VOL. XXXII—PART IV

No. 1462—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—17TH, 18TH AND 24TH MARCH, 1947

COURT OF APPEAL—12TH, 13TH AND 27TH JULY, 1949

HOUSE OF LORDS—13TH, 14TH AND 15TH NOVEMBER AND 14TH DECEMBER, 1950

(1) Latilla *v.* Commissioners of Inland Revenue (No. 2) [1]

(2) Latilla-Campbell *v.* Commissioners of Inland Revenue [1]

(3) Mayo *v.* Commissioners of Inland Revenue [1]

Surtax—Undistributed income of company—Appeal against apportionments of income remitted by High Court to Special Commissioners for further consideration—Right of appeal against amended apportionments—Income apportioned to married woman—Whether assessable on husband—Finance Act, 1922 (12 & 13 *Geo.* V *c.* 17), *Section* 21 *and First Schedule; Finance Act*, 1927 (17 & 18 *Geo.* V, *c.* 10), *Section* 31; *Income Tax Act*, 1918 (8 & 9 *Geo.* V, *c.* 40), *Section* 133 *and General Rules, Rule* 16; *Finance Act* 1936 (26 *Geo.* V & 1 *Edw.* VIII, *c.* 34), *Section* 19 (5).

In each case the wife of the Appellant was, and the Appellant was not, a member of a company to which a direction under Section 21 *of the Finance Act*, 1922, *had been given and whose actual income for the relevant period had been apportioned among its members in accordance with their respective interests.*

The company had in the first place appealed against apportionments of its income for the period in question and the Special Commissioners had discharged the apportionments. The Crown had appealed against this decision and the case had been remitted by the High Court to the Special Commissioners for fresh apportionments on a basis which the Court indicated. This decision had been upheld in the Court of Appeal and the House of Lords (see Commissioners of Inland Revenue *v.* F.P.H. Finance Trust, Ltd. (in liquidation) (No. 2), 28 T.C. 209).

At a meeting held in pursuance of the Order of Court the Special Commissioners amended the apportionments in accordance with the principles laid down. The company contended that it had a right of appeal against the amended apportionments, but the Special Commissioners rejected this contention. The Company gave notice of appeal but did not demand a Case.

On appeal against the consequent assessments to Surtax made on them in the name of the company, the Appellants contended:—

(1) *that the amended apportionments were fresh apportionments against which the company was entitled to appeal and that, the*

[1] Reported (C.A.) [1949] 2 All E.R. 589; (H.L.) [1951] A.C. 421.

company having given notice of appeal, there could be no valid assessments upon members until that appeal had been heard and determined, and alternatively,

(2) *that an assessment to Sur-tax in respect of income apportioned to a member of a company could be made only upon the member, and not, where the member was a married woman living with her husband, upon her husband.*

Held, *that the assessments to Surtax had been correctly made.*

CASES

(1) LATILLA *v.* COMMISSIONERS OF INLAND REVENUE (No. 2)

CASE

Stated under the Finance Act, 1927, Section 42 (7), 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 5th November, 1945, H. G. Latilla (hereinafter called "the Appellant") appealed against an assessment to Surtax made upon him for the year 1936-37 in the sum of £285,996.

The said assessment was made under Section 21 (1) of the Finance Act, 1922, as amended by Section 31 (2) of the Finance Act, 1927, in respect of the amount of the actual income of F.P.H. Finance Trust, Ltd. (in liquidation) apportioned in the said sum to Mrs. E. M. Latilla, the wife of the Appellant, following a direction under the said Section 21 (1) of the Finance Act, 1922.

2. The grounds of the appeal were that in the circumstances hereinafter set forth (including previous litigation affecting the taxation of the said company and its members under the said Section and an Order of the High Court made in the course of such litigation and a previous decision of the Special Commissioners acting or purporting to act in pursuance of the said Order) there had been neither an effective direction nor a final apportionment under the said Section 21, and that the assessment to Surtax made upon the Appellant was therefore bad in law; and, alternatively, that the apportionment of the amount in question having been made to Mrs. E. M. Latilla as a member of F.P.H. Finance Trust, Ltd., there was no authority to assess the Appellant (who was not a member) to Surtax in respect thereof and the assessment was therefore bad in law.

3. F.P.H. Finance Trust, Ltd., went into liquidation on 1st April, 1938. The National Mining Corporation, Ltd., which had owned the ordinary shares, was repaid £1,000, the whole amount to which they were entitled in a winding-up, and the balance of the assets was distributable among and in fact distributed to the three holders of the preference shares, of whom Mrs. E. M. Latilla was one.

The Appellant was not a member of F.P.H. Finance Trust, Ltd.

4. In July, 1941, F.P.H. Finance Trust, Ltd. (in liquidation) (hereinafter called "the company"), appealed to the Special Commissioners of Income Tax against a direction and apportionments made under Section

21 of the Finance Act, 1922, and Paragraph 8 of the First Schedule thereto in respect of the period 1st April, 1935, to 31st December, 1936.

Alternative apportionments had been made, but the Crown relied on the second apportionment only, which was as follows:—

	£	s.	d.
National Mining Corporation, Ltd.	100	0	0
Mrs. E. M. Latilla	286,296	5	0
Mrs. E. Mayo	286,210	7	6
Mrs. G. Latilla-Campbell	286,210	7	6

The grounds of the appeal were (1) a preliminary point that in the circumstances stated the Special Commissioners were precluded by Section 18 of the Finance Act, 1928, from making the direction and apportionments, and (2)—as regards the said second apportionment—that it was not in accordance with Paragraph 8 of the First Schedule to the Finance Act, 1922, and was accordingly bad.

The Special Commissioners who heard the appeal decided against the company on the preliminary point. They expressed doubt as to the validity of the direction because although they were satisfied that the company had not distributed to its members a reasonable part of its actual income any larger distribution of income would have gone to the National Mining Corporation, Ltd., and would not in their hands have been assessable to Surtax. The Special Commissioners were of opinion that in any event neither of the alternative apportionments (without which the directions were ineffective) could be sustained. On these points their decision was worded as follows:—

"There was, therefore, whatever allowance be made for factors "which might justify some limit to a dividend, a failure to distribute "anything remotely related to a reasonable part of the Company's "income.

"But in our opinion it is doubtful whether this failure can justify "action under Section 21 of the Finance Act, 1922, inasmuch as any "larger distribution of income would have gone to the National "Mining Corporation, Ltd. and would not in their hands be assess-"able to Sur-tax.

"However, even if the direction be good, we are of opinion that "neither of the alternative apportionments (without which the direc-"tions are ineffective) can be sustained. The first apportionment was "based on the presumption that Mr. Latilla"—the Appellant—"was "beneficially interested in the Appellant Company but no evidence to "justify this presumption was adduced.

"The second apportionment was supported on the ground that, "in ascertaining 'the respective interests of the members' referred to "in Paragraph 8 of the First Schedule, it is permissible to have "regard not merely to the income rights while the Company remains "in existence but also to income accumulating and enuring for the "benefit of members with rights to a distribution of surplus assets "on a winding-up.

"After considering all the relevant statutory provisions we are "unable to accept this construction.

"We therefore discharge the apportionments."

In due course as required by the Crown they stated a Case, bearing date 19th June, 1942, for the opinion of the High Court.

5. The case came on for hearing in the High Court in October, 1942. As the Special Commissioners, while expressing doubt as to the validity of the direction, had not come to any decision thereon and as the Company desired to contest the matter it was agreed between the parties by leave of the Court to amend the Stated Case by adding two supplementary paragraphs. A copy of the said Case showing the amendments in red ink is annexed, marked " A ", and forms part of this Case (1).

The first supplementary paragraph is as follows:—

" 20. The Special Commissioners shall be taken to have dismissed " the Respondent's "—*i.e.*, the company's—" appeal against the directions " made pursuant to Section 21 of the Finance Act, 1922, and to have " confirmed the same, and the Respondent shall be treated as having ex- " pressed dissatisfaction with their determination and as having appealed " to the High Court against such determination upon the grounds stated " in paragraph 15, sub-paragraphs (*a*), (*b*) and (*c*) hereof."

6. On 26th October, 1942, judgment was given by the Court in favour of the Crown on all points, the Court holding, as regards apportionment, that the Special Commissioners were not as a matter of law precluded from taking liquidation rights into consideration in determining the respective interests of the members. An Order pursuant to the judgment was entered on 12th November, 1942. A copy of the said Order is annexed, marked " B ", and forms part of this Case (1).

Appeals were taken by the company to the Court of Appeal and thereafter to the House of Lords, in both of which the judgment of the High Court was confirmed.

7. The said Order of the High Court, after recital set forth therein, proceeds as follows:—

" Now the Court is of opinion that the determination of the said " Commissioners "—*i.e.*, the Commissioners who had stated the Case— " is erroneous and allowing this appeal doth reverse the said deter- " mination accordingly and doth order that the cross-appeal of the " Respondent the F.P.H. Finance Trust Limited (in liquidation) be " and the same is hereby dismissed.

" And it is further ordered that the said case be remitted to the " said Commissioners for their further consideration and also to make " the proper apportionments."

8. On 24th February, 1943, the Special Commissioners who had stated the Case as aforesaid held a meeting with a view to considering the matter further and making the proper apportionments, as required by the Order.

Objection to such proceedings was taken on behalf of the company on the ground that they were not in accordance with the Order of Court. The said Commissioners therefore heard argument as to the meaning and effect of the said Order.

9. It was contended for the company that the original apportionments had been discharged and had not been restored by the High Court; that the Order of Court referred the case back to the Special Commissioners of Income Tax as a body for apportionments to be made (whether by the same Commissioners who had stated the Case, or by other Com-

(1) Not included in the present print.

missioners) as an administrative act in accordance with Paragraph 8 of the First Schedule to the Finance Act, 1922; that, consequently, notice of such apportionments, when made, was required to be given in terms of Paragraph 10 of the same Schedule, and that under the said Paragraph 10 the company was entitled to appeal to the Special Commissioners, with further recourse, if necessary, to the High Court.

10. It was contended for the Crown that the High Court had reversed the determination of the Special Commissioners who had stated the Case that the apportionments be discharged, and that the Order of Court referred the Case back to the same Commissioners to consider the matter further in their appellate capacity and in that capacity make the proper apportionments.

11. The opinion of the Special Commissioners (being the Commissioners who had stated the aforesaid Case) and the action taken by them are set forth in paragraph 13 below. In brief, after hearing representations as to the basis of any apportionment they made apportionments as final apportionments, holding that they were required so to do by the Order of Court, and consistently therewith they refused an application made for the company that notice of the said apportionments should be given under Paragraph 10 of the First Schedule to the Finance Act, 1922.

12. The representations as to the proper basis of apportionment made for the company (which were rejected by the Commissioners) were put forward as without prejudice to the right of appeal which the company claimed, and which in the circumstances the Commissioners held not to exist.

13. The apportionments of the income of the company (£858,817) were announced by the aforesaid Special Commissioners in the following terms: "The only thing we have to do, and the only duty cast on us "here, is to deal with the question of apportionment and nothing else. We "can apportion in two ways. What we propose to do is to apportion the "total income of £858,817 in accordance with, as Mr. Justice Wrottesley "said, the rights of the shareholders in a liquidation. That will mean, of "course, that the first apportionment has gone, and the second one has "gone, and the true apportionment on our view of the matter will be to "apportion £1,000 to the National Mining Corporation, that being the "amount of the capital and the utmost they can get in a winding-up, and "to apportion the balance between Mrs. Latilla, Mrs. Mayo and Mrs. "Latilla-Campbell. According to my calculations the apportionment will "then be:—

"The National Mining Corporation ...	£1,000	0	0
"Mrs. E. M. Latilla	285,996	5	0
"Mrs. E. Mayo	285,910	7	6
"Mrs. G. Latilla-Campbell	285,910	7	6
"That makes up a total of	£858,817	0	0"

Assessments to Sur-tax were made under Section 21 of the Finance Act, 1922, on the husbands of the three ladies respectively in the amounts set forth.

14. On 1st March, 1943, a letter was addressed by the Special Commissioners of Income Tax to Messrs. Allen, Baldry, Holman & Best, the company's accountants. A copy of this letter and of correspondence which

followed thereupon is annexed, marked "C", and forms part of this Case (1).

The said letter of 1st March states that "in compliance with the "ruling of the High Court (King's Bench Division) given on 26th October "last the apportionment of the Company's income for the period 1st April, "1935, to 31st December, 1936, was amended by the Appeal Commis- "sioners at their meeting held on 24th February, as follows . . .", and the figures are then given as in paragraph 13 above.

The letter further states that "the consequential liability to Sur-tax "under the provisions of Section 21 is computed" for the year 1936-37 in figures set forth, for the husbands of the ladies respectively, that assessments have been made accordingly, and that notices of assessment have been forwarded to the clients of the addressees.

15. On 12th March, 1943, a letter was addressed by the solicitors to the liquidators of the company to the Special Commissioners of Income Tax. It raises a question as to the intention of the letter of 1st March referred to above, and concludes as follows:—

> "If however your letter of the 1st inst. is intended to be a notice "of apportionment given pursuant to the provisions of Paragraph 10 "of the First Schedule to the Finance Act, 1922, we, as Solicitors to "the Liquidators and upon their instructions, hereby give notice of "appeal against such apportionment upon the ground that it is "erroneous in law and has not been made in accordance with the "respective interests of the Members of the Company."

16. On 17th March, 1943, a letter was addressed by the Special Commissioners of Income Tax to the solicitors. It stated that "the letter "of 1st March from this office addressed to Messrs. Allen, Baldry, Holman "& Best was not intended as a notice of apportionment and no right of "appeal against the apportionment therefore arises."

A further letter from the Special Commissioners, dated 14th May, states that "their letter of 1st March, 1943, purports to be nothing more "than a letter informing Messrs. Allen, Baldry & Co. of what had been "done by the Special Commissioners in pursuance of the ruling of the "High Court and of the computations of Sur-tax liability."

17. It was contended on behalf of the Appellant:—

(1) that the Special Commissioners who stated the Case *Commissioners of Inland Revenue* v. *F.P.H. Finance Trust, Ltd.* (in *liquidation*) did not confirm the direction on the company; that, although the parties to that case agreed that they should be taken to have confirmed it, such agreement did not deprive the Appellant, who was not a party to the said litigation, of any rights he might have in the matter; and that there was in existence no effective direction as required for the purpose of a charge to Surtax under Section 21 of the Finance Act, 1922;

(2) that on 24th February, 1943, the Special Commissioners in accordance with the Order of Court remitting the aforesaid case made what was, and could only be, a fresh apportionment open to appeal in accordance with the provisions of Paragraph 10 of the First Schedule to the Finance Act, 1922;

(3) that the letter of 1st March, 1943, addressed by the Special Commissioners of Income Tax to the company's accountants was a notice of apportionment in accordance with the said Paragraph 10;

(1) Not included in the present print.

(4) that notice of appeal had been given by the company against the apportionment, and that until the appeal was heard and determined, there was no final apportionment on which Sur-tax assessments could be based; and that accordingly the assessment made upon the Appellant was bad and should be discharged;

(5) alternatively that, even if the pre-requisites to assessment to Sur-tax under Section 21 of the Finance Act, 1922, be held to be satisfied, such assessment can only be made on a member of the company to whom an amount of the company's income has been apportioned; that there is no provision that where a wife is the member, the husband shall be deemed to be a member in her place; that, on consideration of all the relevant statutory provisions, income apportioned to a wife is not to be deemed the husband's income within the meaning of Rule 16 of the General Rules, Income Tax Act, 1918; and that consequently the assessment made upon the Appellant was bad in law and should be discharged.

18. It was contended on behalf of the Crown:—

(1) that the original direction made on the company had never been set aside; that as regards the appeal against the direction the company was *dominus litis* and could have withdrawn the appeal altogether; that, on the parties to the case *Commissioners of Inland Revenue* v. *F.P.H. Finance Trust, Ltd.* (*in liquidation*) having agreed and the High Court having ordered that the Special Commissioners should be taken to have confirmed the said direction and that the Stated Case should be amended accordingly, the company's objections to the direction were held by the Court to be bad; and that consequently the direction stood and was effective;

(2) that the Special Commissioners, in making the apportionments referred to in paragraph 11 hereof, accepted the validity of, and acted upon, the original direction; that the company might then have asked for a Special Case to be stated for the Court as to the validity of the direction, but did not do so; and for this reason also the direction stood and was effective;

(3) that under the Order of Court the said case went back, as it could only go back, to the Special Commissioners who had stated the Case in their judicial capacity;

(4) that the said Order, in reversing the determination of the said Commissioners, re-established the original apportionments subject to further consideration by the said Commissioners and required the said Commissioners to resume the hearing of the original appeal to consider further the original apportionments and to make the proper apportionments which would supersede the original apportionments if the latter needed correction;

(5) that the said Commissioners had so done, as required, and that, the company not having asked for a Special Case to be stated for the Court, the apportionments made by the said Commissioners held the field and could not be objected to at a later stage;

(6) that the provisions of Section 21 of the Finance Act, 1922, have to be read in the light of Rule 16 of the General Rules, Income Tax Act, 1918, and also in the general context of the Income

Tax Acts, and that, so read, they authorise assessment on a husband in respect of income apportioned to his wife;

(7) that, consequently, the assessment made on the Appellant was in every respect good in law, was correctly made in the amount of the income apportioned to his wife, and should be confirmed.

19. The appeal of the Appellant, H. G. Latilla, was heard by us together with appeals by Eric S. Mayo and Edmund G. Latilla-Campbell, to whose wives respectively income of the company had been apportioned, as set forth in paragraph 13 of this Case. Our decision as set forth in paragraph 20 following dealt with the three appeals together, precisely the same questions being at issue in each case.

20. We, the Commissioners who heard the appeal of the Appellant together with the two other aforesaid appeals, gave our decision as follows:—

(1) The first grounds of appeal in the cases before us are that the pre-requisites to assessment under Section 21 of the Finance Act, 1922, are lacking, *viz.*, an effective direction and a final apportionment under the said Section.

(2) By an Order of Court dated 12th November, 1942, the case *Commissioners of Inland Revenue* v. *F.P.H. Finance Trust, Ltd. (in liquidation)* was remitted to the Special Commissioners "for "their further consideration and also to make the proper appor- "tionments".

(3) The Commissioners who had stated the said Case held a meeting on 24th February, 1943, and heard argument as to the meaning and effect of the Order.

For the company it was contended that the proceedings directed under the Order were not appeal proceedings and that any apportionment made by the said Commissioners must be subject to an appeal under the provisions of Paragraph 10 of the First Schedule to the Finance Act, 1922.

The contention for the Crown was to the contrary in both respects.

(4) The said Commissioners were clearly of opinion, having regard to the terms of the Order, that it was addressed to themselves and that they were required by mandatory direction, still acting as an appellate tribunal in appeal proceedings, to consider the case further and make the proper apportionments; consequently those apportionments, so far as the Special Commissioners of Income Tax were concerned, would be final and not subject to appeal under the provisions of the aforesaid Paragraph 10.

(5) Certain representations were made for the company as to the basis on which any apportionment should be made. These were put forward as without prejudice to the right of appeal which the company claimed (see paragraph (3) above).

(6) After hearing these representations and the contentions for the Crown, the Commissioners proceeded to make apportionments as final apportionments, the previous apportionments being expressed by them as having gone. They refused an application made for the company that notice of the apportionments should be given in accordance with the aforesaid Paragraph 10.

(7) In our opinion this decision by the Commissioners was not open to review or revision by any means except that of action before the Courts. No steps were taken to bring such action and the apportionments therefore stand and are final.

(8) Our attention has been drawn to a letter of 1st March, 1943, addressed by the Special Commissioners of Income Tax to the company's accountants. We hold, however, that this letter was not intended to be, and did not in fact constitute, a notice of apportionment under the aforesaid Paragraph 10, and that the notice of appeal purported to be given against the apportionment was of no effect.

(9) Argument has been addressed to us on the question whether the Commissioners acting on 24th February, 1943, correctly interpreted the Order of Court and acted within their competence. On consideration, and in accordance with our opinion expressed in paragraph (7) above, we do not think that this question is proper to be raised before us, or that we can take cognisance of the arguments thereon.

(10) As regards the direction against the company precedent to the original apportionment, it has never been set aside, and we think it clear, having regard to the whole history of the case, that it stands and is effective.

(11) The further ground of the appeals before us is that, apportionments having been made to the wives as "members" of the company, Section 21 of the Finance Act, 1922, requires any consequent assessment to be made on them, and does not allow assessments to be made on their husbands.

(12) The difficulty of applying the words of Rule 16 of the General Rules to all Schedules, Income Tax Act, 1918 (which lay down the general principle that "the profits of a married woman living "with her husband shall be deemed the profits of the husband, "and shall be assessed and charged in his name") to the provisions of the Income Tax Acts which relate to assessment, etc., is by no means confined to cases arising under Section 21 of the Finance Act, 1922, although it arises there in a somewhat acute form. Sub-section (2) of that Section provides that any Surtax chargeable under the Section "in respect of the amount "of the income of the company apportioned to any member of "the company, shall be assessed upon that member in the name "of the company", and throughout the Section is in terms directed to the members of the company.

(13) On the other hand the concluding words of Sub-section (1)—carried in by Section 31 (2) of the Finance Act, 1927—the words of Sub-sections (2) and (4), and those of Paragraph 8 of the First Schedule, bring the Surtax assessed under the Section into relation with the general provisions of the Acts relating to Surtax and assessments thereunder. They cannot in our opinion be reconciled with those general provisions (as affected by Rule 16, which is without question there to be applied) unless they are understood as contemplating assessment on the husband in cases where an apportionment has been made on the wife as a member of the company.

It was not contended for the Appellants that the income apportioned to their respective wives should not be treated as

part of the Appellants' income for the purpose of determining the rate of tax on the apportioned income (see especially Paragraph 8 of the First Schedule). In our view it is difficult to avoid the further step that the apportioned income is to be treated as the Appellants' income for the purpose of assessment upon them.

(14) On consideration of all the arguments addressed to us we conclude that the assessments to Surtax made upon the Appellants are authorised by Section 21 of the Finance Act, 1922, when read in the context of Rule 16 and of the general provisions relating to the Surtax.

(15) The appeals therefore fail on all grounds and we confirm the assessments.

21. The Appellant immediately after the determination of his appeal declared to us his 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.

G. R. HAMILTON, } Commissioners for the Special Purposes
H. H. C. GRAHAM, } of the Income Tax Acts.

Turnstile House,
94/99 High Holborn,
London, W.C.1.
8th October, 1946.

---

(2) *Latilla-Campbell* v. *Commissioners of Inland Revenue*
(3) *Mayo* v. *Commissioners of Inland Revenue*

The facts and the decisions of the Commissioners in these two Cases were similar to those in the first Case.

The cases came before Atkinson, J., on 17th and 18th March, 1947, when judgment was reserved. On 24th March, 1947, judgment was given in favour of the Crown, with costs.

Mr. Terence Donovan, K.C., and Mr. L. C. Graham-Dixon 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.

Atkinson, J.—This appeal concerns the profits made by the F.P.H. Finance Trust, Ltd., during a period ending on 31st December, 1936. The company carried on the trade of financing and dealing in shares of gold mining companies, and on that date there was a sum of £858,817 standing to the credit of the profit and loss account which could have been properly, if not wisely, distributed in dividends as on that date.

At that time the preference share capital consisted of 10,000 £1 shares, and they were all held by the Latilla family. Mrs. Latilla held 3,334, her daughter, Mrs. Mayo, held 3,333, and another daughter, Mrs. Latilla-

(Atkinson, J.)

Campbell, held 3,333. The ordinary share capital consisting of 1,000 £1 shares was held by the National Mining Corporation, Ltd. The preference shares had the right to a fixed cumulative dividend of 5 per cent., and the right to the surplus assets in a liquidation after payment to the ordinary shareholders of the amount paid up on their shares. The ordinary shareholders had the right to the whole of the sums declared in dividends, subject to the 5 per cent. preference dividend, and in a winding-up to the return of their capital.

On 12th October, 1937, the company adopted the accounts for the period of 21 months from 1st April, 1935, to 31st December, 1936, and declared the preference dividend at 5 per cent. and a dividend of 10 per cent. on the ordinary shares, representing a distribution of £146 11*s.* 6*d.* in all. The company incurred losses in 1937 and went into liquidation on 1st April, 1938. Notwithstanding those losses the preference shareholders received considerable sums in the winding-up.

Clearly the object of the scheme was that the profits made by the company would not be received by the shareholders as income subject to taxation, but in a form in which they would not be so subject, namely, a distribution of assets in the winding-up.

To defeat the evasion of payment of Super-tax by withholding the distribution of income of a company which would normally be distributed Section 21 of the Finance Act, 1922, was enacted. That Section provides: "With a view to preventing the avoidance of the payment of super-tax "through the withholding from distribution of income of a company which "would otherwise be distributed, it is hereby enacted as follows . . .". I need not read the Section, I think I can condense it. It gave to the Special Commissioners power, where they thought an insufficient dividend had been distributed, to apportion to the persons interested the entire sum which might have been distributed as income. It is important to notice—this is one of the points relied upon—that the expression "members of the "company" comes in again and again. The Commissioners might direct that "for purposes of assessment to super-tax, the said income of the "company shall, for the year or other period specified in the notice, be "deemed to be the income of the members, and the amount thereof shall "be apportioned among the members and super-tax shall be assessed and "charged under the provisions of this section in respect of the sum so "apportioned", and so on. Then Sub-section (2) provided that Super-tax on the apportioned sum should be payable by the company. The shareholders were free to pay, but if they did not pay the company had to pay. Sub-section (3) provided: "A notice of charge to super-tax under this "section shall in the first instance be served on the member of the com-"pany on whom the tax is assessed, and if that member does not within "twenty-eight days from the date of the notice elect to pay the tax a "notice of charge shall be served on the company". Sub-section (4) says: "Any undistributed income which has been assessed and charged to super-"tax under this section shall, when subsequently distributed, be deemed "not to form part of the total income from all sources for the purposes "of super-tax of any individual entitled thereto."

Then there are three Paragraphs in the First Schedule which are of importance. Paragraph 8 is: "The apportionment of the actual income "from all sources of the company shall be made by the Special Commis-

(Atkinson, J.)

"sioners in accordance with the respective interests of the members". Paragraph 9 provides that the income shall be deemed "to have been "received . . . on the date to which the accounts of the company for the "year or period were made up". Paragraph 10 provides: "Notice of "any apportionment made by the Special Commissioners shall be given "by serving on the company a statement showing the amount of the actual "income from all sources . . . and either the amount apportioned to each "member or the amount apportioned to each class of shares, as they think "fit." Then it is provided that "a company which is aggrieved by any "notice of apportionment shall be entitled to appeal to the Special Com-"missioners" on giving 21 days' notice.

Section 19 (5) of the Finance Act, 1936, provides: "Where a notice "of charge is served on a company or the liquidator of a company . . . "and the tax thereupon becoming payable is not paid by the company "before the expiration of three months . . . the tax shall thereupon . . . "be recoverable from the member on whom the tax was assessed." I think those are all the relevant provisions.

On 2nd September, 1940, a direction was made and an apportionment under which, except for a small sum, the great bulk of the profits was apportioned to Mr. Latilla. But there was an alternative apportionment, which was the one ultimately relied upon, of £100 to the National Mining Corporation, Ltd., of £286,296 5*s.* 0*d.* to Mrs. Latilla, £286,210 7*s.* 6*d.* to Mrs. Mayo, and a similar sum to Mrs. Campbell.

There was an appeal by the company which was heard in July, 1941. The Special Commissioners hearing the appeal took the view that the apportionment must have regard to what would have happened if the profits had been distributed in the way of dividend and, therefore, that the company holding ordinary shares would have taken all except 5 per cent., and they discharged the apportionment. The Commissioners of Inland Revenue appealed by way of Case Stated, and it was held in every Court up to and including the House of Lords that the Special Commissioners were wrong in law, and that they were not precluded from taking liquidation rights into consideration. It was ordered—these are the words of the Order—"that the said case be remitted to the said Commissioners for "their further consideration and also to make the proper apportionments."

On 24th February, 1943, the Special Commissioners who had stated the Case met in order to consider the matter further and make the proper apportionments. At their meeting the parties appeared and were given an opportunity of arguing, and the like. The company took part in this discussion without prejudice to a contention they had raised to the effect, as I understand it, that the Commissioners were not really continuing the hearing of the original appeal, but were sitting in an administrative capacity, and that the company would have the right to appeal from any decision of the Commissioners. The Special Commissioners did not accept that view, but considered they were in the same position as when they originally heard the appeal, and were further considering the subject-matter of the appeal, and that any amendment of the original apportionment would be ordered precisely as if they had so dealt with it at the first hearing before them, in which event there could be no further appeal, except by way of Case Stated on a point of law. At this further hearing the Commissioners amended the original alternative apportionment, and they made the follow-

(Atkinson, J.)

ing apportionment: £1,000 to the National Mining Corporation; £285,996 5*s.* 0*d.* to Mrs. Latilla, and slightly smaller sums to the two daughters. Assessments were made upon the husbands for these amounts. The company gave notice of appeal, as they had said they would, against the new apportionment, but they did not ask for any further Case to be stated. The right of appeal was rejected, and Mr. Latilla and the two sons-in-law were assessed. Then Mr. Latilla appealed against the assessment upon him. That came before the Special Commissioners, and on that appeal he took three points. The first was that there was no effective direction as the original direction had not been confirmed. Secondly, that the apportionment was a fresh apportionment against which the company was entitled to appeal under Paragraph 10 of the First Schedule of the Act, which I read just now, and that, notice of appeal having been given by the company, there could be no valid assessment upon a member until that appeal had been disposed of. The third point taken was that the assessment could only be upon a member, and there was no power to assess the husband of a member. The Special Commissioners decided all three points against the Appellant, who asked for and obtained the Case Stated which is now before the Court.

Mr. Donovan admitted that on the first point he could not get away from the finding that the direction stands and is effective, so I need say no more about that.

On the second point, as to whether the company had a right of appeal, I have no doubt whatever that the Commissioners on the further hearing were sitting in their appellate capacity, and that there could be no appeal by the company from any apportionment made by them or amended by them. They could be compelled to state a Case raising any question of law, but there was not at any time any request for a Case. The words of the Order seem to me to be too clear for argument. The matter was remitted to the said Commissioners for their further consideration. It seems to me, therefore, that the matter went back to the said Commissioners to continue the hearing which had already begun, and to deal with the matter afresh in accordance with the law laid down by the Courts.

Mr. Donovan relied strongly on the wording of Paragraph 10, saying that there shall be a right of appeal from any apportionment; but to my mind it is clear that the right of appeal there given is against an apportionment by the Special Commissioners in an administrative capacity, and that that right of appeal had been exercised. If the Special Commissioners on the first hearing of the appeal had made the same apportionment as they made on the further hearing, it surely cannot be suggested that a still further appeal would have been open to the company.

Sub-section (2) of Section 133 of the Income Tax Act, 1918, says: "An appeal, once determined by the commissioners, shall be final, and "neither the determination of the commissioners, nor the assessment made "thereon, shall be altered, except by order of the Court when a case has "been required as provided by this Act." It seems clear that that would govern this determination and this apportionment.

With regard to the third point, that husbands cannot be assessed, the Crown relied on Rule 16 of the General Rules, Income Tax Act, 1918, which provides: "A married woman acting as a sole trader, or being "entitled to any property or profits to her separate use, shall be assessable "and chargeable to tax as if she were sole and unmarried: Provided that—

(Atkinson, J.)

"(1) the profits of a married woman living with her husband shall be "deemed the profits of the husband, and shall be assessed and charged in "his name, and not in her name or the name of her trustee". Paragraph 8 of the First Schedule of the Act of 1922, which I read just now, says: "The apportionment of the actual income from all sources of the company "shall be made by the Special Commissioners in accordance with the "respective interests of the members, and the income as apportioned to "each member . . . shall, for the purposes of super-tax, be deemed to "represent . . . income from his interest in the company for the year or "other period and shall be included in the statement of his total income."

The argument for the Crown is that the income apportioned in this way to a member who is a married woman shall be deemed to be her income, and then Rule 16 provides that the husband shall be assessed in respect of the income of a married woman.

I think those are the dominant considerations, but in addition to that there are two provisions which were relied upon. Section 42 (7) of the Finance Act, 1927, provides: "Assessments in respect of sur-tax shall be "subject to appeal to the Special Commissioners", and so on, "and all "the provisions of the Income Tax Acts relating—(*a*) to persons who "are to be chargeable with income tax at the standard rate and to assess-"ments to such tax; (*b*) to appeals against such assessments; (*c*) to the "collection and recovery of such tax", shall be applicable. Also Section 49, Sub-section (1), of the Act of 1922 provides: "Part II of this Act "shall be construed together with the Income Tax Acts and the Acts "relating to inhabited house duty."

Then it is pointed out that the expressions which were so strongly relied upon by Mr. Donovan, "shall be recoverable from the member", and the like, are no stronger than the provisions relating to other income belonging to a wife. If one looks, for example, at the Miscellaneous Rules applicable to Schedule D, one observes: "1. Tax under this Schedule shall "be charged on and paid by the persons or bodies of persons receiving "or entitled to the income in respect of which tax under this Schedule is "hereinbefore directed to be charged." That is a plain direction that it shall be charged on and paid by the person receiving. Notwithstanding that, Rule 16 of the General Rules overrides the provision. By Rule 4, Miscellaneous Rules, it is provided: "(1) A person engaged in a trade, "profession, employment, or vocation shall be assessable and chargeable". If a woman is engaged in a trade, those are express words saying that she shall be chargeable. Notwithstanding that, Rule 16 is the dominating Rule.

In my judgment the appeal fails on all points. Therefore all three appeals must be dismissed with costs.

Appeals having been entered against the decision in the King's Bench Division, the cases came before the Court of Appeal (Tucker, Singleton and Jenkins, L.JJ.) on 12th and 13th July, 1949, when judgment was reserved. On 27th July, 1949, judgment was given unanimously against the Crown, with costs.

Mr. Terence Donovan, K.C., and Mr. L. C. Graham-Dixon 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.

Tucker, L.J.—These three appeals raise the question whether a husband is liable to be assessed and charged to Surtax in respect of a sum which has been apportioned to his wife by the Special Commissioners under Sub-section (1) of Section 21 of the Finance Act, 1922, as representing her interest in a company controlled by five or fewer people which, in the opinion of the Special Commissioners, has not distributed a reasonable part of its income and with regard to which they have made a direction under the above-mentioned Section that its actual income is to be deemed for Sur-tax purposes to be the income of its members.

Under these provisions Mr. Latilla was on 1st March, 1943, assessed to Sur-tax in the sum of £285,996 in respect of the year 1936-37, being the sum apportioned to his wife in respect of her interest as a member of a company called F.P.H. Finance Trust, Ltd. Messrs. Latilla-Campbell and Mayo were similarly assessed in the sum of £285,910 each, being the sums apportioned to their wives in respect of their interests in the same company. These assessments were upheld on appeal by the Special Commissioners, whose decision has been affirmed by Atkinson, J.

The point is a short one. On the one hand, there is the well-recognised principle of Income Tax law based on Rule 16 of the General Rules applicable to all Schedules of the Income Tax Act, 1918, that a husband is liable to be assessed and charged to tax in respect of the income of his wife who is living with him. On the other hand, Section 21 of the Finance Act, 1922, as amended by the Finance Act, 1927, though no doubt designed to prevent loss of Super-tax revenue due to the formation of small private companies which did not distribute their profits in dividends, was deliberately framed so as to make the tax recoverable from the company and not from the individual members of the company, though the individual members were given an option whereby they could elect to pay instead of the company. It was not till the Finance Act of 1936 that the tax in such cases became recoverable from the member, and it is contended that this provision in the Act of 1936 cannot be used so as to give a different meaning to the language of Section 21 of the Act of 1922, which was clearly designed to put the liability on the company and consequently to render Rule 16 inapplicable, save for the purpose of aggregation of income so as to ascertain the rate of tax chargeable against the company.

It will be convenient at this stage to refer to the relevant Rules and Sections. Rule 16 of the General Rules to all Schedules, so far as material, reads as follows: "A married woman acting as a sole trader, or being "entitled to any property or profits to her separate use, shall be assessable "and chargeable to tax as if she were sole and unmarried: Provided that— "(1) the profits of a married woman living with her husband shall be "deemed the profits of the husband, and shall be assessed and charged in "his name, and not in her name or the name of her trustee". Section 21 of the Act of 1922, as far as material, that is to say, Sub-sections (1), (2), (3), (4), (7) and (8), is as follows: "With a view to preventing the avoidance "of the payment of super-tax through the withholding from distribution of "income of a company which would otherwise be distributed, it is hereby "enacted as follows—(1) Where it appears to the Special Commissioners "that any company to which this section applies has not, within a reason-"able time after the end of any year or other period ending on any date "subsequent to the fifth day of April, nineteen hundred and twenty-two. "for which accounts have been made up, distributed to its members in

(Tucker, L.J.)

" such manner as to render the amount distributed liable to be included " in the statements to be made by the members of the company of their " total income for the purposes of super-tax, a reasonable part of its actual " income from all sources for the said year or other period, the Com- " missioners may, by notice in writing to the company, direct that for pur- " poses of assessment to super-tax, the said income of the company shall, " for the year or other period specified in the notice, be deemed to be the " income of the members, and the amount thereof shall be apportioned " among the members." Then it goes on, " and super-tax shall be assessed " and charged under the provisions of this section in respect of the sum " so apportioned after deducting in the case of each member any amount " which has been distributed to him by the company in respect of the said " year or period in such manner that the amount distributed falls to be " included in the statement of total income to be made by that member for " the purposes of super-tax ". Those concluding words that I have just read were added by the Act of 1927. Then it is not necessary to read the proviso or the further provisions of that Sub-section, and I go on to Sub-section (2): " Any super-tax chargeable under this section in respect of " the amount of the income of the company apportioned to any member " of the company, shall be assessed upon that member in the name of the " company, and, subject as hereinafter provided, shall be payable by the " company, and all the provisions of the Income Tax Acts and any regula- " tions made thereunder relating to super-tax assessments and the collection " and recovery of super-tax shall, with any necessary modification, apply to " super-tax assessments and to the collection and recovery of super-tax " charged under this section."

Sub-section (3): " A notice of charge to super-tax under this section " shall in the first instance be served on the member of the company on " whom the tax is assessed, and if that member does not within twenty-eight " days from the date of the notice elect to pay the tax a notice of charge " shall be served on the company and the tax shall thereupon become " payable by the company: Provided that nothing in this subsection shall " prejudice the right to recover from the company the super-tax charged " in respect of any member who has elected as aforesaid but who fails to " pay the tax by the first day of January in the year of assessment or within " twenty-eight days of the date on which he so elected, whichever is later."

Sub-section (4): " Any undistributed income which has been assessed " and charged to super-tax under this section shall, when subsequently " distributed, be deemed not to form part of the total income from all " sources for the purposes of super-tax of any individual entitled thereto." It is not necessary to read the rest of Sub-section (4).

Sub-section (7): " In this section the expression ' member ' shall include " any person having a share or interest in the capital or profits or income " of a company . . . (8) The provisions contained in the First Schedule to " this Act shall have effect as to the computation of the actual income " from all sources of the company, the apportionment thereof amongst " members of the company, and otherwise for the purpose of carrying into " effect, and in connection with, this section."

Then the First Schedule to the Act, Paragraph 8, as subsequently amended reads as follows: " The apportionment of the actual income from

(Tucker, L.J.)

" all sources of the company shall be made by the Special Commissioners " in accordance with the respective interests of the members, and the income " as apportioned to each member so far as assessable and chargeable to " super-tax under section twenty-one of this Act shall, for the purposes of " super-tax, be deemed to represent income from his interest in the company " for the year or other period and shall be included in the statement of " his total income or in an amended statement of total income which the " Special Commissioners are hereby authorised to require and shall be " deemed to be the highest part of that income."

It is not necessary to read Section 38 of the Finance Act, 1927, in full, but it has the effect of substituting Surtax for Super-tax and making Surtax a part of Income Tax. Section 42, Sub-section (7), of that Act provides: " Assessments in respect of sur-tax shall be subject to appeal to the " Special Commissioners except on such matters as under subsection (4) " of this section are to be regarded as having been finally and conclusively " determined, and all the provisions of the Income Tax Acts relating—(*a*) " to persons who are to be chargeable with income tax at the standard " rate and to assessments to such tax; (*b*) to appeals against such assess- " ments; (*c*) to the collection and recovery of such tax; (*d*) to cases to be " stated for the opinion of the High Court; shall, so far as they are applic- " able, apply to the charge, assessment, collection and recovery of sur-tax, " and the Special Commissioners shall, for the purpose of assessment of " sur-tax, have any powers of a surveyor and, for the purpose of the " representation of the Crown on any appeal before the Special Commis- " sioners, any person nominated in that behalf by the Commissioners of " Inland Revenue shall have the same power at, and upon the determination " of, the appeal as a surveyor has at, and upon the determination of, any " appeal relating to income tax at the standard rate."

Finally, Section 19, Sub-section (5) of the Finance Act, 1936, provides: " Where a notice of charge is served on a company or the liquidator of a " company under subsection (3) of the said section twenty-one and the tax " thereupon becoming payable is not paid by the company before the " expiration of three months from the date of service or before the second " day of January following the year of assessment (whichever is the later), " the tax shall thereupon, without prejudice to the right to recover it from " the company, be recoverable from the member on whom the tax was " assessed."

It is said by the Crown that the concluding words of the first paragraph of Section 21 (1) of the Act of 1922 are inapplicable to a married woman living with her husband as she is not required to make a return of her total income, and consequently double taxation would result where there has been an actual distribution to a married woman member. Furthermore, emphasis is laid on the words " be deemed to be the income of the mem- " bers " which, it is said, results in the income being deemed to be the income of the husband where the member is his wife living with him.

It is however conceded that these words would not by themselves justify an assessment to Surtax on the husband having regard to the later words " super-tax shall be assessed and charged *under the provisions of* " *this section.*" The Crown have, therefore, to admit that the husband could not be charged until the Act of 1936. In these circumstances I do

(Tucker, L.J.)

not think they can derive much support from the words "shall be deemed "to be the income of the members" which simply result in the apportioned sums being deemed to be the income of the member—including married women members living with their husbands—as a step in the process of rendering the tax recoverable from the company.

With regard to the double taxation point, I take the view that Paragraph 8 of the First Schedule would justify the Special Commissioners requiring a return of total income from a married woman member for the purposes of ascertaining the sum to be charged on the company of which she is a member. If, however, Paragraph 8 does not justify such a requirement, I think the words "falls to be included in the statement of total "income to be made" have the same meaning as the earlier words "liable "to be included in the statement to be made", and merely refer to the quality of the receipt. See *Penang and General Investment Trust* v. *Commissioners of Inland Revenue*, 25 T.C. 219, and especially the language of Lord Thankerton at page 241, where he says this: "In my opinion, the "words above quoted refer to the quality of the distribution predicated. "It appears to me to be clear that this part of Sub-section (1) had within "its purview the failure of a company to distribute a reasonable part of "its income as income, which, in an appropriate case, would render it "returnable as part of the recipient's total income for purposes of Sur-tax. "My construction of the words quoted may easily be expressed by the "substitution of 'would' for 'to' and the insertion of the words 'if any' "after 'statements', as follows:—'distributed to its members in such "'manner as *would* render the amount distributed liable to be included in "'the statements, *if any*, to be made by the members of the company of "'their total income for the purposes of super-tax'. Accordingly, the "Appellants' ground of challenge of the direction fails".

The language of Sub-section (1) of Section 21 appears to me in its ordinary and natural meaning to be applicable to any member of the company, including a married woman living with her husband, whereas the Crown are compelled to read into the Sub-section, after the words "that "member" in the last line of the first paragraph, the words "or by her husband in the case of a member who is a married woman living with her husband". Similarly, in Sub-section (2), line 3, the Crown must insert after "that member" the words, "or her husband in the case of a member who is a married woman living with her husband".

Again in Sub-section (3) they must insert in line 2, after "member of "the company", the words "or the husband of the member", and in line 3, after "that member", the words "or her husband as the case may be". Sub-section (3) seems to me decisive of this case, as it is, I think, clear that the election is given to the member of the company, and if she be a married woman she, and she alone, is entitled to elect. I cannot accept the submission of the Solicitor-General that the definition of "member" in Sub-section (7) as including "any person having a share or interest in the "capital or profits or income of a company" is wide enough to include the husband of a member by reason of his liability to tax in respect of his wife's income. This submission assumes that the very question in dispute has been answered in favour of the Crown; but even so the husband could not possibly, in my view, be included in this definition. I feel unable to

(Tucker, L.J.)

read into these Sections the words necessary to support the Crown's construction, having regard to the fact that the whole Section is designed merely as machinery for charging the company and not as part of the ordinary procedure of assessing and charging an individual. When Sub-section (5) of Section 19 of the Act of 1936 was passed it merely resulted in enabling the Crown to recover from the member that which had previously been recoverable only from the company, and I can see no reason for reading into that Sub-section the words " but this shall not apply in the case of a member who is a married woman living with her husband, in which case the tax shall be recoverable from her husband ". The Sub-section appears to me to render the tax recoverable from the member whether she be a married woman or not, and I cannot see what answer she would have to such a claim if made upon her personally. The provisions of Section 21 are of a penal character, and to interpret them as imposing on a husband a liability to pay Surtax by reason of non-distribution of profits of a company of which he is not a member and of the profits of which he has no right to any share and from which his wife may in fact have received nothing would require very clear words.

In contrast to the language of Section 21 of the Act of 1922 the Legislature in Section 38 (1) (*a*) of the Finance Act of 1938 makes express reference to the wife or husband of a settlor, while in Section 15 (6) (*a*) of the Finance Act, 1939, it is provided that references in that Section to a person shall in the case of an individual be deemed to include the wife or husband of the individual. The Section in question is one giving extended powers to the Special Commissioners in the case of investment companies to make apportionments under Section 21 of the Act of 1922 in the case of persons who are not members of the company and is therefore very much in point.

Neither the Special Commissioners nor Atkinson, J., have explained precisely how they would read Section 21 of the Finance Act, 1922, so as to give effect to their decision, nor have they expressed any view with regard to the election given under Sub-section (3) of the Section. Furthermore, they make no reference to the fact that the Section was designed solely as machinery for recovering tax from the company.

For these reasons I would allow this appeal.

Singleton, L.J.—If a private company does not distribute a reasonable part of its income it is obvious that members of the company may avoid some part of that which they would have to pay by way of Surtax if more was distributed. I use the expression " private company " to describe a company within Section 21 (6) of the Finance Act, 1922, as amended. The F.P.H. Finance Trust, Ltd., was such a company.

Section 21 of the Finance Act, 1922, was passed in order to meet this position. The Special Commissioners are thereby enabled to direct that the income of such a company shall be deemed to be the income of the members if it appears to them that there has not been distributed a reasonable part of the income of the company from all sources: thereafter that income is to be apportioned among the members. Under Sub-section (2) any Super-tax (now Surtax) chargeable under the Section in respect of the amount of the income apportioned to any member of the company is

(Singleton, L.J.)

to be assessed upon that member in the name of the company and "shall "be payable by the company, and all the provisions of the Income Tax "Acts and any regulations made thereunder relating to super-tax assess- "ments and the collection and recovery of super-tax shall, with any neces- "sary modification, apply to super-tax assessments and to the collection "and recovery of super-tax charged under this section." Under Sub-section (3) a notice of charge to Super-tax under the Section is, in the first instance, to be served on the member of the company on whom the tax is to be assessed, and, if the member does not within twenty-eight days of the notice elect to pay the tax, a notice of charge is to be served on the company and the tax thereupon becomes payable by the company. Thus, though the member might for reasons of his or her own elect to pay the tax, the liability to pay the tax was by the Section placed upon the company and upon no one else.

Paragraph 8 of the First Schedule provides the method of apportionment and that the income as apportioned to each member shall, for the purposes of Super-tax, be deemed to represent income from his interest in the company for the year or other period and shall be included in the statement of his total income or in an amended statement of total income which the Special Commissioners are authorised to require and shall be deemed to be the highest part of that income.

In order to arrive at the rate of tax payable regard must be had to Rule 16 of the General Rules under the Income Tax Act, 1918. The incomes of the husband and wife have to be lumped together and apportioned income of either of them is to be deemed the highest part of that income; on that basis the amount of tax on the apportioned income is calculated.

Under Sub-section (1) of Section 21 of the Finance Act, 1922, the apportionment is among the members of the company; under Sub-section (2) Super-tax chargeable in respect of the amount apportioned to any member is to be assessed upon that member *in the name of the company*. What then was the position of a married woman who was a member of a company in regard to which action was taken by the Special Commissioners under Section 21? An apportionment could only be made among the members; consequently a proportion of the income of the company must be apportioned to her. Under Rule 16 a married woman entitled to any property or profits for her separate use is assessable and chargeable to tax, but if she is living with her husband at the material time the profits are to be deemed the profits of the husband and are to be assessed and charged in his name and not in her name. Section 21 applies when it appears to the Special Commissioners that the company has not distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of Super-tax, a reasonable part of its actual income. A married woman living with her husband did not, and does not, render any such statement. That is done by her husband, and her income is deemed to be his income for that purpose. It is not said that this affects the liability to Super-tax under Section 21, Sub-section (1), but the result would appear to be that "member" in that Sub-section is sometimes to be read literally and at other times as meaning

(Singleton, L.J.)

" husband of the member, if the member is a married woman living with her husband ". This adds greatly to the difficulties of construing the Section and of forming a view as to the position created by subsequent amendments.

By Section 31 (2) of the Finance Act, 1927, there were added to Section 21 (1) of the 1922 Act these words, " and super-tax shall be " assessed and charged under the provisions of this section in respect of " the sum so apportioned after deducting in the case of each member any " amount which has been distributed to him by the company in respect of " the said year or period in such manner that the amount distributed falls " to be included in the statement of total income to be made by that " member for the purposes of super-tax." The object of this amendment was to avoid double taxation. Again the position of a married woman who is a member of the company is overlooked. Where the member is a married woman her share of the income so distributed is distributed to her and not to her husband; but the husband makes the return for tax purposes. Thus once more the word " member " is used in both senses.

Now these refinements did not matter in the least until a further change was made by the Finance Act, 1936. So far a member of a company could not be called upon to pay any Super-tax assessed under the Finance Act, 1922 (as amended in 1927). Under Section 21 (2) the amount of the income apportioned to any member is to be assessed upon the member in the name of the company and is payable by the company, and the provisions of the Income Tax Acts or regulations thereunder relating to Super-tax and the collection and recovery of Super-tax apply, with any necessary modification, to Super-tax assessments and to the collection and recovery of Super-tax charged under that Section; that is, of course, to the collection and recovery of Super-tax from the company. I have already referred to Sub-section (3) which makes it abundantly clear that the liability to pay was upon the company.

By the Finance Act, 1936, Section 19 (5), the matter is carried a stage further. If the tax is not paid by the company within a certain time " the tax shall thereupon, without prejudice to the right to recover it from " the company, be recoverable from the member on whom the tax was " assessed."

The husband, the Appellant, was not a member of the company. Mrs. Latilla was a member, and the Special Commissioners apportioned to her the sum of £285,996 5*s*., part of the income of the company for the period under consideration. An assessment to Sur-tax was made under Section 21 of the Finance Act, 1922, on the Appellant, the husband of the member on whom the apportionment had been made. The company sustained a heavy loss in the year following the year of assessment and is in liquidation; apparently there is no prospect of its paying the tax. The Appellant objects to the assessment, contending that, even if the pre-requisites to assessment to Surtax under Section 21 of the Finance Act, 1922, be held to be satisfied, such assessment can only be made on a member of the company to whom an amount of the company's income has been apportioned; that there is no provision that where a wife is the member the husband shall be deemed to be a member in her place; that, on consideration of all the relevant statutory provisions, income appor-

(Singleton, L.J.)

tioned to a wife is not to be deemed the husband's income within the meaning of Rule 16; and that consequently the assessment made upon the Appellant was bad in law and should be discharged.

The Respondents rely upon Rule 16, which, they claim, is a controlling Rule which operates throughout the Income Tax Acts. You cannot, they say, assess a married woman living with her husband, and this apportioned income, which is to be deemed to be her income, must be treated as his income and he is assessable and chargeable in respect of it.

Rule 16, as Lord Uthwatt pointed out in *Nugent-Head* v. *Jacob* (1), [1948] A.C. 321, at page 328, is a collecting section and not a charging section.

It is, I think, essential to bear in mind that one is not considering income which has been received, nor tax which has become due in respect of income received by a taxpayer. Section 21 of the Finance Act, 1922, initiated a scheme of taxing a private company which did not distribute what was considered to be a reasonably sufficient proportion of its income. One arrived at the amount of the tax by reference to the total income of the member (and for that purpose the incomes of husband and wife had to be aggregated) and the apportioned income was to be deemed to be the highest part of the income, thus attracting the highest rate of tax; but the liability to pay the tax was placed on the company, and is still upon the company.

The change made by the Finance Act, 1936, was to provide that if the company did not discharge its debt or liability the tax is to be recoverable from the member. The tax was, and is, payable by the company: it is a tax upon the company. It is only if it is not paid by the company within the time specified that it becomes recoverable from the member.

I cannot see why in these circumstances "member" in Section 19 (5) of the Finance Act, 1936, should be read as meaning "husband of the member if the member is a married woman". As I have said already, "member" in Section 21 (1) of the Finance Act, 1922, means sometimes one and sometimes the other. The Solicitor-General in dealing with Sub-sections (2) and (3) said that it might mean either the husband or the wife.

There is some reason for making a member of a private company responsible if the company does not pay. He or she has, or had, an interest in the company and, maybe, some direction or control over its affairs. A wholly different position arises when it is sought to charge the husband of a married woman who is a member. So far as I know, he could have no right whatever to recover against the company any tax paid by him. It would require clear words to place liability on the husband, and I cannot find them anywhere. I see no reason why the word "member" in Section 19 (5) of the Finance Act, 1936, should be read as meaning anyone other than member. There is nothing in Section 19 itself to encourage one to take a wider view. If it had been the intention of the Legislature to make the husband responsible it would have been easy to add to Sub-section (5) "provided that if the member is a married woman living with her husband the tax shall be recoverable from the

(1) 30 T.C. 83, at p. 103.

(Singleton, L.J.)

husband ". This is not a case of the husband being called upon to defray tax accruing due on income received by his wife. The tax was a tax upon the company, but as it was Surtax it could not be assessed upon the company. The effect of the change made by the Finance Act, 1936, is to make a debt owed by one person (the company) payable by another (the member) if the first does not discharge the debt.

In my opinion it goes no further than that; even though the debt is, or is described as, tax, it is still a tax upon the company and upon no one else.

I am in favour of allowing the appeal.

Jenkins, L.J.—I agree.

Mr. Donovan.—The appeal will be allowed with costs?

Tucker, L.J.—Yes.

Mr. Hills.—In view of the importance of the matter, I have to ask your Lordships' leave to take this case to the House of Lords.

Tucker, L.J.—Yes.

Mr. Hills.—If your Lordship pleases.

The Crown having appealed against the decision in the Court of Appeal, the cases came before the House of Lords (Lords Simonds, Normand, Oaksey, Morton of Henryton and MacDermott) on 13th 14th and 15th November, 1950, when judgment was reserved. On 14th December, 1950, judgment was given unanimously in favour of the Crown, with costs.

Sir Andrew Clark, K.C., Mr. J. H. Stamp and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. Frederick Grant, K.C., Mr. L. C. Graham-Dixon, K.C., and Mr. J. Preese for the taxpayers.

Lord Simonds.—My Lords, finding myself unable to uphold the decision of the Court of Appeal in these cases I was prepared to give my own reasons for taking a different view of the complicated provisions of the various Acts which we have had to consider, but having had the advantage of reading the opinion which my noble and learned friend Lord MacDermott is about to deliver I shall content myself with saying that I am in full agreement with his reasoning and conclusions and cannot usefully add anything on my own behalf.

I move that the appeals be allowed and that the Order of Atkinson, J., affirming the determination of the Commissioners for the Special Purposes of the Income Tax Acts be restored, and that the Respondents do pay the costs of the Appellants in this House and the Court of Appeal.

Lord Normand.—My Lords, were it not that we are differing from the Court of Appeal I would content myself with expressing my full concurrence with my noble and learned friend Lord MacDermott whose opinion I have had the advantage of reading in print. As it is I shall detain your Lordships as briefly as may be with a statement of my reasons for concluding that the appeal should be allowed. I shall find it necessary

(Lord Normand.)

for this purpose to refer to the Income Tax Act of 1918, the Finance Act, 1922, Section 21, and the Finance Act, 1936, Section 19 (5), but it is not necessary for me to consider the earlier legislation or to refer to the Finance Act of 1927 which substituted Surtax for Super-tax and applied to Surtax the provisions applicable to Super-tax.

Rule 16 of the Income Tax Act, 1918, is an Income Tax rule applicable to all Schedules and it is universally applicable for the purposes of Income Tax unless an application is made under Rule 17 for the separate assessment of the income of husband and wife. Rule 16 enacts that "a married woman . . . being entitled to any . . . profits to her "separate use, shall be assessable and chargeable to tax as if she were "sole and unmarried". I pause there to say that "profit" is equivalent to income and that "chargeable" in that context includes liability to pay. But there are attached to the enactment two provisos of which the first alone is relevant. It provides that the profits of a married woman "living "with her husband shall be deemed the profits of the husband, and shall "be assessed and charged in his name, and not in her name or the name "of her trustee". The effect as a matter of construction seems to me clear. The profits of a married woman living with her husband, instead of being assessed on her as they would have been under the enacting part of the Rule, shall be assessed in her husband's name; instead of being chargeable on her as they would have been under the enacting part of the Rule shall be charged—which must mean charged to tax—in her husband's name, with the effect that instead of being exigible from her as it would have been under the principal enactment, the tax will be exigible from her husband. The proviso, it must be noted, overrides other provisions in the Schedules by which the tax is charged on a person under a particular description. I shall give only one example. Under Schedule E the tax is charged on every person exercising certain offices of profit. If a married woman living with her husband exercises one of these offices, the tax is, in spite of the express term of Schedule E, charged upon her husband and it is from him that it is exigible. Another example of the effect of the proviso is that a statement of total income under Section 27 (1) is made by the husband and includes as part of his income the income of his wife if living with him.

I turn now to the Super-tax provisions of the Income Tax Act of 1918. It is an additional duty of Income Tax on the income of individuals in excess of a certain amount. Therefore the total income of the individual is the basis for it and the individual must furnish a statement of his total income (Section 5 (1) and Section 7 (2) and (3)). All the provisions of the Act relating to persons who are to be chargeable with Income Tax and to Income Tax assessments and to the collection and recovery of Income Tax are made applicable to Super-tax. Rule 16 is thus made applicable in its entirety to Super-tax, so that the husband has to include in his statement of his total income the income of his wife living with him, and he has to pay the Super-tax on this total income. The wife makes no return and pays no part of the tax. Her income is aggregated with her husband's, because the proviso to Rule 16 overrides the word "individual".

Section 21 of the Finance Act, 1922, deals with a notional income. Under Sub-section (1), when a direction is made, the income of the company shall for the specified year be deemed to be the income of the

(Lord Normand.)

members, and the amount thereof shall be apportioned among them. Furthermore the member shall for the purposes of the tax be deemed to have received the amount apportioned to him (First Schedule, Paragraph 9) and it shall be included in the statement of his total income or in any amended statement of his total income, and it shall be deemed to be the highest part of that income (First Schedule, Paragraph 8). Section 21 (2) requires that Super-tax chargeable under the Section in respect of the amount of the company's income apportioned to a member "shall be "assessed upon that member in the name of the company, and, subject "as hereinafter provided, shall be payable by the company". It also provides that all the provisions of the Income Tax Acts relating to Super-tax assessments and the collection and recovery of Super-tax shall, with any necessary modification, apply to Super-tax assessments and to the collection and recovery of Super-tax charged under the Section. Rule 16 with its proviso is therefore *ex figura verborum* made part of the rules applicable to the assessment, collection and recovery of the Super-tax charged under the Section. But that does not greatly advance the Crown's case because the problem for decision lurks under the words "with any "necessary modification". It is also important to note (Section 21 (3)) that the member is given an option to pay, but the Super-tax is not exigible from him, but only from the company after service upon it of a notice of charge. That was, however, changed by Section 19 (5) of the Finance Act, 1936. The Sub-section provides that when a notice of charge has been served on a company or its liquidator under Section 21 (3) of the Act of 1922 and the tax has not been paid by the company before a certain period the tax shall thereupon, without prejudice to the right to recover it from the company, be recoverable from the member on whom the tax was assessed.

My Lords, Section 19 of the Finance Act, 1936, is a series of amendments of Section 21 of the Act of 1922, and Sub-section (5) of Section 19 takes its place as a proviso added to Sub-section (3) of Section 21 of the Act of 1922, and has been from the date at which it came into operation within the outlook of the words "subject as hereinafter provided" in Sub-section (2) of Section 21 of the Act of 1922. When a married woman living with her husband is a member of a company which has been the subject of a direction under Section 21 of the Act of 1922, how far does proviso (1) to Rule 16 apply? In my opinion it applies in its totality with slight modification. In the first place the apportioned income is profits of the wife. There is an express statutory enactment that it is to be deemed to be so and that she is to be deemed to have received it for the purpose of Super-tax under Section 21. Secondly, the tax instead of being assessed on her as it would have been under the enacting part of Rule 16 and under the provisions of Section 21 (2) is to be assessed on her husband under the proviso to Rule 16, but it is to be assessed in the company's name. Thirdly, instead of being chargeable on and payable by her as it would have been under the enacting part of Rule 16, it is to be chargeable upon and payable by her husband, not it is true *primo loco,* but secondarily and conditionally on the company's failure to pay. There are therefore two modifications of Rule 16. The first is that the proviso did not contemplate a charge upon the husband in any name but his own in respect of his wife's income, but as applied to Super-tax under Section 21 of the Finance Act, 1922, the peculiar mode of assessment on the husband

(Lord Normand.)

in the company's name is requisite. Here no contradiction is involved. The effect of Rule 16, proviso (1), is that it overrides the word "member", so that "shall be assessed upon that member in the name of the company" must be read "shall be assessed upon the husband of that member (if she is living with her husband) in the name of the company". No more violence is done to the language than when the person who exercises an office is read as the husband of a person living with him as his wife who exercises an office. The second modification is that the proviso applies when the husband's obligation is subsidiary and conditional and not as formerly only when the sole and absolute obligant would under the principal enactment be the married woman and under the proviso be her husband. But with these modifications the proviso applies in its entirety.

It is an anomaly that the husband of a member and not the member herself should have power to affect the company's liabilities by accepting or refusing the option to pay (Section 21 (3)). But anomalies are inevitable when the Legislature is attempting to deal with the machinations of tax evasion.

I am not to be taken as suggesting that before the passing of the Act of 1936 Rule 16, proviso (1), did not apply to income deemed under Section 21 of the 1922 Act to be the income of a member who was a married woman living with her husband. I am inclined to think that it did apply to the effect that the total income under Section 21 was the total income returnable by the husband including the wife's actual income and her deemed income. But it is not necessary to decide that question in this case, and to avoid unnecessary complication and extension of the discussion I have abstained and shall abstain from entering upon it or referring to further provisions of the relevant Acts which seem *prima facie* to support the view which I am inclined to favour.

I therefore agree with the motion proposed by my noble and learned friend on the Woolsack.

Lord Oaksey.—My Lords, I have come to the conclusion after some hesitation and doubt that this appeal ought to be allowed. It appears to me that it is possible to read Section 21 of the Finance Act, 1922, with Rule 16 of the General Rules applicable to Schedules A, B, C, D and E of the Income Tax Act, 1918, in such a way that the sum apportioned to a married woman living with her husband who is a member of a company to which Section 21 applies shall be assessed on her husband for the purposes of Super-tax.

Section 21 (1) provides that such a sum shall for Super-tax purposes be deemed to be the income of the married woman, and Section 21 (2) provides that all the provisions of the Income Tax Acts and any regulations made thereunder relating to Super-tax assessments shall with any necessary modification apply to Super-tax assessments under the Section. Rule 16 is one of such regulations, and if it is applied to the Super-tax assessment of a married woman living with her husband under Section 21 it seems to me to be a proper and necessary modification that for the purposes of Super-tax the husband should be assessed in the name of the company instead of his wife. If this modification is not made there is a conflict between the provision of Section 21 (2) that the assessment shall be on the wife who is the member of the company and the provision of Rule

(Lord Oaksey.)

16 that the profits of a married woman living with her husband shall be assessed in the husband's name.

Further, I think it is necessary and proper to modify the provision in Rule 16 that the profits shall be charged on the husband since by the express terms of Section 21 (3) they are charged on the company. If this construction is right Rule 16 comes in for the purpose of assessment and aggregation for Super-tax, but that part of his Super-tax which is referable to the sum apportioned is chargeable to the company.

In my view Section 19 (5) of the Finance Act, 1936, which provides that the tax shall be recoverable from the member on whom it was assessed if the company does not pay, neither helps nor harms the Appellants. It is true the husband is not a member of the company but he has been assessed by virtue of the modification of Rule 16 introduced by Section 21 (2) of the Act of 1922 and this Section makes him also chargeable if the company does not pay.

Mr. Grant, in his able argument for the Respondents, contended that Rule 16 only applies to profits of a married woman which satisfy three conditions: (1) that she is entitled to such profits; (2) that she would be assessable on them in her own name but for proviso (1); and (3) that she would be liable to Income Tax on them but for proviso (1); and he said that, none of these conditions being satisfied, Rule 16 could have no application. Whether or not these three conditions are conditions of the applicability of Rule 16 in other cases it appears to me that they are necessarily modified by Section 21 of the Act of 1922 which can only be harmonized with Rule 16 by assessing the husband in respect of the income in question which is deemed to be his wife's by Section 21 (1).

Lord Morton of Henryton.—My Lords, in my view the Special Commissioners and Atkinson, J., were right in upholding the assessments made upon the Respondents in these three appeals. I agree with the opinion which is about to be expressed by my noble and learned friend Lord MacDermott, but as we are differing from the views of the Court of Appeal I shall state my reasons shortly in my own words.

I think it is convenient first to endeavour to discover the true meaning and intent of Section 21 of the Finance Act, 1922, at the time of its enactment and for this purpose to disregard for the time being any subsequent amendments in the Section.

Turning to Sub-section (1) I find that in the events there stated the Commissioners may, " by notice in writing to the company, direct that for " purposes of assessment to super-tax, the said income of the company " shall, for the year or other period specified in the notice, be deemed to " be the income of the members, and the amount thereof shall be appor- " tioned among the members ". With this Sub-section should be read Paragraph 9 of the First Schedule to the Act of 1922, which provides that " the income apportioned to a member of a company . . . under section " twenty-one of this Act shall for the purposes of [super-tax] be deemed " to have been received by him on the date to which the accounts of the " company for the year or period were made up ". The result so far is that the sums apportioned to Mrs. Latilla, Mrs. Mayo and Mrs. Latilla-Campbell respectively were deemed to be the income of these ladies respectively and were deemed to have been received by them.

(Lord Morton of Henryton.)

I now turn to Sub-section (2), which is in the following terms:—

"Any super-tax chargeable under this section in respect of the amount "of the income of the company apportioned to any member of the com- "pany, shall be assessed upon that member in the name of the company, "and, subject as hereinafter provided, shall be payable by the company, and "all the provisions of the Income Tax Acts and any regulations made "thereunder relating to super-tax assessments and the collection and re- "covery of super-tax shall, with any necessary modification, apply to super- "tax assessments and to the collection and recovery of super-tax charged "under this section."

At this stage the vital question arises: Is Rule 16 of the "All Schedules Rules" in the First Schedule to the Income Tax Act, 1918 (hereafter referred to, for the sake of brevity, as "Rule 16") one of the provisions which, by the latter part of this Sub-section, are made applicable "to super- "tax assessments and to the collection and recovery of super-tax charged "under this section"? In order to ascertain what are the "provisions of "the Income Tax Acts and any regulations made thereunder relating to "super-tax assessments and the collection and recovery of super-tax" which are made applicable by Sub-section (2) I turn to Section 42 (7) of the Finance Act, 1927. That Section relates to Surtax, which was substituted for Super-tax by the Act of 1927, but it is common ground between the parties that it is unnecessary for the present purpose to draw any distinction between the two taxes. Section 42 (7) provides, *inter alia,* that "all the provisions of the Income Tax Acts relating—(*a*) to persons who "are to be chargeable with income tax at the standard rate and to assess- "ments to such tax . . . (*c*) to the collection and recovery of such tax . . . "shall, so far as they are applicable, apply to the charge, assessment, "collection and recovery of sur-tax". I do not think there can be any doubt that Rule 16 is one of the provisions thus described, and thus Rule 16 applies "so far as it is applicable" to Super-tax assessments and to the collection and recovery of Super-tax charged under Section 21 of the Act of 1922: but I must next consider what is the effect of the words "so far as applicable". Turning again to Section 21 (2) of the Finance Act, 1922, is there any reason why Rule 16 should not apply to Super-tax assessments and to the collection and recovery of Super-tax charged under that Section?

My Lords, I shall try the experiment of applying Rule 16 to the provisions of Section 21 (2) and see whether such application gives rise to any difficulties. Rule 16, so far as material, is as follows:—

"A married woman acting as a sole trader, or being entitled to any "property or profits to her separate use, shall be assessable and chargeable "to tax as if she were sole and unmarried: Provided that—

> "(1) The profits of a married woman living with her husband "shall be deemed the profits of the husband, and shall be assessed "and charged in his name, and not in her name or the name of her "trustee".

For the sake of simplicity, I shall take the case of income apportioned to Mrs. Latilla. She was at all material times a married woman living with her husband, and the income apportioned to her must be deemed to be her income and to have been received by her, in accordance with Section 21 (1) and Paragraph 9 of the First Schedule to the 1922 Act.

(Lord Morton of Henryton.)

This "deeming" must in my view have the effect of making this income "profits of a married woman living with her husband" within Rule 16. Mr. Grant did not contend that there was any distinction, for this purpose, between the word "income" and the word "profits". These profits, pursuant to Rule 16, "shall be deemed the profits of the husband, and "shall be assessed and charged in his name". I think it follows that, *prima facie* and subject to the two difficulties which I am about to mention, in the case of Mrs. Latilla, a married woman living with her husband, the assessment must be upon her husband and not upon her.

It was said, however, on behalf of the Respondents, that the words "that member" in Section 21 (2) can only refer to Mrs. Latilla, since she and not her husband was the "member of the company" to whom the amount in question was apportioned. I agree that the word "member" refers to Mrs. Latilla, but as soon as the sum in question was apportioned to her it was deemed to be her husband's income under Rule 16. For this reason I think that whenever Section 21 is dealing with assessment it should be read as if the words "or, in the case of a married woman living with her husband, the husband" were inserted after the word "member". So to read the Section does not in my view do any violence to the language of the Section; it is the inevitable result of the latter part of Sub-section (2), which applies Rule 16 "so far as it is applicable." On the other hand, at the beginning of Sub-section (2) where the reference is to apportionment and not to assessment there is no need for the notional insertion of these words, since Rule 16 has no effect upon an apportionment under Section 21.

Another difficulty relied upon by Counsel for the Respondents arises from the fact that under Sub-section (2) the Super-tax is to be assessed "upon that member in the name of the company". They pointed out that under the proviso to Rule 16 the profits there mentioned are to be assessed and charged in the name of the husband. Here, they say, a contradiction arises if "member" is given the suggested construction in Section 21 (2). I think the simple answer to this difficulty is that Rule 16 is to be applied "with any necessary modification" and that Sub-section (2) imposes a necessary modification by providing that the assessment upon the member, or her husband, as the case may be, shall be made in the name of the company.

I now turn to Sub-section (3) of Section 21. That Sub-section deals with assessment and, in accordance with the principle which I have just stated, it should be read as if the words "or, in the case of a married woman," etc. were inserted throughout after the word "member". So read it gives rise to no difficulty.

The second sentence of Sub-section (4) in my judgment strongly supports the view that the provisions of Rule 16 should be imported into Section 21 in the manner which I have suggested. That sentence deals with the case in which "a member of a company has been assessed to and "has paid super-tax otherwise than under this section in respect of any "income which has also been assessed and upon which super-tax has been "paid under this section". As the reference is to the assessment of a member, the words "or, in the case of a married woman," etc. should be inserted if the principle already stated is to be applied. If the words "member of a company" are read with the addition of these words the

(Lord Morton of Henryton.)

provision has a sensible and natural result; the person who has borne double taxation, that is, the husband, gets the relief specified in the Sub-section. If however these words are not inserted the provision is wholly inoperative in the case of a married woman living with her husband, since such a married woman can never be assessed to or pay Super-tax " otherwise than under this section ".

I do not think that Sub-sections (5) and (6) assist at all, nor does the extended definition of " member " in Sub-section (7); but Sub-section (8) is important because it brings into play the First Schedule to the Act. I have already referred to Paragraph 9 of that Schedule, and Paragraph 8, with its reference to " the statement of his total income " strongly supports the view that Rule 16 must be applied to the provisions of Section 21. There is no provision in Income Tax law for a married woman living with her husband to make any return of total income, and any such provision would be inconsistent with Rule 16. Thus Paragraph 8 of the First Schedule works smoothly if the husband is the person to be assessed but does not work at all if the assessment is made on the married woman.

My Lords, so far I have failed to find any reason why Rule 16 should not be applied to the provisions of Section 21 in the manner which I have indicated; and Section 49 of the 1922 Act supplies yet another reason why they should be applied. That Section provides that " Part II of this " Act shall be construed together with the Income Tax Acts and the Acts " relating to inhabited house duty ", and Part II includes Section 21.

I need not refer in detail to the later statutes, which will be dealt with by my noble and learned friend Lord MacDermott. For the reasons which I have given, in my view Section 21 of the 1922 Act fixed the liability to be assessed for Super-tax, in the case of a married woman living with her husband, upon the husband. By the Finance Act, 1927, Surtax replaced Super-tax and certain amendments were made in Section 21, but in my view none of the amendments had the effect of placing upon the wife the liability to be assessed, or of exempting the husband from that liability. Section 19 (5) of the Finance Act, 1936, makes the tax recoverable from the husband, in the events there specified, whereas under the earlier Acts the husband could not be compelled to pay if he did not elect to pay. Again, the phrase " member on whom the tax was assessed " must in my view be read with the application of the provisions of Rule 16, so as to refer to the husband in the case of a member who is a married woman living with her husband.

In the Court of Appeal Singleton, L.J., pointed out[1] that in Sub-section (1) of Section 21, both in its original form and as amended by the Act of 1927, the word " member " was " sometimes to be read literally and at " other times as meaning ' husband of the member, if the member is a " married woman living with her husband ' ". I agree, but regret that the learned Lord Justice did not apply this reasoning to the vital Sub-sections (2) and (3).

I would allow the appeal and restore the Order of Atkinson, J., affirming the assessments.

Lord MacDermott.—My Lords, these three appeals by the Commissioners of Inland Revenue all raise the same question. It may be stated

[1] *See* pages 178-9 *ante*.

(Lord MacDermott.)

thus: Is a husband living with his wife liable to pay Surtax in respect of undistributed income of a company notionally attributed to his wife, as a member of the company, under the terms of Section 21 of the Finance Act, 1922, notwithstanding that those terms are on their face confined to members of the company and the husband himself is not such a member? The Special Commissioners and Atkinson, J., have answered this question in the affirmative. The Court of Appeal has unanimously answered it in the negative.

It will be convenient before referring to the facts to set out or summarise the more important provisions of the relevant enactments, all of which are to be construed (so far as they are not part thereof) together with the Income Tax Acts.

The Finance Act, 1922

Section 21 (*as amended by Section* 31 (2) *of the Finance Act*, 1927, *by the addition of the words shown in square brackets in Sub-section* (1))

"21. With a view to preventing the avoidance of the payment of "super-tax through the withholding from distribution of income of a "company which would otherwise be distributed, it is hereby enacted as "follows—

"(1) Where it appears to the Special Commissioners that any "company to which this section applies has not, within a reasonable "time after the end of any year or other period ending on any date "subsequent to the fifth day of April, nineteen hundred and twenty-"two, for which accounts have been made up, distributed to its "members in such manner as to render the amount distributed liable "to be included in the statements to be made by the members of the "company of their total income for the purposes of super-tax, a "reasonable part of its actual income from all sources for the said "year or other period, the Commissioners may, by notice in writing "to the company, direct that for purposes of assessment to super-tax, "the said income of the company shall, for the year or other period "specified in the notice, be deemed to be the income of the members, "and the amount thereof shall be apportioned among the members "[and super-tax shall be assessed and charged under the provisions "of this section in respect of the sum so apportioned after deducting "in the case of each member any amount which has been distributed "to him by the company in respect of the said year or period in such "manner that the amount distributed falls to be included in the state-"ment of total income to be made by that member for the purposes "of super-tax]:

"Provided that . . .

"(2) Any super-tax chargeable under this section in respect of "the amount of the income of the company apportioned to any "member of the company, shall be assessed upon that member in the "name of the company, and, subject as hereinafter provided, shall be "payable by the company, and all the provisions of the Income Tax "Acts and any regulations made thereunder relating to super-tax "assessments and the collection and recovery of super-tax shall, with "any necessary modification, apply to super-tax assessments and to "the collection and recovery of super-tax charged under this section.

(Lord MacDermott.)

"(3) A notice of charge to super-tax under this section shall "in the first instance be served on the member of the company on "whom the tax is assessed, and if that member does not within "twenty-eight days from the date of the notice elect to pay the tax "a notice of charge shall be served on the company and the tax shall "thereupon become payable by the company:

"Provided that nothing in this subsection shall prejudice the "right to recover from the company the super-tax charged in respect "of any member who has elected as aforesaid but who fails to pay "the tax by the first day of January in the year of assessment or "within twenty-eight days of the date on which he so elected, which-"ever is later.

"(4) Any undistributed income which has been assessed and "charged to super-tax under this section shall, when subsequently "distributed, be deemed not to form part of the total income from all "sources for the purposes of super-tax of any individual entitled "thereto.

"Where a member of a company has been assessed to and has "paid super-tax otherwise than under this section in respect of any "income which has also been assessed and upon which super-tax "has been paid under this section, he shall, on proof to the satisfac-"tion of the Special Commissioners of the double assessment, be "entitled to repayment of so much of the super-tax so paid by him "as was attributable to the inclusion in his total income from all "sources of the first-mentioned income."

Sub-section (6) defines the companies to which Section 21 applies; Sub-section (7) enacts that the expression "member" shall include any person having a share or interest in the capital or profits or income of a company; and Sub-section (8) applies for the purposes of the Section the provisions of the First Schedule.

The First Schedule

This Schedule, by Paragraphs 1 and 10 thereof, provides for an appeal by the company, but not by a member, in respect of any direction or apportionment given or made under Section 21 (1). It also provides, by Paragraph 11, that any person in whose name any shares of a company are registered shall, if required by notice in writing by the Special Commissioners, state whether or not he is the beneficial owner of such shares, and if not the beneficial owner that he shall furnish the names and addresses of those on whose behalf the shares are registered.

Paragraphs 8 and 9 of the Schedule, as amended by the Finance Act of 1927, run as follows:—

"8. The apportionment of the actual income from all sources of the "company shall be made by the Special Commissioners in accordance with "the respective interests of the members, and the income as apportioned "to each member so far as assessable and chargeable to super-tax under "section twenty-one of this Act shall, for the purposes of super-tax, be "deemed to represent income from his interest in the company for the "year or other period and shall be included in the statement of his total "income or in an amended statement of total income which the Special "Commissioners are hereby authorised to require and shall be deemed "to be the highest part of that income."

(Lord MacDermott.)

"9. The income apportioned to a member of a company so far "as assessable and chargeable to super-tax under section twenty-one of "this Act shall for the purposes of that tax be deemed to have been re- "ceived by him on the date to which the accounts of the company for the "year or period were made up or, if an application in that behalf is made "by the company to the Special Commissioners at any time within the "period limited by this Schedule for giving notice of appeal against the "direction to the Special Commissioners, on such date as those Commis- "sioners determine to be just, having regard to the dates on which distri- "butions of income have been made by the company, and so as to avoid, "as far as possible, the inclusion for the purposes of super-tax for any "year of income referable to more than one year."

The Finance Act, 1927

By Section 38 (1) of this Act Surtax was imposed as an additional Income Tax on higher income, in substitution for Super-tax, in terms which make the ascertainment of the "total income" of the subject a necessary prerequisite to his assessment to Surtax. By Section 38 (2) the expression "total income" in relation to any person means "the total income of that "person from all sources estimated, as the case may be, either in accor- "dance with the provisions of the Income Tax Acts as they apply to "income tax chargeable at the standard rate or in accordance with those "provisions as they apply to sur-tax." By Section 42 provision is made as to the payment and assessment of Surtax, and Sub-section (7) thereof enacts (*inter alia*) that "all the provisions of the Income Tax Acts relating— "(*a*) to persons who are to be chargeable with income tax at the standard "rate and to assessments to such tax . . . shall, so far as they are applic- "able, apply to the charge, assessment, collection and recovery of sur-tax . . ." Sub-section (9) provides for the separate assessment of a husband and wife upon an application being made for that purpose in the prescribed manner.

The Finance Act, 1936

Section 19:

"(5) Where a notice of charge is served on a company or the liquida- "tor of a company under subsection (3) of the said section twenty-one and "the tax thereupon becoming payable is not paid by the company before "the expiration of three months from the date of service or before the "second day of January following the year of assessment (whichever is "the later), the tax shall thereupon, without prejudice to the right to "recover it from the company, be recoverable from the member on whom "the tax was assessed."

The Income Tax Act, 1918

Sections 4 to 8 inclusive dealt with Super-tax, but it is unnecessary to set them out as they were repealed by the Act of 1927 and it is conceded that in all relevant respects there is no material difference between their provisions and those now relating to Surtax.

Rule 16 *of the General Rules applicable to all Schedules*:

"A married woman acting as a sole trader, or being entitled to any "property or profits to her separate use, shall be assessable and chargeable "to tax as if she were sole and unmarried:

(Lord MacDermott.)

"Provided that—

"(1) the profits of a married woman living with her husband "shall be deemed the profits of the husband, and shall be assessed "and charged in his name, and not in her name or the name of her "trustee."

The material facts are as follows. The company immediately concerned (hereinafter called "the company") was F.P.H. Finance Trust, Ltd. It was a finance company, financing and dealing in the shares of gold-mining companies. Its capital at all relevant times consisted of 1,000 £1 ordinary shares and 10,000 £1 preference shares. The respective rights of the two shareholding classes were unusual. The preference shareholders had the voting control of the company. They were entitled to a fixed cumulative dividend of 5 per cent. and subject thereto the ordinary shareholders were entitled to the whole of the profits declared for distribution as dividends. On a winding-up the ordinary shareholders were entitled to repayment of the nominal amount of their shares and after that the whole of the surplus assets were divisible among the preference shareholders. The 1,000 ordinary shares were held by a public company, the National Mining Corporation, Ltd., and the 10,000 preference shares were held by three married ladies living with their husbands. They were (1) Mrs. E. M. Latilla, the wife of Mr. H. G. Latilla, an original Appellant, who has died since the commencement of these proceedings and whose executors (Barclays Bank, Ltd., and his widow the said Mrs. E. M. Latilla) are Respondents in one of the present appeals; (2) Mrs. G. Latilla-Campbell, daughter of the said Mr. H. G. Latilla and the wife of Mr. E. G. Latilla-Campbell, the Respondent in another of these appeals; and (3) Mrs. E. Mayo, another daughter of Mr. H. G. Latilla and the wife of Mr. Eric S. Mayo, the Respondent in the remaining appeal. The company made very large profits during the period of 21 months ending on 31st December, 1936, at which date the amount standing to the credit of its profit and loss account was £939,167. In 1937 a small dividend was declared amounting in all to £100 on the ordinary and £46 11*s.* 6*d.* on the preference shares. In 1938 the company went into liquidation, the National Mining Corporation, Ltd., was paid £1,000 in respect of its ordinary shares and the remaining assets were distributed to Mrs. Latilla, Mrs. Latilla-Campbell and Mrs. Mayo as the holders of the preference shares. Subsequently the Special Commissioners, acting under Section 21 (1) of the Act of 1922, made a direction that the income of the company for the said period of 21 months should be deemed the income of the members of the company and they proceeded to apportion this income between the members. The company appealed against the direction and apportionment so made and after much litigation which need not now be traced the matter came to your Lordships' House where, on 22nd March, 1945, the direction was confirmed as was also the following apportionment:—

	£	*s.*	*d.*
To the National Mining Corporation, Ltd.	1,000	0	0
To Mrs. Latilla	285,996	5	0
To Mrs. Latilla-Campbell	285,910	7	6
To Mrs. Mayo	285,910	7	6

It may be observed in passing that this apportionment did not reflect the position as it would have been had the income of the company for

(Lord MacDermott.)

the relevant period been actually distributed in accordance with the dividend rights of the two shareholding classes. The Special Commissioners in apportioning had construed the words of Paragraph 8 of the First Schedule to the Act of 1922—" in accordance with the respective interests of the " members "—as entitling them to take into account all the different interests of the members under the company's constitution, including the rights to undistributed profits on a winding-up, and this view was confirmed by this House in the proceedings to which I have referred—see *F.P.H. Finance Trust, Ltd.* v. *Inland Revenue Commissioners* (No. 2) (1), [1946] A.C. 38.

In the meantime, in 1943, the Special Commissioners had made assessments to Surtax for the year 1936-47 in respect of the sums apportioned to the three ladies as above set out. These are the assessments now under appeal. Each assessment was made on the husband of the lady concerned in the sum apportioned to her. The husbands were duly served under Section 21 (3) with notice of charge. They did not elect to pay the tax. Notice of charge was then served upon the company in liquidation. It did not pay within the time limited by Section 19 (5) of the Act of 1936, and as a result the present position is that, if the assessments were duly made upon the husbands, the tax is now recoverable from them or, in the case of Mr. H. G. Latilla, from his executors.

It is agreed that the company was a company to which Section 21 of the Act of 1922 applied, and of a number of questions raised during the earlier stages of the litigation only that mentioned at the beginning of this opinion remains for decision. Were the Special Commissioners entitled to assess the husbands in respect of the sums apportioned to their wives under Section 21 ?

My Lords, the general purpose of Section 21 appears from its introductory words and, as respects members of a company who are not married women living with their husbands, its subsequent provisions are now reasonably clear. Difficulty does arise, however, where the members concerned are married women living with their husbands and beneficially entitled; but even in that case there are two points which may be regarded as beyond controversy. In the first place, it was plainly the intention of the Legislature to make each of the sums apportioned to individuals subject to Super-tax if, when the sum is reckoned in the total income, such tax is attracted. The question is not whether the sum apportioned to a married woman escapes the net altogether and in any event. It is whether the person to be assessed is the lady or her husband. And secondly, it is, I think, no less clear that Section 21, if regarded in isolation and without reference to the enactments said to be incorporated therewith, contains nothing to authorise the assessment of the husband. The person to be assessed, if the language of Sub-section (2) is to be taken in its natural meaning and without qualification, is the member to whom an amount of the income of the company has been apportioned under Sub-section (1). Such member need not be the registered holder of shares, for he or she may be the beneficial owner having regard to the definition in Sub-section (7); but the husband of a member is not a member within that definition and there is nothing else to put him in the position of a member if one

(1) 28 T.C. 209.

(Lord MacDermott.)

does not look beyond Section 21. This was conceded by the Crown and its case before your Lordships was based entirely on the ground that Rule 16 of the General Rules was brought into operation by Section 21 with the result for which it contended, namely, that the husbands were properly assessed. For the Respondents on the other hand it was submitted that Rule 16 was not brought into play at all and, alternatively, that if it was it did not justify the assessment of the husbands.

The first question to be considered, therefore, is whether Rule 16 has been made applicable to assessments under Section 21. If it has, it must be by virtue of that part of Sub-section (2) of that Section which provides —"and all the provisions of the Income Tax Acts and any regulations "made thereunder relating to super-tax assessments . . . shall, with any "necessary modification, apply to super-tax assessments and to the collec- "tion and recovery of super-tax charged under this section." Now, by Section 42 (7) of the Act of 1927 (which in this respect echoed one of the repealed provisions of the Act of 1918 as to Super-tax) all the provisions of the Income Tax Acts relating to persons chargeable with Income Tax at the standard rate and to assessments to such tax are directed to be applied to the assessment, collection and recovery of Surtax "so far as "they are applicable". But General Rule 16 is undoubtedly applicable to Surtax, as it was to Super-tax, and accordingly it must in my opinion be regarded as a provision "of the Income Tax Acts . . . relating to "super-tax assessments" and therefore as a provision which "shall, with "any necessary modification," apply to Surtax assessments under Section 21.

The next and more difficult question is as to the effect of this incorporation. There can be no doubt that the expression "members" is used in some places in Section 21 in nothing but its ordinary meaning as extended by the definition in Sub-section (7), that is to say, as signifying only the persons in whose names or on whose behalf shares in the company are held. Such, for example, seems to be the plain meaning of "members" on the first, third and fourth of the occasions on which the word is used in Sub-section (1). The conflict then is between, on the one hand, a construction which ascribes to the word throughout a meaning limited, as in places it must be limited, to its natural signification as extended by the definition, and on the other, a construction by which the word is capable of including, where General Rule 16 so requires, a reference to the person who is the husband of and lives with the member to whom part of the company's income has been apportioned. The choice to be made between these rival interpretations must depend on the nature and force of the impact which Rule 16 and the other incorporated provisions make upon the structure of Section 21. The next step will be to examine this, but before doing so it will be well to refer to two general considerations which have to be kept in mind at this stage of the enquiry. First of all, Section 21 is, on the Crown view—at any rate since Section 19 (5) of the Act of 1936 became law—a most drastic enactment for the husbands of members of companies to which Section 21 relates, and that all the more as neither they nor their wives are accorded any right of appeal against the apportionments made, though such apportionments may well be the subject of acute controversy between different classes of shareholders. For this reason, if for no other, the natural meaning of the language used by the Legislature ought only to be departed from on clear and cogent grounds. And

(Lord MacDermott.)

secondly, taxation is imposed by the language and not merely by the trend or habit of the relevant legislation. As Lord Cairns said in *Partington* v. *Attorney-General* (1869) L.R. 4 E. & I. App. H.L. 100, at page 122: "If the person sought to be taxed comes within the letter of the law he "must be taxed, however great the hardship may appear to the judicial "mind to be. On the other hand, if the Crown, seeking to recover the "tax, cannot bring the subject within the letter of the law, the subject is "free, however apparently within the spirit of the law the case might "otherwise appear to be."

By the terms of Sub-section (1) of Section 21 the sum apportioned to the wife of each of the original Appellants was deemed to be her income and, by Paragraph 9 of the First Schedule to that Act, to have been received by her on 31st December, 1936, the end of the relevant accounting period. Apportioned income being, as was conceded, "profits" within the meaning of Rule 16, it must, I think, follow from the wording of proviso (1) to that Rule that this income had to be regarded as the profits of the husband. I do not forget that a proviso must be construed as such, nor yet that what I may call the double deeming necessitated by this application of Rule 16 is a highly notional process. Nonetheless I think as a process it is described in terms sufficiently clear to leave no real doubt about the result. The terms of the proviso are mandatory, the apportioned income "shall be deemed the profits of the husband, and "shall be assessed and charged in his name", and *not* in the name of the wife. That being the position, what is the necessary effect on Section 21? Here attention may conveniently be focused on Sub-section (2) of that Section and in particular on the part thereof which reads "shall be "assessed upon that member in the name of the company", for whichever construction prevails there will necessarily prevail at the other points where dispute may arise, including Section 19 (5) of the Act of 1936.

My Lords, having got this length it seems to me no longer possible to regard the conflict as merely one between the natural meaning of "member" as applied to a married woman living with her husband and the general proposition of Income Tax law that a husband living with his wife is assessable in respect of her profits. That general proposition has now, as it were, become specific and as much a part of Sub-section (2) as the words "shall . . . apply" can make it, for there seems no good reason why the intervening expression "with any necessary modification" should operate to alter the terms of proviso (1) to Rule 16 in any material respect. Such a reason certainly cannot in my opinion, be found in the words "in "the name of the company" which occur in Sub-section (2). It was suggested in the course of the argument that these words were incompatible with the words in proviso (1) "shall be assessed and charged in his name", but I do not think there is substance in this. Whatever the exact import of the words "in the name of the company" may be the assessment under Sub-section (2) must also be upon the individual, and therefore in his name as well.

If then the imperative terms of proviso (1) to Rule 16 are, as I would hold, to be read into Sub-section (2), the tax on the apportioned income must be assessed on the husband and cannot be assessed on the wife, and the only way of accommodating the language of the Sub-section to this state of affairs is to read "member" as the Crown contends. This,

(Lord MacDermott.)

there is no denying, involves an interpretation which does not ride elegantly on the language of the enactment, but if I am right in my views as to the applicability and effect of Rule 16 I see no escape from it. On the contrary, there are to be found in the relevant legislation several further considerations which to my mind lend considerable support to this construction. These I regard as secondary rather than primary grounds for the conclusion I have reached and I will therefore state them shortly. They may be enumerated as follows. (1) The contention of the Respondents, if sound, would entirely stultify the purpose of Section 21 as regards the income apportioned to married women members living with their husbands, because the taxing Acts provide no means of compelling such members to make the return of total income without which Surtax cannot be computed, or of assessing them separately from their husbands in the absence of an application by either spouse in that behalf. (2) Unless the husband is assessed in respect of his wife's income, or there has been an application for separate assessment, there is no provision for the aggregation of the incomes of husband and wife which is necessary for the assessment of Surtax. The Respondents endeavoured to meet this difficulty by an alternative submission to the effect that Rule 16 applied to the extent, but only to the extent, of procuring such aggregation. I do not think one can halt there. If Rule 16 is applicable to that extent it is I think impossible not to apply it completely and with the results I have mentioned above. (3) Apart altogether from Rule 16, it seems fairly clear that the true construction of Section 21 does not require that the word "member" should be read as referring to the same individual throughout it. As Viscount Simon, L.C., said in *Penang and General Investment Trust, Ltd.* v. *Commissioners of Inland Revenue* (1), [1943] A.C. 486, at page 495, after a reference to the definition of "member" in Sub-section (7): "I incline to think that, inasmuch as the apportionment is 'amongst the "'members', it would be legitimate for the Special Commissioners to "apportion a proper fraction to the beneficiary in the first instance if they "already knew that the shareholder on the register was a bare trustee. "Information as to this could be obtained under para. 11 of sch. I, but "whether the Special Commissioners have the information, and act on it, "in the first instance, or not, it seems to me clear that an original appor-"tionment to a trustee may properly be followed up by an assessment on "the beneficiary." Though this may not take the present matter any great distance it at least serves to indicate that the words "upon that "member" in Sub-section (2) have a wider scope than might at first appear to be the case. (4) An examination of the Income Tax Acts shows that proviso (1) to Rule 16 (like its forerunner, Section 45 of the Act of 1842) is the only means of effecting the substitution of husband for wife under charging provisions which are no less clearly referable in their terms to the wife than is the word "member" in the present case. Thus—tax under Schedules A and B "shall be charged on and paid by the "occupier for the time being"—see Rule 1 of No. VII of Schedule A and Rule 4 of Schedule B. Tax under Schedule D "shall be charged on "and paid by the persons or bodies of persons receiving or entitled to the "income in respect of which tax under this Schedule is hereinbefore "directed to be charged."—see Rule 1 of the Miscellaneous Rules of

(1) 25 T.C. 219, at p. 240.

(Lord MacDermott.)

Schedule D. And again, tax under Schedule E " shall be annually charged " on every person having or exercising an office or employment of profit . . ." In all these cases, though the married woman living with her husband may be the occupier of the lands or tenements subject to assessment under Schedule A or Schedule B, or the person actually receiving and entitled to the income chargeable under Schedule D, or having or exercising a particular office or employment of profit within the meaning of Schedule E, it is upon her husband and not upon her that (in the absence of an application for separate assessment) the tax is charged. Rule 16 has always been regarded as justifying this procedure and nothing very different is asked of it by the Crown in this case.

For these reasons I would allow the appeals and confirm the assessments.

Questions Put:

That the Orders appealed from be reversed.

The Contents have it

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

The Contents have it

[Solicitors:—Churchill, Clapham & Co.; Solicitor of Inland Revenue.]