Cottingham's Executors* v. *Commissioners of Inland Revenue* [1938] 2 K.B. 689; [1939] 1 K.B. 250 (1), but was not advanced. In my view, however, if the argument now in question had been advanced in *Cottingham's* case, it would have been rightly rejected.

The result is that it is not established that any income received by the Paris trustees in any of the relevant years ought to be treated as the income of either Lord Vestey or Sir Edmund for the purposes of the Income Tax Acts.

My Lords, I am conscious that in arriving at this conclusion I am differing to a very large extent with the views of the majority of the Court of Appeal, and to a lesser extent with the views of Evershed, L.J., and that I have said very little about their judgments. These judgments have received my most careful and respectful consideration, and I have refrained from discussing them in detail for very simple and compelling reasons. No one of the learned Lords Justices thought that the power of the "authorised persons" to direct investment of the rent was a fiduciary power, and, thinking rightly that they were bound by *Gaunt's* case (2), they thought

(1) 22 T.C. 344. (2) 24 T.C. 69.

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that the word "wife", in the relevant Sections, included a widow of the settlor. Building on this foundation they naturally took a different view on several points from the view which I have expressed. It would therefore serve no useful purpose to discuss their judgments in detail.

In my judgment all the assessments in question should be discharged, the appeals by the taxpayers should be allowed with costs, and the cross-appeals by the Crown should be dismissed with costs.

Lord Reid.—My Lords, I agree with your Lordships and I only add a brief statement of my reasons in my own words because I am differing from the Court of Appeal on several difficult and important questions.

For the Crown to succeed in this case it must be shown that the facts bring the case within one or more of the provisions of Section 18 of the Finance Act, 1936, or Section 38 of the Finance Act, 1938. I shall refer to these two Sections simply as Section 18 and Section 38.

Section 18 applies if individuals ordinarily resident in the United Kingdom seek to avoid liability to Income Tax by transferring assets so that income becomes payable to persons resident out of the United Kingdom. It is not now denied that the late Lord Vestey and Sir Edmund Vestey were both ordinarily resident in the United Kingdom in December, 1921, and that they sought to avoid liability to Income Tax by transferring assets in that month so that income became payable to three persons resident in Paris who are referred to as "the Paris trustees". That being so the Section enacts: "(1) Where such an individual has by means of any such "transfer, either alone or in conjunction with associated operations, acquired "any rights by virtue of which he has, within the meaning of this section, "power to enjoy, whether forthwith or in the future, any income of a "person resident or domiciled out of the United Kingdom which, if it were "income of that individual received by him in the United Kingdom, would "be chargeable to income tax by deduction or otherwise, that income shall, "whether it would or would not have been chargeable to income tax apart "from the provisions of this section, be deemed to be income of that indi-"vidual for all the purposes of the Income Tax Acts."

For this Sub-section to come into operation an individual must acquire rights by virtue of which he has power to enjoy, within the meaning of the Section, income of a person resident or domiciled abroad. The phrase "power to enjoy" is expanded in Sub-section (3) to cover a variety of cases, and Sub-section (4) provides that: "In determining whether an "individual has power to enjoy income within the meaning of this section, "regard shall be had to the substantial result and effect of the transfer and "any associated operations", but there is nothing in the Section to expand, qualify or modify the requirement that the individual who is to be assessed must have acquired rights by virtue of which he has power to enjoy.

It is necessary therefore to determine the nature of the rights which the Vesteys acquired. After the execution of the lease on 29th December, 1921, and the deed of settlement on 30th December, 1921, the only rights relevant to the present case which the Vesteys had with regard to the moneys which came into the hands of the Paris trustees were rights to appoint certain funds to their issue, rights to appoint life interests to their

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widows, and a joint right to direct the investment of the settled fund. I think that these rights must be held to have been "acquired" by them within the meaning of this Section; these rights were brought into existence in connection with the transfer of assets whereby income became payable to the Paris trustees. No doubt the Vesteys gave up other and more extensive rights when they made the transfer but those were rights of a different character. Before the transfer there were no Paris trustees and there were no settled funds. The Vesteys' rights against those trustees and with regard to those funds must, I think, be held to have been acquired by means of the transfer in conjunction with the operations associated with it.

The next question is whether by virtue of any of these rights either of the Vesteys had, during any of the years with which this case is concerned, any power to enjoy any part of the income of the Paris trustees—bearing in mind the very wide meaning attached to the words "power to enjoy" by Sub-sections (3) and (4).

Before the first year with which this case is concerned, 1936-37, Lord Vestey had made an irrevocable appointment covering the whole of the funds which he was entitled to appoint to his issue and Sir Edmund Vestey had irrevocably appointed part of the funds which he was entitled to appoint to his issue. For the reasons which have been given by my noble and learned friend Lord Morton of Henryton I think that these appointments preclude any liability under Section 18 which might have arisen in their absence and I also agree with my noble and learned friend with regard to that part of the fund which Sir Edmund Vestey did not irrevocably appoint until 31st March, 1937.

Sir Edmund also released and extinguished his power to appoint an interest in favour of his widow, but Lord Vestey retained his power to appoint in favour of his widow. This power could only affect Lord Vestey's liability under Section 18 or Section 38 if references in those Sections to "wife" can be held to include "widow". Section 18 provides "(5) For "the purposes of this section—(*a*) a reference to an individual shall be "deemed to include the wife or husband of the individual". Section 38 (2) applies if in the event of the exercise of a power to revoke or otherwise determine the settlement or any provision thereof "the settlor or the wife or "husband of the settlor will or may become beneficially entitled" to property comprised in the settlement or income arising therefrom. Section 38 (4) deems the settlor to have an interest "if any income or property which "may at any time arise under or be comprised in that settlement is, or will "or may become, payable to or applicable for the benefit of the settlor or "the wife or husband of the settlor in any circumstances whatsoever".

I agree with your Lordships that references in the two Sections under consideration to the wife of a settlor do not include his widow. I do not find any clear indication in the Sections themselves of an intention either to include or to exclude widows. The learned judges who decided *Gaunt's* case (1) in the Court of Appeal took the view that "wife" was intended to include "widow", and if there were nothing beyond the terms

(1) 24 T.C. 69.

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of the Sections to point to the intention of the Legislature I might not venture to disagree, though I would have doubts. But there are two reasons which were not discussed in that case but which seem to me to be important. In the first place there is a very obvious reason why the Legislature should treat a benefit to a settlor's wife as equivalent to a benefit to the settlor. In the great majority of cases a husband does in fact derive benefit from a pecuniary benefit to his wife; indeed the benefit to a husband arising from such a benefit to his wife may often be as great or almost as great as if that benefit has accrued directly to him. This fact is recognised in the rule that for Income Tax purposes the incomes of husband and wife are in the general case treated as one. But there is no obvious reason why a benefit to a settlor's widow should be treated as a benefit to him; he can never enjoy it directly or indirectly. It is of great importance to a husband that his wife should be provided for after his death—so it is also that his children should be provided for—but the benefit to the husband from making such provision is of an entirely different kind from the benefit which he can enjoy from a provision to his wife while he is alive. It is not something which could reasonably be regarded as part of his income.

The second reason arises in this way. The argument for the Crown in this case was that "wife" means the person who is the settlor's wife during the particular year of assessment, and that if a benefit may come to her in the future it matters not whether her husband is then alive or dead; she is still the same person and it is the benefit to her that the statute is concerned with. It was admitted that this view must lead to the result that if in a particular year of assessment the settlor is unmarried, there is no wife in that year to whom the Section can apply. So if a bachelor or a widower makes a settlement which contains a provision for sums being set aside to provide payments to his wife during his lifetime, those sums would not be deemed to be part of his income unless or until he married. It appears to me in the highest degree unlikely that this was the intention of the Legislature, but no way was suggested by Counsel of avoiding this result if the argument for the Crown is well founded. This difficulty confirms me in my view that "wife" was never intended in these Sections to include "widow", and of course the same argument applies to husband and widower.

There remains the joint right to direct investment of the settled fund. I agree with your Lordships that this must be held to be a right of a fiduciary character. It was argued for the Crown that there was plainly a comprehensive plan by the Vesteys so to deal with their assets as to minimise their liability to pay taxes in the United Kingdom and at the same time to retain control over the use of those assets. This, it was said, shows that the power to direct investment was intended to be a power which the Vesteys could use for their own purposes and not one which they must use in the interests of the beneficiaries. I think that there is a two-fold answer to this argument. In the first place the words of the deed point so clearly to the power being a fiduciary one that it is not relevant to consider other matters; but if it were relevant I should not accept the inference sought to be drawn from them. It may well be that the Vesteys'

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advisers deliberately introduced a fiduciary power having in mind that death duties were payable on settled property unless it was retained by trustees to the entire exclusion of any benefit to the settlor by contract or otherwise. If this right or power to direct investment is fiduciary I find it very difficult to see how it could confer any power to enjoy income within the meaning of Section 18. It is possible that a person having a fiduciary right may misuse it for his own benefit but he would not then get the benefit by virtue of his right and Section 18 would not apply to it. But I need not pursue this matter because I agree that a right which an indivi-vidual can only exercise in conjunction with some other person is not a right by virtue of which he has power to enjoy anything within the meaning of this Section. I think that it is plain that in Section 18 the singular "indi-"vidual" does not include the plural. The Section is referring to the individual whose taxable income is being determined and to him alone.

I am therefore of opinion that none of the assessments under appeal which were made under Section 18 can stand and I turn to consider the case under Section 38. Sub-section (1) admittedly does not apply to this case. Section 38 (2) involves issues of a different character. It must be considered in conjunction with the definition of settlement in Section 41. It enacts: "If and so long as the terms of any settlement are "such that—(*a*) any person has or may have power, whether immediately "or in the future, and whether with or without the consent of any other "person, to revoke or otherwise determine the settlement or any provision "thereof; and (*b*) in the event of the exercise of the power, the settlor or "the wife or husband of the settlor will or may become beneficially entitled "to the whole or any part of the property then comprised in the settlement "or of the income arising from the whole or any part of the property so "comprised; any income arising under the settlement from the property "comprised in the settlement in any year of assessment or from a corres-"ponding part of that property, or a corresponding part of any such in-"come, as the case may be, shall be treated as the income of the settlor for "that year and not as the income of any other person".

Section 41 (4) (*b*) enacts: "The expression 'settlement' includes any "disposition, trust, covenant, agreement or arrangement, and the expression "'settlor' in relation to a settlement means any person by whom the settle-"ment was made".

Reading the Sub-section at least four questions suggest themselves: (1) What is included in the settlement? (2) Is there any power in any person to revoke or otherwise determine the settlement or any provision of it? If there is such a power, (3) what is the property comprised in the settlement? And (4), in the event of the power being exercised, may the settlor become beneficially entitled to any of that property or of the income arising from it? This Sub-section was fully considered by this House in *Chamberlain* v. *Commissioners of Inland Revenue*, 25 T.C. 317. In that case the settlor formed a company called Staffa with an unusual structure so that he retained control of the company. He then sold to it a number of shares in Commercial Structures, Ltd. which yielded a considerable income, and acquired a number of shares in Staffa. He then transferred to trustees for his family a sum which they invested in shares in Staffa. This was in

(Lord Reid.)

March, 1936, and apparently the terms of this trust were not thought to be suitable for his purpose. So in December, 1936, he caused the ordinary shares of Staffa to be divided into five classes each of which was only to be entitled to such dividend as the company in general meeting should determine. No dividend was ever paid on the A shares held under the earlier trust, but four more trusts were set up for each of the settlor's infant children. These trusts were declared irrevocable and the trustees directed to accumulate the income. The trustees under these trusts invested further sums supplied by the settlor in B, C, D and E shares in Staffa. Dividends were paid on those shares, and reinvested by buying more shares in Staffa.

It was contended for the Crown that in view of the terms of Section 41 (4) (*b*) the whole of these operations must be regarded as the arrangement or settlement so that the whole assets of Staffa were property comprised in the settlement and the whole income of Staffa was income arising under the settlement and therefore to be treated as income of the settlor. That contention was held to be wrong. Lord Thankerton said (1) that the formation of Staffa was "part of the arrangement conceived by the Appellant, whereby a convenient and profitable investment was made available "for the moneys respectively settled under the five deeds of settlement . . . "the sums settled under these deeds were the funds provided for the purpose of the settlement". Lord Macmillan said, at page 331, referring to *Morton's* case 1941, S.C. 467; 24 T.C. 259, "I agree with Lord Moncrieff "that the settlement or arrangement must be one whereby the settlor "charges certain property of his with rights in favour of others . . . " and later he said (2), "It is, I think, fallacious to confuse the steps taken by the "Appellant with a view to effecting a settlement or arrangement with the "settlement or arrangement itself . . . It was not until he granted the trust "deeds that he entered the legal stage of the settlement. All that he did "previously was preparatory to making settlements." Lord Romer said (page 334): "If a man enters into a contract to buy 1,000 shares in a "company with a view to settling 500 of them on his daughter and does "so settle the 500 shares by deed, it may well be that consistently with "Section 41 (4) (*b*) of the Finance Act, 1938, the settlement can be described as consisting of the contract and the deed together. But the property "comprised in the settlement is the 500 shares settled by the deed and not "the whole of the 1,000 shares."

I think that *Chamberlain's* case shews that the most profitable course to follow is first to determine what was the property comprised in the settlement, and that the way to find that property is to look for property charged with rights in favour of beneficiaries. I do not think that any hard and fast rule is laid down in *Chamberlain's* case. The ingenuity of those who devise these schemes is such that it might be rash to say that property can never be comprised in a settlement unless it is charged with rights in favour of others, but I think that as a general rule this must now be the test.

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(1) 25 T.C., at p. 329. (2) *Ibid.*, at p. 332.

(Lord Reid.)

The Solicitor-General sought to distinguish *Chamberlain's* case[1] on the ground that in that case there was no finding that there was an "arrange-"ment" comprising anything more than the deeds of settlement, and that in this case he was free to argue that there was an "arrangement" within the meaning of the Act which comprised both the deed of settlement and the lease, and then to proceed that as the stations were comprised in the lease they were therefore comprised in the arrangement and were therefore property comprised in the settlement within the meaning of Section 38 (2). But in my view that is just the argument which was rejected by this House and I am satisfied that the decision in *Chamberlain's* case makes it impossible in this case to hold that any property was comprised in the settlement other than that which the Paris trustees were entitled to get under the deed of settlement. I think that it follows that the Crown case fails on the double ground that the power to determine the lease on six months' notice was not a power within the meaning of Section 38 (2) (*a*) to revoke or otherwise determine the settlement or any provision thereof, and that if the lease were determined the Vesteys would not, as required by Section 38 (2) (*b*), become beneficially entitled to any part of the property comprised in the settlement or of the income arising therefrom.

There remains only the claim under Sub-sections (3) and (4) of Section 38. Sub-section (3) would only apply if the Vesteys had "an interest in "any income arising under or property comprised in" the settlement. If the stations had been property comprised in the settlement the Vesteys would have had such an interest, because they remained owners of the stations and on the termination of the lease they were entitled to resume possession of them. But on the footing that the property comprised in the settlement is only that which the Paris trustees were entitled to get under it, the Vesteys had no interest in that property or in the income arising under the settlement. Sub-section (4) provides: "For the purpose of the last "foregoing subsection, the settlor shall be deemed to have an interest in "income arising under or property comprised in a settlement, if any income "or property which may at any time arise under or be comprised in that "settlement is, or will or may become, payable to or applicable for the "benefit of the settlor or the wife or husband of the settlor in any circum-"stances whatsoever".

The only way in which any part of the sums which the Paris trustees got under the settlement could become in any sense "payable to or appli-"cable for the benefit of" the Vesteys would be by means of a loan to them. If I am right in thinking that the Vesteys' power to direct investment of the settled fund was of a fiduciary character then no loan could lawfully be made of the trust funds to the Vesteys except at a commercial rate of interest. I do not think that such a loan could come within the scope of Section 38 (4), especially as loans are separately dealt with in Section 40. I find it impossible to hold that a sum of money lent at a commercial rate of interest is "payable to or applicable for the benefit of" the borrower in the sense of this Section.

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[1] 25 T.C. 317.

(Lord Reid.)

I am therefore of opinion that none of the assessments under appeal which were made under Section 38 can stand and I agree that the appeal must be allowed.

Lord Simonds.—My Lords, I beg to move that the report of the Appellate Committee be agreed to.

Questions put:

That the report of the Appellate Committee be agreed to.

The Contents have it.

Executors of Lord Vestey and Another

v.

Commissioners of Inland Revenue, et e contra

That the Order appealed from be reversed in so far as it was thereby declared that Lord Vestey was liable to Sur-tax and in so far as it was thereby declared that Sir Edmund Vestey is liable to Sur-tax.

The Contents have it.

That the assessments to Sur-tax made under the Finance Act, 1938, be discharged.

The Contents have it.

That the Respondents in the original appeal do pay the Appellants in the original appeal their costs here and below, and that the cross-appeal be dismissed with costs.

The Contents have it.

Executors of Lord Vestey and Another

v.

Colquhoun (*Inspector of Taxes*), et e contra

That the Order appealed from be reversed in so far as it was thereby declared that Lord Vestey was liable to Income Tax and in so far as it was thereby declared that Sir Edmund Vestey is liable to Income Tax.

The Contents have it.

That the additional assessments to Income Tax made under the Finance Act, 1938, be discharged.

The Contents have it.

That the Respondent in the original appeal do pay the Appellants in the original appeal their costs here and below, and that the cross-appeal be dismissed with costs.

The Contents have it.

Executors of Lord Vestey and Another

v.

Commissioners of Inland Revenue (Second Appeal)

That the Order appealed from be reversed.

The Contents have it.

That the additional assessments to Income Tax and the assessments to Sur-tax made under the Finance Act, 1936, be discharged.

The Contents have it.

That the Respondents do pay the Appellants their costs here and below.

The Contents have it.

[Solicitors:—Chas. H. Wright & Brown; Solicitor of Inland Revenue.]

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