HIGH COURT OF JUSTICE (CHANCERY DIVISION)—12TH MAY, 1955

COURT OF APPEAL—5TH, 6TH, 7TH AND 8TH JUNE, AND 2ND JULY, 1956

HOUSE OF LORDS—1ST, 2ND, 3RD AND 25TH JULY, 1957

Commissioners of Inland Revenue

v.

Countess of Kenmare[1]

Surtax—Foreign settlement of property in United Kingdom—Settlor and trustees non-resident—Power to revoke or determine—Finance Act, 1938 (1 & 2 *Geo.* VI, *c.* 46), *Sections* 38 (2) *and* 41 (4) (*a*).

By a settlement dated 24th September, 1947, *executed in Bermuda and expressed to be governed by the law thereof, the Respondent, who at the material times was not resident or ordinarily resident in the United Kingdom, transferred securities in the United Kingdom of the value of* £700,000 *to non-resident trustees. The trustees were directed during the Respondent's life to pay the trust income to her or accumulate it in their discretion and after her death to hold the fund on trusts for her issue. The settlement further provided that the trustees might at any time and from time to time during the Respondent's lifetime declare in writing that any part of the fund, not exceeding an aggregate of* £60,000 *in value in any triennial period, should thenceforth be held in trust for her absolutely, and that thereupon the trusts thereinbefore declared concerning that part should forthwith determine. The whole income of the fund for the period from 24th September,* 1947, *to 5th April,* 1948, *was within that period distributed to the Respondent in the exercise of the trustees' discretion.*

The Respondent was assessed to Surtax for the year 1947–48 *on the footing that the trust income fell to be treated as her income under Section* 38 (2) *of the Finance Act,* 1938. *On appeal to the Special Commissioners the Respondent contended* (a) *that the United Kingdom Legislature had no jurisdiction to impose a charge to Surtax on her in respect of income which did not arise to her, she being a non-resident;* (b) *that the provisions of Section* 38 *did not apply to the settlement because the trustees were not resident, and* (c) *that the settlement was not revocable, the powers given to the trustees being exercisable only within its framework. For the Crown it was contended that the jurisdiction of the United Kingdom Legislature could not be called in question, and that the settlement was revocable in view of the trustees' power to take out the funds by successive stages. The Special Commissioners, while rejecting the Respondent's contention* (b) *and without deciding whether the settlement was revocable, allowed the appeal on the ground that, being outside the jurisdiction of the United Kingdom*

[1] Reported (Ch. D.) [1956] Ch. 220; [1955] 3 W.L.R. 922; 99 S.J. 872; (C.A.) [1956] Ch. 483; [1956] 3 W.L.R. 527; 100 S.J. 585; [1956] 3 All E.R. 69; 222 L.T.Jo. 66; (H.L.) [1957] 3 W.L.R. 461; 101 S.J. 646; [1957] 3 All E.R. 33; 224 L.T.Jo. 82.

Legislature at the material time, the Respondent was not liable to Surtax in respect of income her title to which depended on the trustees' discretion.

Held, (1) *that in regard to income from property in the United Kingdom no limits could be put on the provisions of Section* 38 ; (2) *that the power given to the trustees might enable them to determine the settlement by exhausting the trust fund during the settlor's lifetime.*

CASE

Stated under the Income Tax Act, 1952, Sections 229 (4) and 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 21st January, 1954, the Rt. Hon. Enid Countess of Kenmare (hereinafter called "the Respondent") appealed against an assessment to Surtax made upon her in the sum of £47,190 for the year 1947–48. The sole question for our determination was whether the income on certain trust funds settled by the Respondent under a settlement dated 24th September, 1947, fell to be treated as the Respondent's income for the purposes of Surtax under the provisions of Section 38 (2), Finance Act, 1938.

2. The said deed of settlement dated 24th September, 1947 (hereinafter called the "Bermudan settlement") (exhibit K(1)), and an income account for the period 24th September, 1947, to 5th April, 1948 (exhibit L(1)) were produced in evidence before us.

The facts agreed between the parties and as found by us are stated in the following paragraph 3.

3. (i) The Respondent was neither resident nor ordinarily resident in the United Kingdom after 7th August, 1947. The Bermudan settlement was made after the Respondent had ceased to be resident or ordinarily resident in the United Kingdom and the trustees of that settlement were not at any material time resident in the United Kingdom.

(ii) Immediately prior to 24th September, 1947, the Respondent was absolutely and beneficially entitled to certain stocks, shares and securities in the United Kingdom the income from which was liable to United Kingdom Income Tax and Surtax in her hands. By the Bermudan settlement, which was executed in Bermuda and expressed to be governed by the law thereof, the Respondent transferred the said stocks, shares and securities (which are more particularly mentioned in the schedule thereto) to trustees and directed that they should

> "in their absolute discretion pay the income (or such part thereof in their absolute discretion as aforesaid) of the Scheduled investments and of the property for the time being representing the same (hereinafter called 'the Trust Fund')"

to the Respondent during her life. Under Clause 3

> "After the death of the Settlor [the Respondent] the Trustees shall stand possessed of the capital . . . and future income of the Trust Fund In Trust for all or such one or more exclusively of the others or other of the children or remoter issue of the Settlor"

in the manner therein indicated.

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(1) Not included in the present print.

(iii) Under clause 5

> "the Trustees if they in their absolute discretion think fit may at any time and from time to time during the lifetime of the Settlor . . . declare that any part of the Trust Fund not exceedng the amount hereinafter mentioned shall thenceforth be held In Trust for the Settlor absolutely. . . . Provided Always that the foregoing power shall not be exercisable by the Trustees so as to vest in the Settlor in any period of three years . . . a part or parts of the Trust Fund or property of a value or aggregate value exceeding £60,000 of the currency of the Islands of Bermuda."

It was further provided that, if this power should not be exercised to the full extent of £60,000 in any period of three years, the deficiency could be carried forward to increase the amount in respect of which the power might be exercised in any succeeding period of three years.

(iv) The whole of the income arising for the period from 24th September, 1947, to 5th April, 1948, from the trust fund was within that period awarded by the trustees to the Respondent in the exercise of their discretion by putting it at her disposal in an account (exhibit L) and accordingly it was not contended by the Appellants that Section 38 (3) of the Finance Act, 1938, was applicable.

4. It was contended on behalf of the Commissioners of Inland Revenue:

(i) that the income arising under the Bermudan settlement was caught by Part IV, Finance Act, 1938, and in particular by the provisions of Section 38 (2) thereof;

(ii) that the jurisdiction of the United Kingdom Legislature could not be called in question;

(iii) that the fact, which was admitted, that the Respondent was neither resident nor ordinarily resident in the United Kingdom at the material time was irrelevant;

(iv) that the fact, which was admitted, that the trustees of the Bermudan settlement were not resident in the United Kingdom was irrelevant;

(v) that the provisions of Section 38 (2) referred to the income arising under the Bermudan settlement from the trust fund comprised in the settlement, and the amount of income which the trustees might see fit to distribute and the nature of the Respondent's interest in the settlement were irrelevant;

(vi) that on a proper construction of clause 5 of the Bermudan settlement the said settlement was revocable in view of the power given to the trustees to take out of the settlement, by successive stages, the funds comprised in the settlement;

(vii) that on the exercise of the power the Respondent as settlor would become beneficially entitled to the whole or part of the trust fund then comprised in the Bermudan settlement;

(viii) that the Respondent was correctly assessable to Surtax for the year 1947–48 in respect of the income arising from the trust fund comprised in the Bermudan settlement during the period from 24th September, 1947, to 5th April, 1948, which was to be treated as her income under Section 38 (2).

5. It was contended on behalf of the Respondent:

(i) that the income arising under the Bermudan settlement was not caught by Part IV, Finance Act, 1938, and in particular by the provisions of Section 38 (2);

(ii) that the United Kingdom Legislature had no jurisdiction to impose a charge to Surtax on the Respondent in respect of income which did not arise to her, she being a non-resident ;

(iii) that the provisions of Section 38 had no application to the income arising from the Bermudan settlement, the trustees of which being non-resident were outside the jurisdiction of the United Kingdom Legislature ;

(iv) that on the proper interpretation of Section 38 (5) and Paragraph 1, Part I, Third Schedule, Finance Act, 1938, an effective right of recovery by the Respondent of Surtax with which she might become chargeable was a condition precedent to the imposition of a charge to Surtax ;

(v) that no such right of recovery could be exercised and enforced against the trustees of the Bermudan settlement because they were outside the jurisdiction of the Courts of the United Kingdom ;

(vi) that on a proper construction of clause 5 of the Bermudan settlement the said settlement was not revocable, the powers therein given to the trustees being exercisable only within the framework of the settlement ;

(vii) that the Respondent was not liable to be assessed to Surtax for the year 1947–48 in respect of income arising from the trust fund comprised in the Bermudan settlement.

6. We, the Commissioners who heard this appeal, decided to allow it.

(i) We rejected the Respondent's contention that the provisions of Section 38 had no application to the Bermudan settlement because the trustees to whom income from the trust fund arose were not resident in United Kingdom.

(ii) We held that on a proper construction of Section 38 (2), Finance Act, 1938, read in its context in Part IV of that Act, the Respondent, being outside the jurisdiction of the United Kingdom Legislature during the material time, was not liable to be assessed to Surtax in respect of income from the Bermudan trust fund, which did not arise to her and to which she had only such title as, in their absolute discretion, the trustees might see fit to allow her. We were assisted in the opinion to which we came by a consideration of the case of *Perry* v. *Astor*, 19 T.C. 255, in particular the speech of Lord Macmillan, at pages 283 to 291.

(iii) Having regard to the conclusion to which we came on this contention of the Respondent we did not find it necessary to come to any decision on the Respondent's third contention that the Bermudan settlement was not revocable.

(iv) We accordingly allowed the appeal and left figures to be agreed. Subsequently, it being reported to us that figures had been agreed following our decision in principle, on 9th March, 1954, we reduced the said assessment for 1947–48 to the sum of £23,063.

7. The Appellants, the Commissioners of Inland Revenue, immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law and on 23rd March, 1954, required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1952, Sections 229 (4) and 64, which Case we have stated and do sign accordingly.

8. The point of law for the opinion of the High Court is whether on the proper construction of Section 38 (2), Finance Act, 1938, the Respondent,

being a non-resident during the material period, is liable to be assessed to Surtax in respect of income arising from the Bermudan Settlement for the year 1947–48.

A. W. Baldwin
W. E. Bradley
} Commissioners for the Special Purposes of the Income Tax Acts.

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

19th October, 1954.

The case came before Danckwerts, J., in the Chancery Division on 12th May, 1955, when judgment was given in favour of the Crown, with costs.

Mr. Geoffrey Cross, Q.C., Sir Reginald Hills and Mr. E. B. Stamp appeared as Counsel for the Crown, and Mr. F. Heyworth Talbot, Q.C., Mr. F. N. Bucher, Q.C., and Mr. H. H. Monroe for the taxpayer.

Danckwerts, J.—This is an appeal from a decision of the Special Commissioners under the Income Tax Acts in regard to the assessment to Surtax made upon Enid Countess of Kenmare, which, so far as is material to the purposes of this case, depends upon the assessment as her income of certain income arising from investments in this country under a settlement which she made, dated 24th September, 1947. The Respondent, Lady Kenmare, was not at any material time, at any rate in any material year, resident or ordinarily resident in the United Kingdom, and apparently the trustees of the settlement were not resident or ordinarily resident in the United Kingdom.

Now the terms of the settlement which was made by Lady Kenmare were these, so far as is material. She had three children, all of whom had attained the age of 21 years, and was desirous of making a settlement for the benefit of her children, and she settled investments, mentioned in the schedule to the settlement, which were apparently of the value of something like £700,000, upon a trust for investment. Then there was a provision that the trustees should

> "in their absolute discretion pay the income (or . . . part thereof in their absolute discretion . . .) of the Scheduled investments and of the property for the time being representing the same (hereinafter called 'the Trust Fund') to the Settlor during her life."

The trustees were to hold all such income as should not be paid to the settlor on income account and were in their absolute discretion to pay the whole or any part of such balance from time to time to the settlor during her life, provided always that any such balance was to be added to the trust fund and to devolve accordingly. After the death of the settlor the trustees were to stand possessed of the capital and the income of the trust fund upon trusts which are the usual trusts to be found for the benefit of children and issue of a settlor.

The material clause is really clause 5 and I will read that clause in full :

> "(*a*) Notwithstanding the trusts hereinbefore declared the Trustees if they in their absolute discretion think fit may at any time and from time to time

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> during the lifetime of the Settlor by writing under their hands declare that any part of the Trust Fund not exceeding the amount hereinafter mentioned shall thenceforth be held In Trust for the Settlor absolutely and thereupon the trusts hereinbefore declared concerning the part of the Trust Fund or the property to which such declaration relates shall forthwith determine and the Trustees shall thereupon transfer such part of the Trust Fund or the property to which such declaration relates to the Settlor absolutely Provided Always that the foregoing power shall not be exercisable by the Trustees so as to vest in the Settlor in any period of three years the first of which shall commence on the date hereof and end on the same date in the year 1950 the second of which shall end on the same date in the year 1953 and so on in every third year a part or parts of the Trust Fund or property of a value or aggregate value exceeding £60,000 of the currency of the Islands of Bermuda. (*b*) If in any such period of three years the foregoing power shall not be exercised to the full extent of the said sum of £60,000 the deficiency may be carried forward so as to increase the amount in respect of which the said power may be exercised in any succeeding period of three years";

and then there is a provision about how the value shall be fixed. The result of that provision therefore is that the trustees might declare in writing that the trusts relating to a portion of the trust fund should determine and the portion of the trust fund relating to that declaration would thereupon be held on trust for the settlor absolutely. By reason of the limitation the maximum amount which could be released in that way in each period of three years is £60,000, but any part which was not fully released in one period of three years would be available to be released in the subsequent period. It was pointed out by Mr. Cross that if the trust funds were diminished in value it might be possible for the fund to be wholly freed from the trusts within a foreseeable time, an event which I should imagine is rather unlikely having regard to the size of the fund; and similarly that it might be possible if Lady Kenmare lived for a considerable time for the whole of the fund to be released in this way during her life—again, I should have thought, rather an improbable event.

Then there is a provision, to which I will refer, to be found in clause 13 of the settlement, that the settlement was to be construed and take effect in accordance with the law of the Islands of Bermuda and that the courts of those Islands should be the forum for the administration thereof. There was a very peculiar provision under which the trustees might make declarations changing the law which would be applicable to the settlement. I do not think I need trouble with that rather surprising provision.

A claim against the Respondent is made in virtue of the provisions of Section 38 (2) of the Finance Act of 1938, which provides as follows:

> "If and so long as the terms of any settlement are such that—(*a*) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and (*b*) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person".

Then there is a proviso that

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

I may say that nobody has suggested that the last-mentioned proviso can apply in the present case.

Now Section 41 must be referred to because it contains certain definitions which are of material importance. In Section 41 (4) it is provided:

> "For the purposes of this Part of this Act—(*a*) the expression 'income arising under a settlement' includes—(i) any income chargeable to income tax by deduction or otherwise, and any income which would have been so chargeable if it had been received in the United Kingdom by a person domiciled, resident and ordinarily resident in the United Kingdom".

Then there is a provision about the income apportioned. Then it goes on:

> ". . . where the settlor is not domiciled, or not resident, or not ordinarily resident, in the United Kingdom in any year of assessment, does not include income arising under the settlement in that year in respect of which the settlor, if he were actually entitled thereto, would not be chargeable to income tax by deduction or otherwise by reason of his not being so domiciled, resident or ordinarily resident".

Then there is an extended definition of "settlement", upon which I think nothing turns in the present case.

Then there are provisions in the Third Schedule which must be referred to because Mr. Heyworth Talbot, for the Respondent, relied upon them.

> "Part I. Adjustments between the Settlor and Trustees. 1. Where by virtue of any provision of section thirty-eight of this Act any income tax becomes chargeable on and is paid by a settlor, he shall be entitled—(*a*) to recover from any trustee, or other person to whom income arises under the settlement, the amount of the tax so paid".

Then there are certain other provisions which I think need not go through in detail, including a provision for the handing over of relief which the settlor might get in certain events; and in Part III, Paragraph 1, there is a provision that tax chargeable at the standard rate shall be charged under Case VI of Schedule D. Mr. Heyworth Talbot says that that cannot possibly be workable in the case of a person who is not a resident and therefore that provision must be nugatory if it is intended to apply to non-residents in this case; and Paragraph 4, which Mr. Heyworth Talbot also says it is impossible to carry out in the case of non-residents, is as follows:

> "The General or Special Commissioners may by notice in writing require any person, being a party to a settlement, to furnish them (within such time as they may direct, not being less than twenty-eight days) with such particulars as they think necessary for the purposes of any of the provisions of Part IV of this Act, and if that person without reasonable excuse fails to comply with the notice he shall be liable to a penalty not exceeding fifty pounds and, after judgment has been given for that penalty, to a further penalty of the like amount for every day during which the failure continues."

Well, of course, you cannot enforce penalties against persons who are not here and, therefore, you cannot, so far as that provision goes, necessarily obtain the particulars required from persons who are non-resident.

Now the Special Commissioners decided in favour of the Respondent. They held as follows:

> "that on a proper construction of Section 38 (2), Finance Act, 1938, read in its context in Part IV of that Act, the Respondent, being outside the jurisdiction of the United Kingdom Legislature during the material time, was not liable to be assessed to Surtax in respect of income from the Bermudan trust fund, which did not arise to her and to which she had only such title as, in their absolute discretion, the trustees might see fit to allow her. We were assisted in the opinion to which we came by a consideration of the case of *Perry* v. *Astor*, 19 T.C. 255, in particular the speech of Lord Macmillan, at pages 283 to 291. Having regard to the conclusion to which we came on this contention of the Respondent we did not find it necessary to come to any decision on the Respondent's third contention that the Bermudan settlement

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> was not revocable. We accordingly allowed the appeal and left figures to be agreed. Subsequently, it being reported to us that figures had been agreed following our decision in principle, on 9th March, 1954, we reduced the said assessment for 1947-48 to the sum of £23,063 "

—that is, from £47,190.

Now it will be observed that the Special Commissioners did not decide the question whether the settlement which is material was revocable. Counsel on both sides have asked me if possible to decide that matter and not to remit the question to the Special Commissioners if I should be in favour of the Commissioners of Inland Revenue (the Appellants) on the other point which has been discussed in this case. I propose to adopt that course, and I think it will be convenient to deal first of all with the question of whether the settlement is revocable, which seems to me a less complicated point than the other matter and one which depends really simply upon the interpretation of the settlement and of the provisions of Section 38 (2). It was argued by Mr. Heyworth Talbot, on behalf of the Respondent, that there was no power to revoke the settlement or any provision thereof, and he sought in aid the reference in paragraph (*b*) of Sub-section (2) dealing with beneficial interests in any part of the property as showing that the references to partial revocation were in a different context and not to be imported into paragraph (*a*), which is really the material provision which I have to apply, because there is no appropriate context. It is plain that in the event of the trust being determined in this settlement the person who benefits is the settlor (the Respondent), who becomes absolutely entitled to the property in respect of which the trustees exercise their power of release, if I may adopt that neutral term. Now what the trustees can in fact do under the provisions of clause 5 is not expressed, it is true, by using the word " revoke ". What they can do is, they may

> " by writing under their hands declare that any part of the Trust Fund not exceeding the amount hereinafter mentioned shall thenceforth be held In Trust for the Settlor absolutely " ;

and the clause proceeds :

> " and thereupon the trusts hereinbefore declared concerning the part of the Trust Fund or the property to which such declaration relates shall forthwith determine and the Trustees shall thereupon transfer such part of the Trust Fund or the property to which such declaration relates to the Settlor absolutely ".

Mr. Heyworth Talbot argues that that is not a provision which determines the settlement or the provisions of the settlement, or a provision of the settlement, because, he says, it merely substitutes one trust for another and the settlement continues: it is an exercise of the power within the framework of the settlement. That argument at first sight appears to have some attraction, but it seems to me that it is not a correct way of looking at the matter. In the first place I am satisfied that although the word " revocation " is not expressly used the effect of the provision in clause 5 (*a*) is a revocation of the trust ; and it seems to me that if there is a revocation of the trust, whether it is subject to a limitation or not, there is a revocation or determination of either the settlement or some provision thereof. It seems to me there is quite clearly a determination of the provisions settling the property in trust for other persons in respect of the trust fund so far as the trustees have by their declaration in writing power to deal with the trust fund at any particular time, and this is a power which might in the end, therefore, possibly be exercised in regard to the whole trust fund. Therefore it seems to me, so far as that point is concerned, that the settlement is quite clearly one which is revocable within the provisions of Section 38 (2) of the Finance Act, 1938.

Now the other point seems to me more formidable. First of all Mr. Heyworth Talbot said that the levying of tax on a settlor who is non-resident, in respect of income which is not his income from property in the United Kingdom but is the income of the trustees, who are also non-resident and operating under a settlement not governed by the law of England (or any part of the United Kingdom for that matter), is beyond the recognised taxing power of the Legislature of this country. He referred me to a decision of the Privy Council, *Sirdar Gurdyal Singh* v. *Rajah of Faridkote,* [1894] A.C. 670. The Privy Council were dealing with an appeal in which, as I understand the result, they decided that the Rajah of Faridkote and his courts had exceeded their jurisdiction in dealing with the property of somebody who was resident outside the particular sovereign State, and the passage on which Mr. Heyworth Talbot relied is to be found at page 684, in which the Privy Council judgment, delivered by the Earl of Selborne, stated :

> "As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction ; but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates."

He relied also upon the case of *Perry* v. *Astor* (1), and contended that it was a result of the observations of Lord Macmillan, who made the principal speech in that case, that in the same way the powers to tax of the Imperial Parliament in the United Kingdom were subject to a limitation of the kind for which he contended.

Now so far as the Privy Council case is concerned I will merely observe that there the Privy Council was dealing with the legislation or decisions of a foreign State. Here I am attempting to deal with the legislation of the country of which this Court is a Court, and I have to deal with the legislation of a Parliament which within the United Kingdom is not, as I understand the matter, subject to any limitations of any kind whatever. There is no theory of unconstitutionality such as may be found in countries which have a written constitution. The power of Parliament is, at any rate as to property in this country, supreme. Therefore it seems to me the same considerations do not apply at any rate so long as I am dealing with either property within the country or persons who are resident within the jurisdiction, and I do not think that Lord Macmillan's statement involved any other proposition. The matter seems to me to be pointed out quite plainly by Lord Russell in his dissenting speech on the point, on which he treats the majority of the House of Lords as being of the same opinion, because he says (19 T.C., at page 280):

> "There must, of course, be the necessary limitation which is inherent in all our Income Tax legislation, namely, that what is taxed under or by virtue of this provision can only be either (1) income which is here, or (2) income of a person resident here."

Now it is quite true that in the case with which I am dealing it is not the income of a person resident here but this case is limited to income of property in this country. Therefore it seems to me that it falls within one of the recognised limits which were mentioned by Lord Russell in that case and were also referred to by the House of Lords in the case of *Colquhoun* v. *Brooks*(2), 14 App. Cas. 493.

Now it seems to me the real basis upon which Lord Macmillan reached the result which he did is that he found that, when dealing with apparently

(1) 19 T.C. 255. (2) 2 T.C. 490.

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general words in the particular Section which was in one sense a predecessor of the present one (that is to say, Section 20 of the Finance Act, 1922) the situation required some limitation to be put upon those general words. The words were "any income", and he held that the words "any income", by reason of the strange results which would follow otherwise, must be regarded as subject to some limitation which he could formulate. At 19 T.C. 290 he says:

> "If the words 'any income' are construed, as they reasonably may be, to mean any income chargeable with tax under the British Finance Act of the year, the difficulties of the Crown's interpretation to a large extent disappear."

It was I think, therefore, as Mr. Cross contended, simply a matter of construction of the words to be found in Section 20 of the Finance Act, 1922, and a question of construction upon which the majority of the Lords and Lord Russell differed.

Now that case was decided in 1935. I have to deal with Section 38 of the Finance Act, 1938, a Section which it seems to me was probably recast with a view to the decision of the House of Lords in *Perry* v. *Astor*(1), and I have to deal with a Section which uses different words. Mr. Heyworth Talbot has very plainly and correctly pointed out that the provisions of the Section may produce what might be injustices, because the Third Schedule, which attempts to enable a settlor to recoup himself for tax which he has paid, will possibly not be enforceable against the trustees under a settlement regulated by the law and by the courts—and construed by the courts and enforced by the courts—of some other country. But the question is whether the result of those contentions and submissions is such that I can find some limitation which must be put upon the words to be found in Section 38 (2)—which are perfectly general, it seems to me—"any settlement" and "any income arising under the settlement"; and in regard to that I must refer to a Sub-section which I have not mentioned already, Sub-section (7) of Section 38, which provides:

> "The foregoing provisions of this section shall apply for the purposes of assessment to income tax for the year 1937-38 and subsequent years and shall apply in relation to any settlement, wherever made and whether made before or after the passing of this Act".

"Any settlement, wherever made", it is to be observed. That certainly seems to indicate some extension to settlements made in other countries, like the one in the present case.

Then when I come to the provisions of Section 41 (4) I find that the expression "income arising under a settlement" is defined in a way which it seems to me leads me to the conclusion that the Section was intended by the Legislature to deal with income which might be payable to non-residents; and it seems to me that, if that is the result, I must deal with the provisions on the footing that the income of non-residents must be included in the provisions of the Statute. There are provisions in Section 41 (4) which seem to be intended to limit the provisions to property within this country, though it includes the taxing of non-residents.

I am unable to find, and Mr. Heyworth Talbot was really unable to suggest, what limits I could put upon the provisions of this Section which would be consistent with the provisions of Section 41 and would operate in the way in which Lord Macmillan found himself able to deal with the matter in *Perry* v. *Astor*. It seems to me, therefore, that I am unable to limit the words in the way which was contended for on behalf of the

(1) 19 T.C. 255.

Respondent and which satisfied the Special Commissioners, and I must come to the conclusion that the terms of this settlement and the position of the settlor fall within the provisions of Section 38 (2) of the Finance Act, 1938, and so the appeal must be allowed.

Sir Reginald Hills.—My Lord, the appeal will be allowed with costs and the case be remitted to the Special Commissioners to adjust the assessment in accordance with your Lordship's judgment?

Danckwerts, J.—Yes, no doubt that would be the proper Order.

The taxpayer having appealed against the above decision, the case came before the Court of Appeal (Singleton, Morris and Romer, L.JJ.) on 5th, 6th, 7th and 8th June, 1956, when judgment was reserved. On 2nd July, 1956, judgment was given unanimously in favour of the Crown, with costs.

Mr. F. Heyworth Talbot, Q.C., Mr. F. N. Bucher, Q.C., and Mr. H. H. Monroe appeared as Counsel for the taxpayer, and Mr. Geoffrey Cross, Q.C., Sir Reginald Hills and Mr. E. B. Stamp for the Crown.

Singleton, L.J.—This is an appeal from the judgment of Danckwerts, J., who allowed the appeal of the Commissioners of Inland Revenue against the decision of the Special Commissioners. That which we have to consider appears clearly from the statement at the commencement of the report of the case before Danckwerts, J., [1956] Ch. 220, which I read in order to avoid repetition.

> "The question on this appeal arose in connexion with an assessment to surtax made on Enid, Countess of Kenmare, which, so far as is material, depended on the assessment as her income of certain income arising from investments in the United Kingdom under a settlement made by her dated September 24, 1947.
>
> Lady Kenmare was not in any material year resident or ordinarily resident in the United Kingdom. She had three children, all of whom had attained the age of 21 years, and for the benefit of whom she had been desirous of making a settlement. Investments (referred to in the schedule to the settlement) to the value of some £700,000 were settled by her on trust for investment.
>
> The settlement contained a provision that the trustees should 'in their absolute discretion pay the income' (or part thereof in their absolute discretion) 'of the scheduled investments and of the property for the time being representing the same (hereinafter called "the trust fund") to the settlor during her life.' The trustees were to hold all such income as should not be paid to the settlor on income account and were in their absolute discretion to pay the whole or any part of such balance from time to time to the settlor during her life, provided always that any such balance was to be added to the trust fund and to devolve accordingly. After the death of the settlor the trustees were to stand possessed of the capital and the income of the trust fund on the usual trusts for the benefit of children and issue of a settlor. Clause 5, which was the material clause, provided: '(*a*) Notwithstanding the trusts hereinbefore declared the trustees if they in their absolute discretion think fit may at any time and from time to time during the lifetime of the settlor by writing under their hands declare that any part of the trust fund not exceeding the amount hereinafter mentioned shall thenceforth be held in trust for the settlor absolutely, and thereupon the trusts hereinbefore declared concerning the part of the trust fund or the property to which such declaration relates shall forthwith determine and the trustees shall thereupon transfer such part of the trust fund or the property to which such declaration relates to the settlor absolutely provided always that the foregoing power shall not be

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> exercisable by the trustees so as to vest in the settlor in any period of three years the first of which shall commence on the date hereof and end on the same date in the year 1950 the second of which shall end on the same date in the year 1953 and so on in every third year a part or parts of the trust fund or property of a value or aggregate value exceeding £60,000 of the currency of the Islands of Bermuda. (*b*) If in any such period of three years the foregoing power shall not be exercised to the full extent of the said sum of £60,000 the deficiency may be carried forward so as to increase the amount in respect of which the said power may be exercised in any succeeding period of three years.' There was then a provision as to the manner in which the value should be fixed.
>
> Lady Kenmare was assessed to surtax in respect of the income of the settlement under section 38 (2) of the Finance Act, 1938. The Special Commissioners discharged the assessment and held that Lady Kenmare being outside the jurisdiction at the material time was not liable to be assessed to surtax in respect of income from the settlement. Their reasons are referred to in the judgment. In the circumstances they did not consider the question whether the settlement was revocable within the meaning of section 38 (2). The Crown appealed from that decision ",

that is, from the decision of the Special Commissioners. Danckwerts, J., held (1) that the settlement is clearly one which is revocable within the provisions of Section 38 (2) of the Finance Act, 1938, and (2) that the point raised as to jurisdiction failed. Accordingly, he allowed the appeal and ordered that the case be remitted to the Special Commissioners to adjust the assessment.

The terms of the settlement in clauses 2, 3 and 5 (*a*) and (*b*) are summarised in [1956] Ch., at pages 221–2, which I have read. Clause 13 (*a*) reads:

> " 13. (*a*) This Settlement shall be construed and take effect in accordance with the law of the Islands of Bermuda, and the courts of these Islands shall be the forum for the administration thereof ".

It is followed by clause 13 (*b*), which appears to me to be somewhat unusual:

> " (*b*) Provided always that the Trustees may at any time and from time to time by writing under their hands or by deed (but during the lifetime of the Settlor only with her consent in writing) declare that this settlement shall from the date of such declaration take effect in accordance with the law of any other place in any part of the world and that the forum for the administration thereof shall thenceforth be the courts of that place and as from the date of such declaration the law of the country named therein shall be the law applicable to this settlement and the courts of that country shall be the forum for the administration thereof but subject to the power conferred by this sub-clause and until any further declaration is made hereunder."

The scheduled investments, the subject-matter of the trust, were investments by way of mortgage or loan or debentures and stocks and shares in English companies.

I propose to consider the points raised in the order in which the learned Judge dealt with them. Section 38 (2) of the Finance Act, 1938, reads:

> " (2) If and so long as the terms of any settlement are such that—(*a*) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and (*b*) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person ".

It is claimed by the Crown that the trustees have or may have power to revoke or otherwise determine the settlement or any provision thereof.

The Appellant contends that there is no such power to be found within the terms of the settlement. Our attention was directed to clause 3, which provides that after the death of the settlor the trustees should, subject to the provisions of the clause, stand possessed of the capital

> "In Trust for all or any the children or child of the Settlor now living or hereafter to be born who being male attain the age of 21 years or being female attain that age or marry under it and if more than one in equal shares."

On behalf of the Appellant it was submitted that there was no power given to revoke or to determine the settlement or any provision thereof. I do not read the argument now, as it is fully set out in the judgment of Danckwerts, J., to which I shall come.

Mr. Cross, for the Crown, referred to the definition of "settlement" in Section 41 (4) (*b*) of the Act of 1938, and pointed out that a document was not essential to a settlement, but was merely the legal way of doing it. He submitted that if there was power in a settlement to hand over to the settlor the whole fund, such a power would be a power to determine the settlement, while if there was power to hand over one half of the fund, that would be a power to make a partial revocation or determination and would be caught by Sub-section (2), and he drew attention to the wording of Sub-section (2) (*b*). He asked us to read the word "provision" in Sub-section (2) (*a*) as covering the amount provided, or anything affected, by the settlement.

Danckwerts, J., in dealing with this point said, [1956] Ch., at page 228[1]:

> "It was argued by Mr. Heyworth Talbot on behalf of Lady Kenmare that there was no power to revoke the settlement or any provision thereof, and he sought in aid the reference in paragraph (*b*) of subsection (2) dealing with beneficial interests in any part of the property as showing that the references to partial revocation were in a different context and not to be imported into paragraph (*a*) (which is really the material provision which I have to apply), because there is no appropriate context. It is plain that in the event of the trust being determined in this settlement the person who benefits is the settlor (Lady Kenmare), who becomes absolutely entitled to the property in respect of which the trustees exercise their power of release. What the trustees can in fact do under the provisions of clause 5 is not expressed, it is true, by using the word 'revoke.' What they can do is, they may 'by writing under their hands declare that any part of the trust fund not exceeding the amount hereinafter mentioned shall thenceforth be held in trust for the settlor absolutely'; and the clause proceeds: 'and thereupon the trusts hereinbefore declared concerning the part of the trust fund or the property to which such declaration relates shall forthwith determine and the trustees shall thereupon transfer such part of the trust fund or the property to which such declaration relates to the settlor absolutely.' Mr. Heyworth Talbot argues that that is not a provision which determines the settlement or any provision of the settlement, because it merely substitutes one trust for another, and the settlement continues: it is an exercise of the power within the framework of the settlement. That argument at first sight appears to have some attraction, but it is not a correct way of looking at the matter. In the first place, I am satisfied that although the word 'revocation' is not expressly used, the effect of the provision in clause 5 (*a*) is a revocation of the trust; and it seems to me that if there is a revocation of the trust, whether it is subject to a limitation or not, there is a revocation or determination of either the settlement or some provision thereof. It seems to me that there is clearly a determination of the provisions settling the property in trust for other persons in respect of the trust fund so far as the trustees have by their declaration in writing power to deal with the trust fund at any particular time, and this is a power which might in the end, therefore, possibly be exercised in regard to the whole trust fund. Therefore, so far as that point is concerned, the settlement is clearly one which is revocable within the provisions of section 38 (2) of the Finance Act, 1938."

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[1] *See* page 390 *ante*.

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The word "provision" when used for the second time in Section 38 (1) (*a*) clearly means a clause or part of a clause in the settlement, and I think it has the same meaning earlier in Section 38 (1) (*a*) and in Section 38 (1) (*b*). In Sub-section (2) the words "or any provision thereof" following the word "settlement" should be given the same meaning. Before Sub-section (2) comes into play it must be shown that someone has or may have power to revoke or otherwise determine the settlement or a provision of the settlement, by which I mean words which are contained in the settlement, a clause or proviso, a defined part of a written instrument. Much argument was devoted to this point, based upon *Berkeley* v. *Berkeley*, [1946] A.C. 555. It may be said that the word "provision" is used in a different sense in different parts of the Section, which would be odd. Whichever is the right view, the answer to the problem before us is not determined thereby.

On a fair reading of the terms of the settlement I am satisfied that the position created was within the words of Section 38 (2) (*a*) and that consequently the income from the settled fund falls to be treated as the income of the settlor, subject to the second point in the case. The words "or may have" follow the words "If . . . any person has". It appears to me that the term of the settlement in clause 5 that the trustees may pay out to the settlor in any three years the sum of £60,000 (with a carry-forward) might result in time in the fund being exhausted. That is not likely unless there should be a fall in the value of the investments held under the trusts, but it is something which might happen; in other words it is covered by the words "may have". If the settled fund disappeared that would be a determination, not a revocation, of the settlement. There would be nothing left except a document. If the position created by the settlement is such that that may be brought about, the case is then within Section 38 (2) (*a*), and, moreover, if the whole of the settled fund goes there is nothing left to which the trust in clause 3 of the settlement can apply and, consequently, there is, or would be, a determination of that provision, to wit, of clause 3. Thus, I agree with the conclusion at which Danckwerts, J., arrived, though I do not go quite so far as he did in some respects.

We were referred to the judgment of Wynn-Parry, J., in *Saunders* v. *Commissioners of Inland Revenue*[1], [1956] Ch. 283. The learned Judge there held that the word "provision" in Section 38 (2) meant a benefit conferred by the settlement, as the surrounding language was inapt if taken to refer to a defined part of the settlement. In the course of his judgment he said that he accepted the principle that the word "provision" should be given the same meaning wherever it occurs in the Section. I am clearly of opinion that in Sub-section (1) the word "provision" is used in the sense of a clause in the settlement, and that is carried further by the use of the word in Sub-sections (5) and (7), and in the Third Schedule.

On the other point in this case it was submitted on behalf of Lady Kenmare that Section 38 of the 1938 Act does not apply to the settlement as the settlor was not and is not resident in this country, nor are the trustees, and the settlement is a foreign settlement (see clause 13 (*a*)). From the date of the settlement the income was income of the trustees, it was said, and Parliament has no jurisdiction to lay a charge of tax on a non-resident in respect of income to which that non-resident person is not entitled; the trustees have a discretion as to whether they pay her or not. Reliance

(1) Page 416 *post*.

was placed on the decision of the House of Lords in *Perry* v. *Astor* (1935), 19 T.C. 255, and in particular on the speech of Lord Macmillan in that case. The case arose under Section 20 (1) (*a*) of the Finance Act, 1922, which may be described as the forerunner of Section 38 of the Act of 1938 now under consideration. The finding of the Special Commissioners is stated thus, at page 259:

> "We, the Commissioners who heard the appeal, held that the matter was concluded by the decision in the case of the *Marchioness of Ormonde* v. *Brown*[1], and that Section 20 (1) (*a*) of the Finance Act, 1922, could not be applied so as to charge the Respondent with Income Tax on foreign income which under the provisions of the Settlement was income of the American Trustee. We accordingly amended the assessments by substituting amounts computed under Rule 2 of Case V for those computed under Rule 1 as from the date of the Settlement."

This was held by the House of Lords to be correct. The Section is sufficiently set out at page 284; I need not read it. Lord Macmillan said, at pages 285–6:

> "My Lords, the argument for the Crown has at first sight an attractive simplicity. Is the Appellant able, by means of the exercise of a power of revocation contained in a disposition made directly by himself, to obtain for himself the beneficial enjoyment of the income which, under that disposition, his American trustee collects? The answer must plainly be in the affirmative. And does that income arise from stocks and shares in a place out of the United Kingdom? The answer must again be in the affirmative. The words of Section 20 and Rule 1 of Case V fit the facts precisely, and that, contends the Crown, must end the matter. This appearance of simplicity is delusive, for if, as the Crown submits, the critical words 'any income' with which Section 20 opens, are read without any qualification, territorial or other, the most startling anomalies result. Thus, if the Section is to be read as applicable to any income anywhere of which any person anywhere can by the exercise of a power of revocation obtain for himself the beneficial enjoyment, it covers the case of a revocable disposition to an American trustee of American stocks and shares by a person resident in America under which the income is payable to a person resident in this country. In the case put, the American settlor is able by exercising his power of revocation to obtain for himself the beneficial enjoyment of the income of the stocks and shares which he has settled. That income, therefore, is to be deemed for British Income Tax purposes to be his income and not to be the income for those purposes of the person resident in this country who is entitled to it. Incidentally one asks how a British Income Tax Act can impute to an American citizen 'for the purposes of the enactments relating to (British) income tax (including super-tax)' an income of which the American citizen has by the law of his own country effectually divested himself."

Mr. Cross, for the Crown, pointed out that Section 20 (1) (*a*) of the 1922 Act was repealed by the 1938 Act and was replaced by carefully thought out provisions in the light of the words used by Lord Macmillan, and that we have to consider the provisions of the 1938 Act. He referred to Section 38 (7) to show that the provisions of the Section apply to any settlement *wherever made*, and to the words "any income arising under the settlement" in Section 38 (2) and to Section 41 (4) (*a*) to show what is covered by the words "income arising under the settlement"; and he added that income from investments in this country would be chargeable to tax against a person who was not residing in this country. I agree with the judgment of Danckwerts, J., that this point fails. His conclusion is stated in [1956] Ch., at page 231[2]:

> "I am unable to find, and Mr. Heyworth Talbot was really unable to suggest, what limits I could put upon the provisions of section 38 (2) which would be consistent with section 41 and would operate in the way in which Lord Macmillan found himself able to deal with the matter in *Perry* v. *Astor*.

(1) 17 T.C. 333.

(2) *See* pages 392-3 *ante*.

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> I am unable, therefore, to limit the words in the way in which it was contended on behalf of Lady Kenmare and which satisfied the Special Commissioners, and I must come to the conclusion that the terms of this settlement and the position of the settlor fall within the provisions of section 38 (2) of the Finance Act, 1938, and, accordingly, the appeal must be allowed."

Before this Court Mr. Heyworth Talbot further submitted that Parliament could not have intended that the provisions of Section 38 should extend to a case of this nature in view of the provisions of Part I of the Third Schedule to the Act applied by Section 38 (5). He argued that if the settlor paid the tax he or she would not be able to recover it. Now it is unlikely that any such question would arise, but none the less the point raised must be considered. Paragraph 1 of Part I of the Third Schedule contains the words :

> ". . . he shall be entitled to recover from any trustee . . . the amount of the tax so paid ".

That means, entitled to obtain judgment for the amount ; it is in no sense a guarantee that judgment so obtained will be satisfied. I know of no reason why the settlor should not be allowed, if necessary, to obtain leave to serve a writ outside the jurisdiction under R.S.C., Order XI, Rule 1 (*g*), or perhaps (*c*), and to obtain judgment against the trustees if he had paid. Such an action might be brought against the company claiming a declaration and an injunction if the trustees had not paid the amount due to the settlor, and the trustees could be joined as necessary parties. If a judgment so obtained could not be enforced, that is the misfortune of the settlor, who appointed trustees who were not resident here and gave them charge of funds invested in this country. The position would be precisely the same as if someone had been held entitled to contribution, or to an indemnity, but the party against whom the Order was made could not meet his liability. This point fails.

In my opinion the judgment of Danckwerts, J., was right and the appeal should be dismissed.

Morris, L.J.—The Appellant submits that there are two reasons why the income arising under the settlement should not be treated as her income by virtue of Section 38 of the Finance Act, 1938 : firstly, that the terms of the settlement are not such that the provisions of Section 38 (2) of the Finance Act, 1938, apply to them ; secondly, that the provisions of the Finance Act, 1938, do not apply for the reasons that the Appellant and the trustees of the settlement are not resident in this country and that the settlement is governed by the law of Bermuda, which is the forum for the administration of the settlement.

In dealing with the first of these submissions the question arises whether there is a power " to revoke or otherwise determine the settlement or any provision thereof ". The meaning of the word " provision " as used in its context has given occasion for much controversy. Before dealing with that matter it is desirable to consider whether there is a power to revoke or otherwise determine the settlement. The words " revoke " and " determine " both denote putting an end to the settlement. I do not consider that it is necessary to express any concluded opinion as to the respective meanings of the two words. The word " revoke " might denote a cancellation of a settlement before it has been effectively operated ; the word " determine " might denote the bringing to an end after a settlement has for a time been effective. The word " revoke " might relate to what a settlor himself could do and the word " determine " might denote that which someone else might do. It is sufficient for present purposes that each word conveys the suggestion of bringing something to an end. It seems to me that one very

effective way by which a settlement might be determined would be by withdrawing all the capital of the settlement. It becomes necessary, therefore, to investigate, following the wording of Section 38 (2), whether any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to determine the settlement. The words " whether any person has or may have power " can cover both the case of someone having a present power and the case of someone who may in the future have a power. Thus, it may be that if someone has a present power to withdraw from time to time stated amounts from the capital there may come a time when, because the amount of capital remaining is less than that which he may withdraw, he becomes in a position by his next operation of withdrawal effectively to put an end to or determine the settlement.

The provisions of clause 5 (*a*), (*b*) and (*c*) of the settlement enable the trustees of the settlement to declare that a part of the trust fund shall be held in trust for the settlor absolutely. As to that part the trusts forthwith determine. Such part of the trust fund is a part not exceeding £60,000 in value every three years ; the value is value of the currency of the Islands of Bermuda ; to the extent that in a three-year period there has been a non-exercise of the power there may be a carry-forward. It was submitted on behalf of the Appellant that it cannot be predicated that a time will ever come when by an exercise of the powers given by clause 5 the trustees will be in a position to remove all remaining capital funds from the trust. This is true ; there can be no certainty. There is the uncertain element of the length of life of the settlor. There is the uncertain element as to the value of the trust fund ; it may increase or appreciate or it may not ; the value in the currency of Bermuda may fluctuate. Furthermore, it was submitted that, even if the result of the operation of clause 5 of the settlement may be to exhaust the funds, there is even so no revocation or determination of the settlement. But it seems to me that if the trustees by one or more declarations bring it about that the trusts concerning the greater part of the trust fund are determined, the time may come when the trustees, by declaration made by them, may be in a position to exercise their power so that it affects all the remaining part of the trust fund. If so, the trusts concerning that remaining part of the trust fund would forthwith determine. Such a time may come even though it may not seem likely that it will. If the trustees were in that position they would have power to determine the settlement. It seems to me that the trustees may have such power in the future. The wording of Section 38 (2) (*a*) is, therefore, satisfied. In the situation envisaged the wording of Section 38 (2) (*b*) would also be satisfied, for on the exercise of the power the settlor would

> " become beneficially entitled to the whole or any part of the property then comprised in the settlement ".

I consider, therefore, that the trustees may have power in the future to determine the settlement. The word " settlement " is defined by Section 41 (4) (*b*) of the Finance Act, 1938, for the purposes of Part IV to include any disposition, trust, covenant, agreement or arrangement. This definition does not make it necessary to regard the word " settlement " as only denoting the document or instrument, if any, recording the terms of the disposition, trust, covenant, agreement or arrangement. I consider that a settlement may be determined even though some deed or written instrument remains physically in existence.

If the view which I have expressed is correct it will suffice for a decision on the first of the two main questions in the appeal. But it is desirable further

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to consider whether there is or may be a power to revoke or otherwise to determine any provision of the settlement. The phrase " provision of the settlement " is one that blossoms with ambiguity. The difficulty here is that some words in the vocabulary of speech and writing are perforce made to do service in varying contexts with varying meanings. When examining what is meant by a provision of a settlement it is necessary to consider the meanings both of the word " settlement " and of the word " provision ". The definition of the word " settlement " merely records what is to be included. The word " provision " may denote that which is provided; it may denote some clause or part of the words of some deed or instrument or agreement which is or which effects a settlement.

If the word " provision " is interpreted as meaning that which is provided, then, in my judgment, the effect of clause 5 of the settlement is that the trustees may have power in the future to determine a provision of the settlement. Since on the exercise of the power the settlor would become beneficially entitled, then the wording of Section 38 (2) (*a*) and (*b*) of the Finance Act, 1938, would be satisfied. If the word " provision " is interpreted as meaning a clause or part of the words which effect a settlement, then if by successive exercises or deferred exercise of the power given by clause 5 of the settlement the capital becomes completely withdrawn, the result would be to prevent the operation of clause 3 of the settlement, which stipulates that

> " After the death of the Settlor the Trustees shall stand possessed of the capital (including any balance on income account as provided in clause 2b hereof) and future income of the Trust Fund In trust for all or such one or more exclusively of the others or other of the children or remoter issue of the Settlor ".

It is to be observed that the clause states that the trustees " shall stand possessed of the capital . . . and future income ". If, therefore, before the death of the settlor all capital was withdrawn from the trust, the trustees could not so stand possessed. The result would be that by the exercise of their power the trustees would prevent clause 3 from ever coming into play. Can it be said that the trustees had power to revoke clause 3? Can it be said that they had power to determine clause 3? Their powers did not enable them to deal with clause 3 in isolation. If the notion of determining implies putting an end to something which is operating, can there be determination before there is any operation? These questions are as elusive as are the meanings of the words which give rise to the questions. But, endeavouring to read the words of Section 38 (2) (*a*) in a reasonable manner, my view is that the exercise by the trustees of their powers under clause 5 endows them with the power to determine clause 3 if that clause is a provision of the settlement.

If the above conclusions are correct then it is immaterial in this appeal whether the word " provision " in its context bears one or other of the meanings to which I have referred. That question is, however, of great importance. The words " provision thereof " clearly refer to the settlement; the words therefore mean " provision of the settlement ". While any reference to a provision of a settlement could denote a provision in either of its two meanings, the word " of " seems to me to be slightly more appropriate if " provision " means a clause than it would be if " provision " refers to that which is provided. It is to be observed that in the opening words of the Section the word " terms " is found. It can therefore be suggested that if it was intended to refer to a clause in a settlement the word " term " and not " provision " would have been selected. Assistance can, I think, be derived by looking at the words used in Section 38 (1). It must, of course,

be remembered that a word can be used in a Section with two quite distinct meanings. The opening words in Section 38 (1) (*a*) correspond for nearly the first five lines with the opening words in Sub-section (2) (*b*). Where later in Sub-section (1) (*a*) there is a reference to payments which may be made by virtue of a provision of a settlement it seems to me that the word "provision" is being used in the sense of a clause or part. The words "by virtue of" point to that conclusion. I consider that in Sub-section (2) the word "provision" is used in a similar sense. The word "provision" in the phrase "provision of the settlement" marches with the word "provision" in the phrase "provision of section thirty-eight" in the Third Schedule to the Act and is, I think, in each instance used in the sense of a term. I have for these reasons come to the conclusion that the word "provision" is used in the sense of a clause or term or part as opposed to the sense of denoting that which is provided.

The second contention of the Appellant is that the Legislature did not intend the provisions of Section 38 of the Finance Act, 1938, to apply to a foreign settlement and has not so enacted that they do. In support of that contention attention is directed to the contents of the Third Schedule, and it is submitted that, if they would not avail a settlor resident abroad as against trustees of a foreign settlement who are abroad, an indication is thereby given that Section 38 does not apply where these circumstances exist. It was submitted that Section 38 (2) only applies to a settlement if the trustees of it are effectively under the control of the English Courts and if it is to take effect in accordance with English law.

There are two considerations which, in my judgment, indicate that the contention should not be upheld. In the first place, the language of Section 38 (7) shows that a settlement may be within the statutory definition irrespective of where the settlement is made. In the second place, the careful definition in Section 41 of the phrase "income arising under a settlement" shows that the Legislature was clearly providing for cases where a settlor is not domiciled here and is not resident here and is not ordinarily resident here. The Legislature was enacting within the limitation, which Lord Russell in *Perry* v. *Astor*, 19 T.C. 255, at page 280, described as being inherent in all our Income Tax legislation, that what is taxed is either (1) income which is here or (2) income of a person resident here. The income which is affected if Section 38 applies in this case is only the income which is here, and in my judgment the Legislature contemplated and covered the cases of non-resident settlors. I cannot think that this settlement is excluded merely because it is provided in the settlement that it is to be governed by foreign law. Upon analysis it must be that this is the sole circumstance upon which the Appellant can rely in support of the present contention.

It may be that the rights given to a settlor by the Schedule will not always be effectively available as against foreign trustees. In the case of settlements made after the Act of 1938 a settlor could always insert suitable provisions in the settlement to ensure indemnity. Immediately prior to the date of the settlement in this case (24th September, 1947) the Appellant (the settlor) was absolutely and beneficially entitled to certain stocks, shares and securities in the United Kingdom, the income from which was liable to United Kingdom Income Tax and Surtax in her hands. But, quite apart from this, it seems to me that the Schedule merely gives a *de jure* right of recourse, and the Legislature does not purport to ensure that such right of recourse would in all cases prove effectively available.

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For these reasons I consider that the Appellant's submissions fail and I would dismiss the appeal.

Romer, L.J.—It is the contention of the Appellant that no such power of revocation or determination as is referred to in Section 38 (2) of the Finance Act, 1938, was or is vested in any person under the terms of the settlement which she executed on 24th September, 1947, and that, accordingly, she was free in the year of assessment 1947–48 from the liability to Surtax which arises in cases to which the Sub-section applies. The Crown, on the other hand, submit, and it was so held by Danckwerts, J., that under the terms of the settlement the trustees thereof have or might have power in the future to revoke or otherwise determine the settlement or some provision thereof; and that inasmuch as Lady Kenmare would or might become beneficially entitled, if the power were fully exercised, to the whole of the property then comprised in the settlement, Lady Kenmare was rightly assessed on the footing that Section 38 (2) applied.

Although, in my view, the question in issue falls primarily to be answered by reference to the trusts declared by the settlement, there was much discussion during the argument before us as to the meaning of the word " provision " in the context in which it appears in the Sub-section. Mr. Heyworth Talbot and Mr. Bucher contended that the word is used in the sense of some clause or other part of a written instrument. Mr. Cross, for the Crown, on the other hand, submitted that it meant, or at least included, some beneficial interest which is provided by a settlement. It seems to me that there is much to be said for each of these views. If " provision " was intended to be referable to some clause or term which appears in the settlement, then the word " determine ", with which " revoke " is disjunctively associated, would not only be inapt but otiose; for " revoke " is just as applicable to the cancellation of a particular part of a written instrument as it is to the cancellation of an instrument as a whole, as was pointed out by Wynn-Parry, J., in *Saunders* v. *Commissioners of Inland Revenue*[1]. As against this it seems reasonably clear that, apart possibly from the first occasion where the word " provision " appears in Section 38 (1), it was intended in that Sub-section to have the meaning of some written provision, which would in most cases be a covenant, contained in a settlement. Moreover, as Morris, L.J., observed during the hearing, the word as used in the first line of Paragraph 1 of Part I of the Third Schedule to the Act,

> " Where by virtue of any provision of section thirty-eight of this Act ",

would seem to be used in reference to the wording of that Section. However, as Viscount Simonds pointed out in *Berkeley* v. *Berkeley*, [1946] A.C. 555, at page 580, the word " provision " is

> " a word of diverse meanings which slide easily into each other. It may mean a clause or proviso, a defined part of a written instrument. Or it may mean the result ensuing from, that which is provided by, a written instrument or part of it."

It is, of course, an accepted rule of construction that where the same word appears more than once in a Section of a Statute it should receive the same interpretation wherever it occurs, and ambiguity in one place will be resolved by any clarity of meaning which is apparent from another. Nevertheless, where a word has shades of meaning which merge into each other it is, I think, permissible to vary the shade according to each individual context without transgressing the rule to which I have referred. I am

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(1) *See* page 420 *post*.

relieved, however, from the necessity of expressing any final conclusion on this question because this case, in my opinion, falls within Section 38 (2) whether the word "provision" in the Sub-section means "clause" or "result".

The relevant terms of the 1947 settlement have been fully stated by my Lord and I will not repeat them. The Appellant contends that declarations made by the trustees under clause 5 of the settlement and the consequent withdrawals of capital sums for the benefit of Lady Kenmare constitute no more than a due performance by the trustees of one of the trusts of the settlement and cannot be regarded in any sense as a revocation or determination of the settlement or of any provision thereof. The position was likened in argument to a power vested in trustees to make advancements of income to beneficiaries out of capital, or to resort to capital in order to maintain a life tenant's income at a prescribed minimum level. It was suggested that in neither of these illustrations could the trustees be regarded as having power to determine the settlement or any provision of the settlement, either for the purpose of Section 38 or for any other purpose, notwithstanding that the exercise of their powers might eventually diminish the trust capital to vanishing point, to the loss and prejudice of the remaindermen.

I am not clear that, if in these illustrations the person to whom the advancements were authorised to be made, or whose income was to be maintained, were the settlor or the wife or husband of the settlor, and if during the lifetime of such person the whole trust capital might be exhausted by the exercise of the power, the case would not fall within Section 38 (2). But, however that may be, what we are concerned with are the powers which are vested in the trustees of the 1947 settlement and the possible result of those powers being exercised in full. I do not think that each authorised withdrawal of £60,000 during a three-year period could in itself be regarded as a revocation or determination for the purpose of Section 38. Each such withdrawal would *pro tanto* reduce the corpus and future income of the trust fund, but the settlement would continue to subsist and no "provision" of the settlement could be said to have become determined, in whatever sense that word should be interpreted. It is, however, expressly provided by clause 5 of the settlement that any sum authorised to be withdrawn should, from the time of the relevant declaration by the trustees,

> "thenceforth be held In Trust for the Settlor absolutely and thereupon the trusts hereinbefore declared concerning the part of the Trust Fund or the property to which such declaration rela'es shall forthwith determine and the Trustees shall thereupon transfer such part of the Trust Fund or the property to which such declaration relates to the Settlor absolutely".

Now, the settlor was only in her early fifties when the settlement was executed and it was not impossible, nor is it impossible now, that if the trustees exercised to the full their powers under clause 5 of the settlement the whole of the trust fund might during her lifetime become subject exclusively to the trust for Lady Kenmare to which I have just referred. Such a contingency cannot be said to be likely having regard to the size and value of the settled fund, but it is not outside the range of possibility. If it had not been for the proviso to clause 5 (*a*) the trustees could have made a declaration as to the whole fund at any time and held it on trust for Lady Kenmare. Had such an unqualified power been vested in the trustees it could scarcely be doubted, in my judgment, that it would have been within Section 38 (2). The Appellant challenges this and says that the settlement and every provision thereof would remain unrevoked and undetermined even though such a power had been conferred and exercised. If this be the

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true view it would be no difficult matter to escape the provisions of the Sub-section altogether. In my opinion, however, it is not the true view. An unqualified power such as I have mentioned would have enabled the trustees wholly to determine the trusts of clause 3 of the settlement, which are the trusts in favour of the settlor's issue; for if there is no property there can be no trust. Accordingly, the trustees would have had power to determine, viz., to bring to a termination, a "provision" if the meaning of "clause" be attributed to that word, namely, the provision of the settlement in favour of the issue. Alternatively, the trustees would have had power to determine the provision made by the settlement in favour of the issue if that word in Section 38 (2) was intended to mean the result ensuing from that which is provided by a written instrument or part of it. By reason of the proviso to clause 5 (*a*) the trustees cannot at any time while the settlor is alive make a declaration as to the whole trust fund; but as the successive declarations which they are empowered to make may eventually divert the whole fund to the settlor, and as the relevant statutory language is "has or may have power, whether immediately or in the future", the position is the same, in my opinion, for relevant purposes, as though the proviso had been omitted. Accordingly, whether or not the power which the trustees have is a power to determine the settlement as a whole, which I think it probably is, it is, in my judgment, at least a power to determine clause 3 of the settlement and the benefits provided for the issue by that clause and is accordingly within Section 38 (2) of the 1938 Act.

The Appellant then submits that the settlement is not within Section 38 (2) because Parliament has no jurisdiction to lay a charge of tax on a non-resident person in respect of income to which that person is not entitled. It is not disputed that Parliament could do so, but it is suggested that clearer language than that found in the 1938 Act would be required before the Court would be justified in attributing so improbable an intention to the Legislature, and that there are, in fact, indications in the Act itself which tend strongly to negative any such intention. In support of his general proposition Mr. Talbot placed much reliance on an observation made by Lord Macmillan in *Perry* v. *Astor*, 19 T.C. 255, at page 286, where the learned Lord cited the hypothetical case of a revocable disposition to an American trustee of American stocks and shares by a person resident in America under which the income is payable to a person resident in this country and after considering some of the results of such a case said:

> "Incidentally one asks how a British Income Tax Act can impute to an American citizen 'for the purposes of the enactments relating to (British) income tax (including super-tax)' an income of which the American citizen has by the law of his own country effectually divested himself."

Mr. Talbot sought to apply that observation to the present case, but certain considerations exist which deprive this point of a good deal of its force. *Perry* v. *Astor* was decided upon Section 20 of the Finance Act, 1922. This Section was replaced by Section 38 of the 1938 Act, and it may be supposed that the latter Section received a good deal of consideration in its drafting and that the draftsman of this and the other relevant provisions had well in mind the decision in *Perry* v. *Astor* and the speeches of the noble and learned Lords in that case. In particular, the point to which Lord Macmillan referred was dealt with by the concluding part of Section 41 (4) (*a*) of the Act, the effect of which, as applied to the present case, is that, had the investments comprised in Lady Kenmare's settlement been American investments instead of stocks and shares in the United Kingdom, the income of such investments would not have been income arising under the settlement

for the purposes of Section 38 (2). It is further to be observed that the improbability of an intention to tax in Lord Macmillan's illustration would obviously be greater where the relevant funds are abroad than where they are situate in this country and earning income here. Nevertheless, Mr. Talbot contends that, in view of a general principle which emerges from what Lord Macmillan said, the Court should lean against a construction of Section 38 which would result in taxing Lady Kenmare in the circumstances of this particular case.

As ancillary to the broad proposition to which I have referred the case was put on behalf of the Appellant in two somewhat different ways. First, it was said that, quite apart from putting any gloss on any particular word in Section 38, when one takes the Section along with the Third Schedule to the Act it becomes manifest that Parliament, duly observing the limitation of jurisdiction to which Lord Macmillan referred, could not have intended that the Section should operate in the case where a settlor was not resident in this country and where recovery of tax in the way for which provision is made by the Schedule, viz., in the Courts of this country, could not be effected. The whole machinery, it is contended, for the recovery of tax by the person charged from the trustees of the settlement or other person to whom income arises under the settlement, breaks down in the case of a foreign settlement; and when one finds that no equivalent or other machinery which is suited to the case of such a settlement is provided by the Act, the inference must be that the Legislature was not intending to deal with foreign settlements such as that now in question at all.

At first sight there seems force in this, but even if it were founded upon a right assumption I do not think, upon further examination, that it should succeed. If a taxing Statute clearly imposes a liability on A and at the same time gives him a remedy over against B, I think the liability would still subsist even though it should transpire that in A's particular case he could not enforce his remedy against B. By Part I of the Third Schedule to the 1938 Act Lady Kenmare is given the right of recovery therein mentioned and nothing can deprive her of it. But Parliament does not guarantee that that right will be effective. What is given is, as I think Mr. Stamp suggested, a *de jure* right and not a *de facto* right. The effectiveness or otherwise of the right cannot govern liability to assessment; for, if it did, all kinds of matters would have to be enquired into, including the point of time at which the enforceability of the right falls to be considered, and in this connection it will be noted that the right to recover does not arise until after the settlor has paid the tax and this will not be until after the assessment has been made. Apart altogether, however, from these considerations, I am by no means satisfied that Lady Kenmare could not enforce her statutory right of recovery in the Courts of this country. The only difficulty in her way would be that the relevant defendant would probably be outside the jurisdiction, but our procedural law gives adequate facilities for service upon parties who are resident abroad. I accordingly do not think that the Appellant has succeeded in showing that a narrow interpretation should be given to Section 38 because of considerations founded upon the Third Schedule to the Act.

The second way in which Mr. Talbot put his case was to submit that the word "settlement" in Section 38 (2) should be confined in its meaning to a settlement which takes effect and is enforceable under the law of the United Kingdom. It is quite clear that in some cases where language of apparent generality is found in a Statute some limitation has perforce to be

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placed upon it; and *Colquhoun* v. *Heddon*(1), 25 Q.B.D. 129, and *The Camille & Henry Dreyfus Foundation, Inc.* v. *Commissioners of Inland Revenue,* 36 T.C. 126, to which Mr. Talbot referred us, are instances of this being done. I am unable, however, to see any sufficient reason to adopt the narrow construction of the word "settlement" in Section 38 for which the Appellant contends. It seems clear from Section 41 that the Legislature was contemplating the possibility of settlors being domiciled abroad; and when it is remembered that it is an inherent feature of our Income Tax code that foreign income which is sent here is taxable, there would appear to be no ground for assuming that when the word "settlement" is used in a taxing Act it means only a settlement which is within the jurisdiction of our Courts. Finally, the extremely wide scope of the definition of the expression "settlement" in Section 41 of the 1938 Act disposes, as it seems to me, of the Appellant's contention on this point.

As, therefore, the assessment of which Lady Kenmare complains was justified by the relevant language of the Finance Act, 1938, and as I can see no warrant for attributing an artificial construction to that language, I agree with Danckwerts, J., in thinking that the assessment was rightly made and I would dismiss the appeal.

Sir Reginald Hills.—The appeal will be dismissed with costs, my Lord?

Singleton, L.J.—Yes, Sir Reginald.

Mr. F. N. Bucher.—Might I respectfully ask your Lordships to consider granting the Appellant leave to appeal to the House of Lords?

Singleton, L.J.—Yes, you may have leave to appeal.

The taxpayer having appealed against the above decision, the case came before the House of Lords (Viscount Simonds and Lords Reid, Cohen, Keith of Avonholm and Somervell of Harrow) on 1st, 2nd and 3rd July, 1957, when judgment was reserved. On 25th July, 1957, judgment was given unanimously in favour of the Crown, with costs.

Mr. F. Heyworth Talbot, Q.C., Mr. F. N. Bucher, Q.C., and Mr. H. H. Monroe appeared as Counsel for the taxpayer, and Mr. Geoffrey Cross, Q.C., Sir Reginald Hills and Mr. E. B. Stamp for the Crown.

Viscount Simonds.—My Lords, on 24th September, 1947, the Appellant, the Countess of Kenmare, being then neither resident nor ordinarily resident in the United Kingdom, made in Bermuda, in accordance with the law of that island, a settlement of certain United Kingdom stocks, shares and securities of the value of about £700,000. The trustees of the settlement were Nicholas Conyers Dill and the Bank of N. T. Butterfield & Son, Ltd., both of them resident in Bermuda. The beneficial trusts of the settlement were (*a*) for the trustees in their absolute discretion to pay the whole or any part of the income of the trust to the Appellant during her life and to hold the balance of such income as should not be paid to her on income account and to pay the whole or any part of such balance to her from time to time during her

(1) 2 T.C. 621.

life, with the proviso that any balance remaining at her death should be added to the trust fund and devolve accordingly, and (*b*) after the death of the Appellant to stand possessed of the capital of the trust fund upon the trusts for the benefit of the children or remoter issue of the settlor which are usually found in such a settlement. So far the settlement followed the common form, but it contained also the following clause 5, which has given rise to the question which your Lordships have now to determine:

> "5. (*a*) Notwithstanding the trusts hereinbefore declared the Trustees if they in their absolute discretion think fit may at any time and from time to time during the lifetime of the Settlor by writing under their hands declare that any part of the Trust Fund not exceeding the amount hereinafter mentioned shall thenceforth be held In Trust for the Settlor absolutely and thereupon the trusts hereinbefore declared concerning the part of the Trust Fund or the property to which such declaration relates shall forthwith determine and the Trustees shall thereupon transfer such part of the Trust Fund or the property to which such declaration relates to the Settlor absolutely Provided Always that the foregoing power shall not be exercisable by the Trustees so as to vest in the Settlor in any period of three years the first of which shall commence on the date hereof and end on the same date in the year 1950 the second of which shall end on the same date in the year 1953 and so on in every third year a part or parts of the Trust Fund or property of a value or aggregate value exceeding £60,000 of the currency of the Islands of Bermuda. (*b*) If in any such period of three years the foregoing powers shall not be exercised to the full extent of the said sum of £60,000 the deficiency may be carried forward so as to increase the amount in respect of which the said power may be exercised in any succeeding period of three years."

The income arising from the trust fund for the period from 24th September, 1947, to 5th April, 1948, amounted, before deduction of United Kingdom tax and expenses, to £24,127 6*s.* 7*d.*, and this sum was included in the assessment of the Appellant to Surtax for the year 1947–48 upon the footing that it was caught by Section 38 (2) of the Finance Act, 1938. The net income was in fact paid to the Appellant or placed at her disposal by the trustees. Section 38 (2) is as follows:

> "38. . . . (2) If and so long as the terms of any settlement are such that—(*a*) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and (*b*) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person: Provided that, where any such power as aforesaid cannot be exercised within six years from the time when any particular property first becomes comprised in the settlement, this subsection shall not apply to income arising under the settlement from that property, or from property representing that property, so long as the power cannot be exercised."

Reference must also be made to Sub-section (5) of the same Section, which provides that the provisions of Part I of the Third Schedule to the Act shall have effect as respects the recovery by a settlor of tax with which he becomes chargeable and the recovery from a settlor of any additional relief to which he becomes entitled by virtue of that Section, and to Sub-section (7), which provides that the provisions of that Section shall apply for the purposes of assessment to Income Tax for the year 1937–38 and subsequent years and shall apply in relation to any settlement wherever made and whether made before or after the passing of the Act. I must also mention that by Section 41 (4) the expression "income arising under a

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settlement" is defined as including any income chargeable to Income Tax by deduction or otherwise, and any income which would have been so chargeable if it had been received in the United Kingdom by a person domiciled, resident and ordinarily resident in the United Kingdom; and the expression "settlement" is defined as including any disposition, trust, covenant, agreement or arrangement; and the expression "settlor" in relation to a settlement as meaning any person by whom the settlement was made. Finally, reference must be made to Part I of the Third Schedule to the Act, which provides, by Paragraph 1, that where by virtue of any provision of Section 38 of the Act any Income Tax becomes chargeable on and is paid by a settlor, he shall be entitled (*a*) to recover from any trustee or other person to whom income arises under the settlement the amount of tax so paid, and (*b*) for that purpose to require the Commissioners concerned to furnish to him a certificate specifying the amount of income in respect of which he has so paid tax and the amount of tax so paid.

The Appellant, submitting to the jurisdiction, appealed against this assessment to the Special Commissioners on two grounds which stated shortly, were (*a*) that the settlement by reason of what I may call its foreign character was not a settlement to which upon its true construction Section 38 applied, and (*b*) that the power conferred by clause 5 upon the trustees was not a power to revoke or determine the settlement or any provision thereof within the meaning of the Section. The Special Commissioners upheld her appeal on the first ground, and therefore thought it unnecessary to express any view on the second. Upon appeal by way of Case Stated to the Court, Danckwerts, J., reversed the decision of the Special Commissioners, and his judgment was upheld by the Court of Appeal.

Upon what I have called the first ground there was no difference of opinion between any of the learned Judges, and there was, in my view, little room for any difference. The language of Section 38, and particularly of Sub-section (7), and of Section 41, makes it clear beyond all doubt that any settlement, wherever made and whatever foreign element might be imported by the residence of settlor or trustees or the forum of administration, is caught by its provisions if the income arises in the United Kingdom. It is conceivable that there might be other provisions of the Act which, read with Section 38, would enforce a narrower meaning upon the word "settlement" where it occurs in Section 38. In *Astor* v. *Perry*(1), [1935] A.C. 398, this House by a majority was constrained as a matter of construction to limit the *prima facie* generality of certain words appearing in Section 20 of the Finance Act, 1922, and the Special Commissioners were led or misled by this decision, and particularly by the opinion of Lord Macmillan, into imposing a similar limitation upon Section 38. It cannot, however, be ignored that the Finance Act of 1938 was enacted after the decision in *Astor* v. *Perry*, that its language appears to be designed precisely to overcome the difficulties to which that case had given rise and that the definition of "income arising under a settlement" excludes from the operation of the Section the income arising from foreign investments to which Lord Macmillan had directed the very pertinent question relied on by Counsel for the Appellant. Special attention was properly directed to the so-called machinery provisions of the Third Schedule. But the difficulty which may or may not arise in applying them to the case of a settlement with foreign trustees—an event which may happen whether the settlor himself is or is not resident in the United Kingdom—falls far short of such a contradiction or inconsistency as must impel the Court to limit

(1) 19 T.C. 255.

the plain meaning of the substantive words of the Section. Upon this part of the case I can add nothing to what has been said by the learned Judges of the Court of Appeal, with whom I am in full agreement.

I turn to the second point. Is the power given to the trustees by clause 5 of the settlement a power within the meaning of Section 38 (2) of the Act? In the Courts below the conclusion has been unanimously reached that it is, but not always for the same reason. For the purpose of this appeal I think it necessary only to consider and, having considered, affirm the opinion of the Court of Appeal that, whatever may be the meaning of the word "provision", the power given to the trustees may enable them by successive withdrawals of the trust fund to exhaust it during the lifetime of the settlor and thus determine the settlement. This conclusion admittedly leaves unsolved certain difficulties of interpretation, but I think it better to reserve them for discussion in *Saunders* v. *Commissioners of Inland Revenue*(1) where their solution is inescapable.

I have already stated in full the relevant parts of Section 38 (2). I would now only recall attention to the words "has or may have", "immediately or in the future" and "revoke or otherwise determine". Applying these words to the present case, I do not see how it can be denied that the trustees may in the future have power to determine the settlement. Successive withdrawals from the trust fund upon the permitted scale will within a measurable space of time leave nothing upon which the trusts of the settlement can operate; the settlement will then be determined. This event may be advanced by a depreciation of the trust fund or delayed by its appreciation. It may never take place by reason of the earlier death of the settlor. But I do not see how it can be said that the day may not arrive when, the Appellant being still living, the trustees will have the power to withdraw the last pound of the trust fund and place it at her disposal. For all I know that is what may have been intended or at least hoped for.

For these reasons I am of opinion that this settlement was within Section 38 (2) of the Act and that the assessment was rightly made. I would dismiss the appeal accordingly, with costs.

Lord Reid.—My Lords, in August, 1947, the Appellant ceased to reside in the United Kingdom and she was not resident there at any relevant time so far as this case is concerned. On 24th September of that year she made a settlement in Bermuda which is governed by the law of Bermuda. The property comprised in that settlement consisted of mortgages and shares of industrial companies in the United Kingdom which were then worth about £700,000.

The relevant provisions of the settlement are:

> "2. (*a*) The Trustees shall in their absolute discretion pay the income (or such part thereof in their absolute discretion as aforesaid) of the Scheduled investments and of the property for the time being representing the same (hereinafter called 'the Trust Fund') to the Settlor during her life. . . .
> 5. (*a*) Notwithstanding the trusts hereinbefore declared the Trustees if they in their absolute discretion think fit may at any time and from time to time during the lifetime of the Settlor by writing under their hands declare that any part of the Trust Fund not exceeding the amount hereinafter mentioned shall thenceforth be held In Trust for the Settlor absolutely and thereupon the trusts hereinbefore declared concerning the part of the Trust Fund or the property to which such declaration relates shall forthwith determine and the Trustees shall thereupon transfer such part of the Trust Fund or the property

(1) Page 416 *post*.

(Lord Reid.)

> to which such declaration relates to the Settlor absolutely Provided Always that the foregoing power shall not be exercisable by the Trustees so as to vest in the Settlor in any period of three years the first of which shall commence on the date hereof and end on the same date in the year 1950 the second of which shall end on the same date in the year 1953 and so on in every third year a part or parts of the Trust Fund or property of a value or aggregate value exceeding £60,000 of the currency of the Islands of Bermuda. (*b*) If in any such period of three years the foregoing powers shall not be exercised to the full extent of the said sum of £60,000 the deficiency may be carried forward so as to increase the amount in respect of which the said power may be exercised in any succeeding period of three years. (*c*) For the purposes of this Clause the value of a part of the Trust Fund or property declared to be held in trust for the Settlor absolutely shall be the value thereof at the date of such declaration and the Trustees may ascertain and fix such value in any manner they may think fit and their decision shall bind all parties claiming hereunder."

Clause 3 provides that after the death of the settlor the trustees shall hold the capital and any balance on income account in trust for the settlor's children.

The whole of the income arising from these investments for the period from 24th September, 1947, to 5th April, 1948, was put at the disposal of the Appellant by the trustees. The Appellant was assessed to Surtax on the income, and the question in this case is whether that assessment was rightly made. It is admitted that this income did not belong to the Appellant when it accrued and that the sum which she received came to her by virtue of her rights under the settlement. Accordingly, as she resided abroad and received the money by virtue of rights under a foreign settlement, she could not be assessed unless there are statutory provisions which cover this case. The Crown relies on Section 38 (2) of the Finance Act, 1938, which is in these terms:

> "(2) If and so long as the terms of any settlement are such that—(*a*) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and (*b*) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person: Provided that, where any such power as aforesaid cannot be exercised within six years from the time when any particular property first becomes comprised in the settlement, this subsection shall not apply to income arising under the settlement from that property, or from property representing that property, so long as the power cannot be exercised."

The Appellant maintains that on their true construction the provisions of that Sub-section do not apply. Her case is put on two quite separate grounds. In the first place it was argued that the terms of this settlement are not such that the trustees

> "may have power . . . in the future . . . to revoke or otherwise determine the settlement or any provision thereof".

If that submission is well founded then admittedly the assessment is invalid. If it is not well founded then the Appellant's second argument is that the Sub-section must be so construed as not to have any application to a case where the settlor is not resident in the United Kingdom and the settlement is a foreign settlement, and that the fact that the income is derived from property in the United Kingdom is immaterial.

(Lord Reid.)

Under clause 5 of the settlement the trustees were empowered in their absolute discretion to release £60,000 from the trusts of the settlement during the period of three years which ended on 24th September, 1950, and they have been empowered and will be empowered to release a further sum of £60,000 in each succeeding triennium so long as the settlor survives. This power is cumulative so that, even if nothing has yet in fact been released and put at the absolute disposal of the settlor, there would now be power to release £240,000. The time must come, if the settlor survives long enough, when the trustees will have power to release the whole of the trust fund. We do not know when that time may come because the value of the trust fund may alter. But if the increase or decrease in value is not very substantial that time will come if the Appellant survives to an age of between 80 and 90 years. If there is a substantial fall in the value of the trust fund the time will come before the Appellant reaches the age of 80.

Can it reasonably be said in those circumstances that the trustees may have power during the lifetime of the settlor to release the whole of the trust fund so that the settlor becomes beneficially entitled to the whole of it? I think it can. In my opinion the word "may" must be construed in accordance with the principle of *de minimis*. There must be a real possibility of there being power to release the whole fund before the death of the settlor. I do not think that "may" means that there must be a probability in the sense that the event is more likely to happen than not to happen, but there must be more than a negligible possibility. I do not think that the possibility of there being power to release the whole fund before the death of the settlor is in this case negligible.

It was argued that even if that be so this is not the kind of power aimed at by the Sub-section. But I am of opinion that we must look, not at the nature or the apparent object of the power, but at its possible effect if it is exercised. Then the question arises: if the exercise of the power may release the whole of the trust fund and revest it in the settlor, is that power a power to determine the settlement? In my opinion it is. It is not a power to revoke the settlement in the sense of cancelling or annulling it, but it appears to me that if there is nothing left for the trusts of the settlement to operate on then the settlement can properly be said to have been determined or brought to an end. I am therefore of opinion that the first argument for the Appellant fails and I pass to the second.

It might have been argued before the decision of this House in *Whitney* v. *Commissioners of Inland Revenue*(1), [1926] A.C. 37, that because the Appellant resides abroad there is no power to make an assessment on her. But that argument is not now open and the Appellant can only succeed by showing that on a true construction of Section 38 (2) it does not apply to this case. Construed literally it clearly does apply, and therefore the Appellant must point to some word or phrase in it which can be given a limited meaning so as to exclude her case.

The Appellant relies on certain observations made in *Astor* v. *Perry*(2), [1935] A.C. 398, but I do not think that that case helps her argument. There, a resident in the United Kingdom made a foreign settlement of property situated abroad and reserved power to revoke it. On a literal construction Section 20 of the Finance Act, 1922—the predecessor of the Section we are now dealing with—would have applied, as it taxed "any income" of which a person was able to obtain for himself beneficial enjoyment by exercising a

(1) 10 T.C. 88. (2) 19 T.C. 255.

(Lord Reid.)

power of revocation. But it was held that the words "any income" must be given a limited meaning and must mean income already charged to tax under the ordinary provisions of the Income Tax Acts. So the Section did not bring new income into charge but it enacted with regard to income already chargeable that it should be deemed to be the income of a person other than the person entitled to receive it. That is precisely what the Crown seeks to do in the present case. The income in the present case arises in the United Kingdom and the persons entitled to receive it are the Bermudan trustees: apart from Section 38 (2) they would have to suffer payment of tax by deduction at the source. If the Crown is right this Sub-section requires this income to be treated as the Appellant's income and not as income of the Bermudan trustees, with the result that, in addition to tax being payable at the standard rate, she is assessable to Surtax in respect of it.

The Appellant's argument is that it would be unreasonable to suppose that Parliament intended to make a foreign resident liable for tax on income from property which he has ceased to own, and that the machinery provisions of the Act show that this was not intended. An equally strong argument based on the difficulty of applying machinery provisions was rejected by the majority of their Lordships in *Whitney* v. *Commissioners of Inland Revenue*(1), and I do not think that it can prevail here. What appeared to me the most substantial point made was that the 1938 Act entitles a settlor who pays tax under Section 38 (2) to recover that tax from the trustees who receive the income in respect of which it is paid, that it may not be possible to operate that relief against foreign trustees, and that Section 38 (2) should only apply to a settlor who has available this consequential right of relief. To that argument there appear to me to be two answers. In the first place, if a settlor settles property situated in the United Kingdom by means of a foreign settlement, he takes the risk of difficulty in operating his right of relief. But, it was said, suppose that an American settlor settled American property by an American settlement and then the trustees invest trust property here: the American settlor would not have created the difficulty and he should not be chargeable. I think that the practical answer is that, if such a case ever arose, the Inland Revenue would probably be unable to recover anything from the American settlor because Courts do not enforce liability to pay taxes in another country. The second answer to this argument is that if it is correct it would also apply to relieve a resident in this country who settled property situated in this country by means of a foreign settlement. He also could say that it might not be possible to operate his statutory right of relief against the foreign trustees. But in my opinion it is clear that Section 38 (2) is intended to apply and does apply to such a case. Section 38 (7) provides that it shall apply in relation to any settlement wherever made, and the provisions of Section 41 (4) appear to me to be designed to meet such a case. With the experience of the 1922 Act before them, it cannot have escaped the notice of those responsible for advising Parliament in 1938 that failure to include within the scope of Section 38 (2) foreign settlements made by British residents would leave an easy and obvious loophole for evasion. The wording of the 1938 Act satisfies me that this was appreciated and prevented.

Once it is determined that Section 38 (2) applies to foreign settlements made by residents in the United Kingdom I can find no way of construing any word or phrase in the Act in such a manner that foreign settlements made by foreign residents can be differentiated from foreign settlements made by persons resident here. Indeed, Counsel for the Appellant were unable to

(1) 10 T.C. 88.

point to any word or phrase capable of a construction which would lead to that result. In my judgment this appeal should be dismissed.

Lord Cohen.—My Lords, the question raised in this appeal is whether certain income amounting to £24,127 6*s.* 7*d.*, arising during the fiscal year 1947–48 under a settlement dated 24th September, 1947, being a settlement made by the Appellant and governed by the law of the Islands of Bermuda, should be included in the total income of the Appellant for that year under the provisions of Section 38 (2) of the Finance Act, 1938, notwithstanding that the Appellant was not resident in the United Kingdom when the income arose. The question turns on the construction and effect of certain provisions of the Finance Act, 1938: Part IV and the Third Schedule. The points in issue, shortly stated, are (*a*) whether Section 38 applies to a settlement made by a non-resident settlor, having non-resident trustees and governed by the law of a country other than the United Kingdom; and (*b*) whether a power given to trustees under a settlement from time to time to vest any part of the capital of the settled fund, not exceeding a certain specified amount in value, in the settlor, is a power "to revoke or otherwise determine the settlement or any provision thereof" within the meaning of Section 38 (2) in a case where the exercise of the power may ultimately exhaust the whole of the settled fund.

I find myself in such complete agreement with what your Lordships have said about the first point that I can state quite shortly my reasons for agreeing with the Court of Appeal that the Appellant's argument thereon cannot be sustained. Section 38 (7) provides that the foregoing provisions of the Section shall apply in relation to any settlement *wherever* made (the italics are mine) and whether made before or after the passing of the Act. Section 41 (4) (*b*) provides that for the purposes of the Part of the Act which includes Section 38 the expression "settlement" shall include any disposition, trust, covenant, agreement or arrangement and the expression "settlor" in relation to a settlement means any person by whom the settlement was made.

Prima facie the settlement of 24th September, 1947, is a settlement, and Lady Kenmare is a settlor, within the meaning of Section 38 (2). But, said Mr. Heyworth Talbot, on her behalf, it cannot have been the intention of Parliament to tax a non-resident person on income of which she has effectually divested herself or on income which has never been her income. As an illustration of the alleged preposterousness of the opposite view he instanced a case containing the following features: (1) a settlement made in the United States by a person resident in the United States; (2) the settled fund consisting of United States securities; (3) the trustees resident in the United States and having a power to revoke the settlement; (4) the settlement containing a provision that on such revocation the settled fund should revert to the settlor. Mr. Heyworth Talbot assumed that the trustees subsequently invested part of the settled fund in United Kingdom securities and asked rhetorically: Can it be that the foreign settlor is liable to pay Surtax on the income derived from those United Kingdom securities? My Lords, that case is not before us, but my provisional answer must be: Yes, because the Act in plain terms so provides.

Mr. Heyworth Talbot relied on the decision of your Lordships' House in *Astor* v. *Perry*[1], [1935] A.C. 398, a decision on Section 20 of the Finance Act, 1922. In that case the securities comprised in the settlement were American securities and the majority of the House held that "any income" in Section 20 must be confined to income chargeable with tax

(1) 19 T.C. 255.

(Lord Cohen.)

under the British Finance Act of the year. The material portion of Section 20 was repealed by the Finance Act, 1938, and the language of Section 38 (2) is so different that I cannot derive assistance from the decision in *Astor* v. *Perry*[1] on the meaning of Section 20 of the Act of 1922. I do, however, derive assistance from the observation of Lord Russell of Killowen in his dissenting judgment at page 406[2], where he said:

> "There must . . . be the necessary limitation which is inherent in all our Income Tax legislation—namely, that what is taxed under or by virtue of this provision can only be either (1) income which is here, or (2) income of a person resident here."

This observation is not inconsistent with anything in the judgments of the majority in the case cited. Applying it to Mr. Heyworth Talbot's hypothetical case, it is plain that no tax would have been payable under Section 38 (2) on the income from the settled fund so long as that consisted only of foreign securities because of the limitation on the meaning of the expression "income arising under a settlement" to be inferred from the concluding words of Section 41 (4) (*a*). In the present case your Lordships are dealing with a claim to tax on income which is here, and the language of the Act is plainly wide enough to bring that income within the ambit of the taxing provision.

Mr. Heyworth Talbot also said that his case was supported by the provisions of the Third Schedule, which contains machinery for giving effect to Section 38, enables a settlor who had been compelled to pay tax under Section 38 to recover what he has paid from the trustee or other person to whom income arises under the settlement, and contains other provisions to which it might be difficult to give effect in a case where the settlor and trustees were outside the jurisdiction. My Lords, the language of Section 41 (4) makes it clear that the Legislature contemplated the possibility of the settlor being resident outside the United Kingdom, and I cannot derive from these machinery provisions any sufficient justification for cutting down the plain meaning of the language used.

I turn, therefore, to the second point. If the assessment is to stand, two conditions have to be satisfied. There is, however, no dispute as to the second condition. It is admitted that if the power contained in clause 5 of the settlement dated 24th September, 1947, is a power,

> "whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof",

the Appellant will, on the power being exercised, become entitled to the whole or some part of the property comprised in the settlement.

Mr. Heyworth Talbot, however, submitted that it cannot be predicated that a time will ever come when, by an exercise of the powers given by clause 5, the trustees will be in a position to remove all remaining capital funds from the trust. That is true, but I agree with the reasons given by Morris, L.J., for thinking that this submission does not afford a reason for setting aside the assessment. The question is whether there is power to determine the settlement. I understand the word "determine" as denoting putting an end to the settlement. I agree that there can be no certainty that an exercise of the powers given by clause 5 will ever remove all the remaining capital funds from the trust. But I would adopt what was said

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(1) [1935] A.C. 398; 19 T.C. 255. (2) 19 T.C., at p. 280.

by Morris, L.J., in the course of his judgment in the passage which reads as follows(1):

> "There is the uncertain element of the length of life of the settlor. There is the uncertain element as to the value of the trust fund; it may increase or appreciate or it may not; the value in the currency of Bermuda may fluctuate. Furthermore, it was submitted that, even if the result of the operation of clause 5 of the settlement may be to exhaust the funds, there is even so no revocation or determination of the settlement. But it seems to me that if the trustees by one or more declarations bring it about that the trusts concerning the greater part of the trust fund are determined, the time may come when the trustees, by declaration made by them, may be in a position to exercise their power so that it affects all the remaining part of the trust fund. If so, the trusts concerning that remaining part of the trust fund would forthwith determine. Such a time may come even though it may not seem likely that it will. If the trustees were in that position they would have power to determine the settlement. It seems to me that the trustees may have such power in the future. The wording of Section 38 (2) (*a*) is, therefore, satisfied."

I would add that no argument appears to have been addressed to the Commissioners based on the probability or improbability of the Appellant, who was over 50 years of age when the settlement was executed, being alive at a date when the exercise of the powers given by clause 5 would finally exhaust the settled funds. I therefore express no opinion on the question what the position would be in a case where under a similar provision it is impossible or at least highly improbable that the funds would ever be exhausted by the due exercise of the alleged power of revocation.

For the reasons I have given I agree that the appeal should be dismissed.

Lord Keith of Avonholm.—My Lords, I agree with the result reached by your Lordships on the case as presented. It may be arguable in an appropriate case that "may have power" does not bring Section 38 (2) into operation until the power is actually exerciseable. In the present case the power increases cumulatively with every three-year period and at this moment is exerciseable only over £240,000 of the trust fund calculated in the currency of the Islands of Bermuda. As I shall develop in *Saunders* v. *Commissioners of Inland Revenue*(2), I think Section 38 covers a partial revocation of a provision, and on this view it might be proper to look at the state of the power at any particular moment of time. But I reserve my opinion on this line of construction.

I would dismiss the appeal.

Lord Somervell of Harrow.—My Lords, I agree that the appeal should be dismissed for the reasons given by my noble and learned friend on the Woolsack.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Theodore Goddard & Co.]

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(1) *See* page 399 *ante*. (2) *See* pages 437-8 *post*.