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HIGH COURT OF JUSTICE (CHANCERY DIVISION)—
13TH, 14TH, 15TH AND 20TH JULY 1966

Bulmer *v*. Commissioners of Inland Revenue[1]
Lady Bulmer *v*. Commissioners of Inland Revenue
Kennedy *v*. Commissioners of Inland Revenue
B
P. H. Oates *v*. Commissioners of Inland Revenue
A. R. Oates and Others *v*. Commissioners of Inland Revenue
Macaulay *v*. Commissioners of Inland Revenue

Surtax—Settlement—Sale of shares with option to repurchase—Whether a "settlement"—Income Tax Act 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 411(2).

C *The Appellants, together with certain relatives and associates, owned in December* 1954 *between* 25 *and* 30 *per cent. of the shares in B Ltd., a public company. They discovered that another company was attempting to acquire control of B Ltd. by purchasing its ordinary shares on the Stock Exchange. The Appellants and certain other like-minded shareholders wished to avoid a takeover and to gain control of B Ltd. themselves. To this end they arranged with a public* D *company, S Ltd., for the latter to incorporate a subsidiary company, Y Ltd., and lend money to it at a commercial rate of interest to enable it to acquire shares in B Ltd. in the market. The Appellants sold their own shares in B Ltd. to Y Ltd. at a price below the market value (because S Ltd. wished the balance sheet of its subsidiary Y Ltd. to show creditors outside the group at a low figure) and the purchase price was left outstanding as an interest-free loan. Under the arrangement* E *the net profits of Y Ltd.* (i.e. *the dividends on its shares in B Ltd.) were applied towards the servicing and repayment of the loan from S Ltd. (there was, however, no bar to the loan being repaid from other sources); and each of the Appellants was given an option, exercisable when the loan from S Ltd. had been repaid, to purchase shares in B Ltd. held by Y Ltd., in proportion to the shares originally sold by him to Y Ltd., for an amount equal to that left on loan by him in respect* F *of the original sale. In addition, when the loan from S Ltd. had been repaid, the Appellants were obliged to buy at par from S Ltd. the issued capital of Y Ltd. in proportion to their interests. From December* 1954 *to June* 1961 *Y Ltd. operated in accordance with the arrangement.*

The Appellants were assessed to surtax for the years 1954–55 *to* 1959–60 *inclusive in respect of the dividends paid by B Ltd. to Y Ltd. on the footing that* G *the transactions constituted a "settlement" as defined in s.* 411(2), *Income Tax Act* 1952. *On appeal, they contended,* inter alia, *that the transactions were commercial without any element of bounty and did not constitute a "settlement" within s.* 411(2). *For the Crown, it was contended that the transactions were within ss.* 404(2), 405(2) *and* 415 *of the Act. The Special Commissioners held* (1) *that there was a "settlement" within s.* 411(2) *and the Appellants were "settlors";* H (2) *that the settlement was within ss.* 404(2), 405(2) *and* 415.

Held, *that the scheme was a* bona fide *commercial transaction without any element of bounty and did not constitute a "settlement" within the meaning of s.* 411(2).

Copeman *v*. Coleman 22 T.C. 594; [1939] 2 K.B. 484 *and* Commissioners I of Inland Revenue *v*. Leiner (1964) 41 T.C. 589 *applied.*

[1] Reported [1967] Ch. 145; [1966] 3 W.L.R. 672; [1966] 3 All E.R. 801.

CASES

(1) *Bulmer* v. *Commissioners of Inland Revenue*

CASE

Stated under the Income Tax Act 1952 ss. 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. A

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on 16th, 17th, 19th and 20th July 1962, 12th and 13th December 1962 and 20th February 1964, William P. Bulmer (hereinafter called "the Appellant") appealed against the following assessments to surtax: B

Year of assessment	*Amount of assessment*
	£
1954–55 (additional)	1,577
1955–56	6,500
1956–57 (additional)	11,846
1957–58 (additional)	13,410
1958–59 (additional)	13,285
1959–60	18,073

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2. Together with the Appellant's appeal we heard the following appeals against assessments to surtax:

Name of Appellant	*Year of assessment*	*Amount of assessment*
		£
Lady (Florence) Bulmer	1954–55 (additional)	1,316
	1955–56 (additional)	9,692
	1956–57 (additional)	9,886
	1957–58 (additional)	11,191
	1958–59 (additional)	11,088
	1959–60	16,792
Robert J. Kennedy	1954–55 (additional)	273
	1955–56 (additional)	2,009
	1956–57 (additional)	2,050
	1957–58 (additional)	2,320
	1958–59 (additional)	2,399
	1959–60 (additional)	2,304
Philip H. Oates	1954–55 (additional)	110
	1955–56 (additional)	808
	1956–57 (additional)	825
	1957–58 (additional)	934
	1958–59	3,700
	1959–60 (additional)	928
John H. Oates deceased	1954–55 (additional)	658
	1955–56 (additional)	4,846
	1956–57 (additional)	4,943
	1957–58 (additional)	5,596
	1958–59	6,700
Donald A. R. Macaulay	1954–55 (additional)	768
	1955–56 (additional)	5,654
	1956–57 (additional)	5,767
	1957–58 (additional)	6,529
	1958–59 (additional)	6,468
	1959–60 (additional)	6,483

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The facts relating to these appeals are so closely connected with those of the Appellant's appeal that it is not practicable to separate them. The issue between the parties was whether the dividends arising from certain shares in a company called Bulmer & Lumb (Holdings) Ltd. (hereinafter referred to as "Bulmer") were to be treated as income of the above-named Appellants for the purposes of assessment to surtax.

3. (1) The first question for our decision was whether certain transactions constituted a settlement within the meaning of s. 411(2) of the Income Tax Act 1952.

(2) We held that they did, and the second question was, therefore, whether this settlement was caught by any of the provisions of ss. 404(2), 405, or 415 of the said Act.

(3) As a result of our decision on this second question, the third question was who were the settlors.

(4) Finally, what income should be deemed to be income of the settlors.

4. A preliminary point was taken on behalf of the Crown, that the equitable interest in the said Bulmer shares had never been transferred by the Appellant to a company called Yorkshire Investment Co. Ltd. ("Yorkshire") or to Yorkshire's nominee, and that accordingly the dividends from those shares were income of the Appellant apart from the provisions of the said ss. 404(2), 405 and 415.

5. (1) The Appellant gave evidence before us. He was at all material times a shareholder in and a director of Bulmer, and is now the managing director. On behalf of the Appellant Mr. Peter Williams gave evidence before us. He is a partner in the firm of Wheawill & Sudworth, chartered accountants, who were Bulmer's auditors.

(2) On behalf of the Crown Mr. G. B. Baron F.C.A. gave evidence before us. He is a chief accountant to the Board of Inland Revenue.

6. Bulmer was incorporated in 1909 under the name of Ambler & Lumb Ltd., becoming Bulmer & Lumb (Holdings) Ltd. in October 1952, since which date it has been an investment holding company. At all material times it has been a public company with its shares quoted on the stock exchange. At December 1954 control was as to 70 per cent. to 75 per cent. in the general public, as distinct from the shareholders mentioned later.

Bulmer's subsidiary companies carried on business in what may be called various aspects of the wool trade, chiefly in Yorkshire.

7. During October and November 1954 Bulmer's board of directors noticed that there was considerable activity in Bulmer's ordinary 4*s.* shares on the stock exchange; and from about the middle of November the price rose sharply. On 15th November 1954 the price of the shares on the stock exchange was 7*s.* 3*d.* per 4*s.* ordinary share. In the morning of 3rd December 1954 the price was 10*s.* $6\frac{3}{4}$*d.* and by the evening the price had risen to 13*s.* 9*d.* Thereafter the price began to settle at about 11*s.* to 11*s.* 6*d.* per share. The directors suspected that somebody was attempting to acquire control, and it was discovered that this was in fact the case, and that the attempt was being made by a company called Illingworth Morris & Co. Ltd. ("Illingworth").

Bulmer's directors decided that the first step to deal with this danger was to counter-attack. Bulmer had available about £500,000 in cash. Its bank was approached and agreed to grant borrowing facilities for £1,000,000. Bulmer then made a bid for all Illingworth's shares, which was rejected by 13th December 1954. Bulmer's bid attracted a lot of attention in the Press. Illingworth was

controlled by the Ostrer family, and it could not, therefore, be taken over unless the family agreed. On the other hand, Bulmer could be taken over by patient buying on the market.

8. There was a small group of shareholders in Bulmer, all of like mind, who wished to avoid a takeover by Illingworth and to gain control of Bulmer for themselves. These persons (hereinafter referred to as "the scheduled parties") were: the Appellant, Lady (Florence) Bulmer (the Appellant's mother), R. J. Kennedy, D. A. R. Macaulay, J. H. Oates, Winifred Oates, P. H. Oates and Mrs. M. K. Lunn (nominee of R. J. Kennedy). In addition, there was a further group of shareholders who were sympathetic to the object of preventing a takeover by Illingworth, but who were for various reasons not prepared to risk their interests in Bulmer in order to obtain control of Bulmer. They were, however, willing to exercise their voting rights in the manner desired by the scheduled parties. These persons (hereinafter referred to as "the Macaulays") were: Edith Heather Macaulay, Betty Bulmer, Frances M. Macaulay and E. K. Macaulay.

9. In pursuance of the above-mentioned objects a scheme, which it was a matter of urgency to put into operation as soon as possible, was formulated some time shortly before 3rd December 1954. The scheme had as its ultimate objective that a majority of the shares of Bulmer should be held by the scheduled parties and persons who were like-minded in relation to the control of Bulmer. The transactions in the scheme as it was in fact operated are complicated. We think it will be easier to follow them if we give here a brief outline of the idea as it was formulated at an early stage, although what happened was not always in accordance with this early idea:

(1) There was a company, Sanderson, Murray & Elder (Holdings) Ltd. ("Sanderson"), which had long been associated (not by way of shareholding) on friendly terms with Bulmer and one of whose subsidiaries was a supplier to one of Bulmer's subsidiaries. Sanderson was anxious to help to defeat any attempt by Illingworth to take over Bulmer.

(2) A wholly-owned subsidiary of Sandersons was to be formed, to which 552,262 Bulmer shares ("the original Bulmer shares") were to be transferred at a price by the scheduled parties. As will appear, such a company was formed, under the name of Burlington Finance Co. Ltd., but its name was soon changed to Yorkshire Investment Co. Ltd. ("Yorkshire").

(3) Sanderson was to lend Yorkshire up to £400,000 ("the Sanderson loan") at a commercial rate of interest, and with this money Yorkshire was to buy Bulmer shares on the market ("the accretions"). The dividends from the original Bulmer shares and from the accretions were to be used to service the Sanderson loan and to repay it.

(4) In certain circumstances the scheduled parties were to get back the original Bulmer shares together with their proportions of the accretions.

10. (1) The basic idea of the scheme had been discussed before 3rd December 1954. On that day there was a lunch party in London at which were present the Appellant, Mr. Peter Williams, Mr. J. E. Williams (Mr. Peter Williams' father), who was a director of Sanderson, Mr. R. J. Kennedy, Sir Ian Stewart-Richardson (Bulmer's chairman) and Mr. Whitehead, of Whitehead Industrial Trust Ltd. ("Whitehead"). To that party Mr. Williams, senior, brought the news that the Sanderson loan would be forthcoming on condition that the scheduled parties would in some way put their shares forward as security under a scheme the details of which were to be worked out later. On that information Whitehead immediately began buying Bulmer shares on the

A market; Whitehead agreed to take up and pay for the shares until Sanderson paid the first instalment of the Sanderson loan, and these shares were put into the name of the Bank of Scotland as nominee.

This buying by Whitehead continued until 14th or 15th December 1954, by which time 131,000 units had been bought at a cost of £88,425.

(2) Lady Bulmer (the Appellant's mother) was not present at the lunch B party on 3rd December 1954, and it is probable that her position as a large shareholder in Bulmer was not then discussed; but without her consent to put her shares into the scheme it would have been very difficult, if not impossible, to carry it out. On 13th December 1954 Mr. Williams, senior, wrote the following letter to Lady Bulmer:

"I am writing to you in order to give you an opportunity to consider C the position before the Board Meeting on Wednesday. There are two practicable proposals: 1. To apply to the Capital Issues Committee for a Preference Share Bonus Issue of one £1 share for five 4*s*. shares with full voting rights. If this were done, it would make it much more difficult for anyone to obtain control and you would have an established income from the Preference Shares, which could not be interfered with, of some £6,000 D per annum. Taking your holding and that of the trust together, you would have £100,000 of Preference Shares which could not be affected by any future controlling shareholder. If this were done, you would not then risk any funds in the market but you would be making it as difficult as possible for Illingworth Morris to obtain control and you would then await events. 2. In the case of the proposed Finance Company, you are putting in 300,000 E Bulmer & Lumb shares (being your share capital, with the exception of the trust shares of 182,000 odd) and this capital you are going to risk by buying in the market at a price most certainly in excess of their true market worth based on dividends paid. I want to make it quite clear that it may be necessary to pay up to 14*s*. or 15*s*. a share so that eventually the average price of the Finance Company's shares, if you bring in your shares at F today's market price, will be quite high in relation to the Company itself. It all boils down to this, that in the first proposal you would safeguard yourself against future events to quite a considerable extent and risk loss of control. The alternative is that you and in particular the other directors, will risk your present fortunes in the hope that the necessary share purchases can be made without paying an excessive price."

G (3) On 15th December 1954 there was a meeting of the scheduled parties. The evidence of what took place at this meeting was very vague. We find that it was then definitely decided that there should be incorporated a company to take over the original Bulmer shares and that there should be drawn up an agreement between the scheduled parties and Sanderson.

(4) There had existed for some time a company called W. & S. Investment H Co. Ltd. ("W. & S."). This was a company formed as a matter of convenience by Messrs. Wheawill & Sudworth to hold as nominee shares of the firm's clients from time to time.

(5) On 20th December 1954 the Appellant wrote the following letter to W. & S.:

"I hereby acknowledge that I have transferred into the name of W. & S. I Investment Company Limited, 4, New Burlington Street, London W.1., a total of 185,234 Ordinary Shares of 4*s*. each, fully paid, in Bulmer & Lumb (Holdings) Limited. 33,000 of the said Shares were transferred from my own name and 152,234 from the name of my mother, Dame Florence Bulmer, who was my nominee in respect of the 152,234 Shares. I further

acknowledge that the aforementioned Shares are hereby charged by me to W. & S. Investment Company Limited as security for monies borrowed by W. & S. Investment Company Limited and used for the purchase in the market of Shares in Bulmer & Lumb (Holdings) Limited." A

W. & S. in fact never borrowed any money for the purchase of Bulmer shares.

On the same day transfers of the original Bulmer shares to W. & S. were executed by the schedule parties, the total consideration for each transfer being stated to be 10*s*. The number of shares involved was as follows: B

Lady Bulmer	154,594
W. P. Bulmer (the Appellant)	185,234
R. J. Kennedy	25,050
Mrs. M. K. Lunn (a nominee for R. J. Kennedy)	7,000
D. A. R. Macaulay	90,184
J. H. Oates	71,190
Winifred Oates	6,110
Philip H. Oates	12,900
	552,262

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D

The transfers bear certificates that the shares were being placed in the name of W. & S. as a nominee for investment purposes, and we find that at the date of these transfers W. & S. was the nominee of the transferors. A copy of a transfer of 33,000 Bulmer shares by the Appellant is annexed hereto, marked "1", and forms part of this Case[1]. At this date the Appellant and Lady Bulmer held approximately 17 per cent. of the voting rights in Bulmer, and they were directors, together with Mr. Macaulay, Mr. Kennedy and Mr. Oates. The Bulmer family held approximately 25 per cent. of the voting rights. E

(6) On 21st December 1954 Yorkshire was incorporated, with an issued capital of £2 divided into £1 shares, the directors being Mr. Peter Williams and his father: the two shares were held by nominees for Sanderson. The reason for the formation of Yorkshire was that it was undesirable that Sanderson (which was a public company) should be known to be buying Bulmer shares. On 22nd December 1954 Yorkshire's directors resolved that the company should purchase the original 552,262 Bulmer shares at a price of 5*s*. per share, and that loans free of interest should be accepted from the transferors equivalent to such purchase price and amounting in all to £138,065 10*s*. Bulmer's shares had never at any material date been as low as 5*s*. on the market, and at this date the price on the market was over 11*s*. The price of 5*s*. per share was fixed after negotiation with Sanderson: Sanderson, being a public company, wanted the balance sheet of Yorkshire, to whom they were going to lend money, to show creditors other than Sanderson at a low figure, but the scheduled parties considered 4*s*. per share too low. A copy of an extract of the minutes of this meeting is annexed hereto, marked "2", and forms part of this Case[1]. F G H

(7) On 23rd December 1954 the Appellant wrote the following letter to the directors of Yorkshire:

"I have accepted your offer to purchase from me 185,234 Ordinary Shares of 4*s*. each in Bulmer & Lumb (Holdings) Limited at par. These Shares are registered in the name of W. & S. Investment Company Limited. I have informed that company of the above facts." I

[1] Not included in the present print.

A It will be seen that the price the Appellant mentions is 4*s*. per share, and not 5*s*. There had been no written offer by Yorkshire.

(8) On 12th January 1955 heads of agreement were entered into between Sanderson, Yorkshire and the scheduled parties, as follows:

"Heads of Agreement relating to the purchase of Shares in Bulmer & Lumb (Holdings) Limited.

B 1. Sanderson Murray & Elder (Holdings) Limited (hereinafter referred to as 'S.M. & E.' have formed a wholly owned subsidiary company (hereinafter referred to as 'the Finance Company') with an authorised capital of £1,000 divided into 1,000 Shares of £1 each and having Memorandum and Articles of Association suitable for a finance company. The first Directors of the Finance Company are Messrs. J. E. Williams and P. Williams.

C 2. Each of the following persons named in this clause has transferred to the Finance Company or its nominees the Ordinary Shares in Bulmer & Lumb (Holdings) Limited (hereinafter referred to as 'B. & L.') set opposite his or her name at the price of 5*s*. per Share:

Name	*No. of Shares*
Lady Bulmer	154,594
W. P. Bulmer	185,234
R. J. Kennedy	25,050
D. A. R. Macaulay	90,184
J. H. Oates	71,190
Winifred Oates	6,110
Philip H. Oates	12,900
M. K. Lunn	7,000
	552,262

D E

The purchase consideration shall not be paid to such Vendors but shall be left on loan to the Finance Company such loan to be repayable on demand but to rank after the loan referred to in clause 4 below and not F to carry any interest.

3. Each of the following persons named in this Clause shall undertake with the Finance Company in such form as to be binding on him or her and on his or her estate that until the loan referred to in Clause 4 below has been repaid to S.M. & E. in full he or she will exercise the voting rights attached to the Ordinary Shares in B. & L. set opposite his or her name and to any G bonus shares allotted in respect thereof as the Finance Company shall direct:

Name	*No. of Shares*
Heather Macaulay	6,060
Betty Bulmer	3,000
Frances M. Macaulay	3,000
Edward Kingston Macaulay	3,000
	15,060

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4. S.M. & E. shall make a loan to the Finance Company which shall be applied for the sole purpose of purchasing Ordinary Shares in B. & L. and of paying the expenses of purchase (including stamp duty). The amount I of the loan shall be such as to enable the Finance Company to purchase a number of Ordinary Shares in B. & L. which when added to the Shares specified in Clauses 2 and 3 hereof (plus 198,012 shares) are sufficient to give the Finance Company a majority of the votes carried by the Ordinary

Shares of B. & L. provided that S.M. & E. shall not be obliged to lend to the Finance Company more than £400,000. The loan shall carry interest at the rate of 5 per cent. per annum. A

5. The income received by the Finance Company from the dividends on the Shares in B. & L. which it owns shall be applied first in payment of expenses, interest on the loan from S.M. & E. and any liabilities of the Finance Company (other than the loans referred to in Clauses 2 and 4 hereof) and secondly any balance thereof shall be applied in reduction of the loan from S.M. & E. B

6. The Finance Company will grant to each of the persons named in Clause 2 hereof and their respective personal representatives an option to purchase the Shares in B. & L. which the Finance Company for the time being owns on the following terms: C

(*a*) Such option shall not be exercisable until the loan from S.M. & E. to the Finance Company has been repaid in full together with interest thereon.

(*b*) Each of such persons or his personal representatives shall be entitled for a period of one year after the option has become exercisable on giving one month's previous notice in writing to the Finance Company to require the Finance Company to transfer or procure the transfer to him or her of the same proportion of the Shares in B. & L. owned by the Finance Company when the option first becomes exercisable as the number of Shares in B. & L. transferred by him or her pursuant to Clause 2 hereof bears to 552,262 and the Finance Company shall make such transfer on payment to it of the purchase price as hereinafter provided. The purchase price payable by each of such persons or his personal representatives shall be a sum equal to the amount due to him or her under Clause 2 hereof, and against payment of the purchase price the Finance Company shall discharge the amount so due. D E

7. A majority in number of the persons named in Clause 2 hereof or their respective personal representatives (J. H. Oates, Winifred Oates and Philip H. Oates or their respective personal representatives to be counted as one person in computing such majority also R. J. Kennedy and M. K. Lunn or their personal representatives to be counted as one in computing such majority) may at any time serve notice in writing upon the Finance Company declaring that they wish to take advantage of the provisions of this Clause, and if such notice is served the following provisions shall have effect, viz: F G

(*a*) The Finance Company will sell and each of the persons named in Clause 2 hereof or his personal representatives will purchase the same proportion of the shares in B. & L. owned by the Finance Company at the time when the notice is served as the number of shares in B. & L. transferred by him or her pursuant to Clause 2 hereof bears to 552,262 and the Finance Company shall make such transfer on payment to it of the purchase price as hereinafter provided. H

(*b*) The purchase price payable by each of such persons or his personal representatives shall be the aggregate of (i) a sum equal to the amount due to him or her under Clause 2 hereof and (ii) the same proportion of the other liabilities of the Finance Company as the number of shares in B. & L. transferred by him or her pursuant to Clause 2 hereof bears to 552,262 and against such payments the Finance Company shall discharge its liabilities under Clauses 2 and 4 and any other liabilities it may have. Such price shall I

A be determined by the Auditors of the Finance Company whose decision shall be final.

(c) Notwithstanding anything in this Clause hereinbefore contained, the Finance Company shall not be bound to sell and transfer pursuant to this Clause unless all purchasers complete their purchases at the same time.

8. The Finance Company will undertake (a) that it will not sell any B B. & L. Shares except for the purpose of realising money to repay the loan made to it by S.M. & E. under Clause 4; (b) that the net proceeds of all such realisations shall be applied in or towards discharge of such loan; and (c) that it will not effect any such sale without first giving each of the persons named in Clause 2 hereof or his personal representatives a reasonable opportunity of purchasing, at the market price ruling at the time, a rateable C proportion of the B. & L. Shares proposed to be sold, the rateable proportion in the case of each such person being the same proportion of the shares proposed to be sold as the number of shares transferred by him or her pursuant to Clause 2 bears to 552,262.

9. Each of the persons named in Clause 2 hereof agrees with each of the remainder of such persons that for a period of five years after he or D she acquires any shares in B. & L. pursuant to Clause 6, 7 or 8 hereof he or she or his personal representatives will not sell such shares or any part thereof without first giving each of the remainder or his personal representatives a reasonable opportunity of purchasing, at the market price ruling at the time, a rateable proportion of the B. & L. Shares proposed to be sold, the rateable proportion in the case of each such person being the same E proportion of the shares proposed to be sold as the number of shares transferred by him or her pursuant to Clause 2 bears to the total number of shares so transferred by all the persons to whom the said opportunity of purchasing is offered.

10. As soon as the loan from S.M. & E. to the Finance Company has been repaid in full together with interest thereon the following provisions F shall have effect, namely:

(a) S.M. & E. will sell and each of the persons named in Clause 2 hereof or his or her personal representatives will purchase a rateable proportion of the shares in the Finance Company at par.

(b) In the case of each such persons the said rateable proportion shall be the same proportion of the shares of the Finance Company as the number G of shares transferred by him or her pursuant to Clause 2 bears to 552,262.

11. The Finance Company will undertake with the persons named in Clause 2 and their personal representatives that without the consent of a majority in number of the persons named in Clause 2 or their respective personal representatives (J. H. Oates, Winifred Oates and Philip H. Oates or their respective personal representatives to be counted as one person in H computing such majority also R. J. Kennedy and M. K. Lunn or their personal representatives to be counted as one in computing such majority):

(i) The Finance Company will not borrow money (other than under Clause 4) or increase its share capital beyond the figure mentioned in Clause 1.

(ii) The Finance Company will not buy any B. & L. shares (other than I under Clauses 2 and 4) or acquire any assets (other than shares in B. & L. under Clauses 2 and 4).

(iii) The Finance Company will not engage in any business or activity

other than that contemplated by this Agreement. A

12. S.M. & E. will undertake with the persons named in Clause 2 and their personal representatives that until such time as the sale under Clause 10 has been completed the Finance Company will duly perform its obligations under the Agreement and that S.M. & E. will not sell or charge any of the shares of or its loan to the Finance Company or allow any of the assets of the Finance Company to be disposed of (otherwise than as B contemplated by the Agreement).

13. Each of the persons named in Clause 2 shall indemnify the Finance Company against any (if any) liability to estate duty arising out of the transfer by him or her of shares pursuant to Clause 2.

14. These Heads of Terms record the principles agreed between the parties. They constitute a binding Agreement but it is intended that as soon C as practicable they shall be embodied in a formal Agreement containing such additional or ancillary provisions as the parties may consider to be necessary or desirable or as Counsel (to be appointed by The President of the Law Society) may on the application of any party determine and such provisions when agreed or determined shall be part of the binding Agreement. D

Dated the 12th January, 1955

One part executed thus:
Signed by Norman Hamilton-Smith
for and on behalf of S.M. & E.
in the presence of:— } N. Hamilton-Smith

6*d.* stamp E

S. L. Johnson,
Leith House,
47, Gresham Street,
London, E.C.4.

Signed by
for and on behalf of the Finance
Company in the presence of:— } J. E. Williams F

The other part executed thus:
Signed by the persons named in
Clauses 2 and 3 in the presence
of:— }

	Signature	*Witness to Signature*
6*d.* stamp	J. H. Oates	
	R. J. Kennedy	
	W. P. Bulmer	
	Florence Bulmer	E. Stead
	D. A. R. Macaulay	
	P. H. Oates	
	W. Oates	
	M. K. Lunn	
	Betty Bulmer	
	E. Heather Macaulay	
	E. K. Macaulay	E. Stead
	Frances M. Macaulay	

G H I

A A copy of these heads of agreement is annexed hereto, marked "3", and forms part of this Case([1]). It should perhaps be pointed out, as regards clause 2, that at 12th January 1955 the original Bulmer shares had been transferred to W. & S. as nominee for the transferors, that the Appellant had written his letter of 23rd December 1954 mentioning a price of 4*s.* per share, and that the Bulmer shares had not been transferred to Yorkshire: in fact they never have been. As regards B clause 4, the 198,012 shares (in brackets) are the trust fund of a family settlement made by Lady Bulmer, the trustees being the Appellant, Mr. J. E. Williams and Mr. Dean, another director of Sandersons. The ceiling of £400,000 for the Sanderson loan was reduced to £250,000 by the formal agreement referred to in the next sub-paragraph.

(9) The formal agreement referred to in clause 14 of the above-mentioned C heads of agreement was dated 29th March 1956, although it was not executed by Yorkshire until 4th June 1956; and it was as follows:

[The full text of the formal agreement was included in the Case. Only those passages referred to in sub-paras. (10) and (11) below are here reproduced.]

"This Agreement made the Twenty ninth day of March One thousand nine hundred and fifty six Between The Individuals respectively named and D described in the Schedule hereto (hereinafter referred to as "the Scheduled Parties") of the first part Sanderson Murray & Elder (Holdings) Limited whose registered office is at Leith House, 47 Gresham Street in the County of London (hereinafter called "Sanderson") of the second part Yorkshire Investment Company Limited whose registered office is at 4 New Burlington Street in the County of London (hereinafter called "the Company") of the E third part and Edith Heather Macaulay of 3 Whinney Field, Huddersfield Road Halifax in the County of York Betty Bulmer of Holgate Head Kirkby Malham near Skipton in the County of York Frances Mary Macaulay of Rylestone House, Rylestone Near Skipton in Craven in the County of York and Edward Kingston Macaulay of Rylestone House Rylestone aforesaid (hereinafter together referred to as "the Macaulays") F of the fourth part

"Whereas:—

* * * * *

(G) In this Agreement unless the context otherwise requires:

(i) 'The Scheduled Debts' means the purchase consideration owing by the Company to the Scheduled Parties respectively as specified in the Schedule hereto

* * * * *

G (iii) 'Interests under this Agreement' means in relation to a Scheduled Party or the successor in title to a Scheduled Party the benefit of his Scheduled Debt and the benefit of the Scheduled Debts of others or any proportion thereof hereafter acquired by and for the time being owned by him

(iv) 'Successor in title' in relation to a Scheduled Party means his H personal representatives or such other person or persons as may for the time being be entitled to his interests under this Agreement or any proportion of such interests

* * * * *

([1]) Not included in the present print.

Now This Agreement Witnesseth And It Is Hereby Agreed And Declared as follows:— A

* * * * *

4\. . . . (*b*) Sanderson will on the written request of the outgoing Party or his personal representatives made within thirteen weeks after the expiration of the said period of six months or three months (as the case may be) purchase the interests under this Agreement of the outgoing Party (so far as the same shall not have been disposed of as aforesaid) at a price to be calculated as hereinafter provided B

(*c*) The said purchase price shall be calculated (i) by valuing as at the date of the death of the outgoing Party or of his ceasing to hold office as aforesaid the assets of the Company (and so that for this purpose the shares in Bulmer held by the Company shall be valued at their then current market price) (ii) by deducting from such value the liabilities of the Company as at such date including its liability in respect of the Sanderson loan but excluding its liabilities in respect of the Scheduled Debts and (iii) by calculating the proportion of the sum resulting from such valuation and deduction which shall be equal to the rateable proportion (ascertained by reference to the interests under this Agreement comprised in the purchase) of the outgoing Party or his personal representatives and the proportion so calculated shall be the purchase price All calculations and valuations under this provision shall be made by the Auditors for the time being of the Company acting as experts and not as arbitrators and their determination accordingly of the purchase price shall be final and binding on all parties. C D

5\. Each of the Scheduled Parties or their successors in title shall have the option to purchase from the Company such proportion of the shares in Bulmer owned by the Company as is hereinafter mentioned in accordance with the following provisions: E

(*a*) Such option shall become exercisable so soon as the Sanderson loan and all interest thereon has been paid in full and shall be exercisable at any time within twelve months thereafter by one month's notice in writing to the Company F

(*b*) Such option shall extend to such proportion of the shares in Bulmer owned by the Company at the date when the option first became exercisable as is equal to the rateable proportion of the person exercising the option as at the date of the notice of exercise

(*c*) The purchase price payable by any person exercising such option shall be a sum equal to the amount of the Scheduled Debts comprised in his interests under this Agreement as at the date of the notice of exercise and against payment of such purchase price the Company shall pay and discharge the amount so owing. G

* * * * *

A copy of this agreement is annexed hereto, marked "4", and forms part of this Case[1]. It will be noticed that the provisions of clause 7 of the heads of agreement are not included in this formal agreement. H

(10) This formal agreement was amended by a series of subsequent agreements: (*a*) 31st December 1956; (*b*) 4th July 1957; (*c*) 19th August 1961, by which the option granted by clause 5 of the formal agreement of 29th March 1956 was deleted. Copies of these agreements, marked "5", "6" and "7" respectively, are annexed hereto and form part of this Case[1].

[1] Not included in the present print.

A (11) Two transactions took place in relation to the interests, as defined in clause (G) (iii) of the recitals in the formal agreement of 29th March 1956 (exhibit 4), of the scheduled parties:

(*a*) By an agreement made on 9th October 1958 J. H. Oates and his wife Winifred Oates sold their respective interests, as so defined, for a total of £30,920. Mr. Oates sold his interest for £28,476: his scheduled debt, as defined B in clause (G) (i) of the formal agreement, was £17,797 10*s*. This sale was made under the terms of clause 4(*b*) of the formal agreement of 29th March 1956, by which Sanderson was compelled to buy on request the scheduled parties' interests at a price to be calculated in accordance with the terms of clause 4(*c*) of the said agreement. A factor in this calculation was the number of Bulmer shares which Yorkshire then held, i.e., the original Bulmer shares plus the accretions up to C that date. Similarly Mrs. Winifred Oates sold her interests for £2,444; her scheduled debt, as defined in the formal agreement, was £1,527 10*s*.

(*b*) By an agreement made on 11th July 1960 Lady Bulmer sold her interests under the formal agreement to the trustees of her family settlement for £38,684 10*s*., and this figure is very nearly that of her scheduled debt as defined in clause (G) (i) of the formal agreement of 29th March 1956 (exhibit 4). D Her interests at the date of this sale were worth very much more than £38,684 10*s*., because of the accretion of Bulmer shares purchased on the market by Yorkshire.

This transaction was not carried out under any of the provisions of the formal agreement.

(12) It is the income arising on the original Bulmer shares and on the accretions that the Revenue contend should be deemed to be the income of the E scheduled parties as settlors.

(13) In pursuance of the scheme Bulmer shares were bought on the market by Yorkshire throughout the period 12th December 1954 to 30th June 1961. As will be seen from the next mentioned document, these shares were in the names of nominees for Yorkshire.

(*a*) There is annexed hereto, marked "8", and forming part of this Case([1]), F a document being an analysis of Yorkshire's holdings of Bulmer shares. From this document it will be seen that there were two bonus issues of Bulmer shares, and that at 30th June 1961 Yorkshire held 2,260,595 Bulmer shares, the cost price of which (with the unpaid cost of the original Bulmer shares) was £348,954, and the market value £875,980, these figures being the Yorkshire balance sheet figures. (The three columns headed "Value" on this document should be headed G "Cost".) At that date, in addition to the 2,260,595 Bulmer shares held by Yorkshire, Mr. Peter Williams and his father held at 30th June 1961 490,430 shares as trustees of Lady Bulmer's settlement: Bulmer's issued capital being 7,807,170 shares. At 30th June 1961 the Sanderson loan was £63,579.

(*b*) There is annexed hereto, marked "9", and forming part of this Case([1]), a document showing the rateable proportion of the shares held by Yorkshire H during the period 1955 to 1961 which could have been purchased by the Appellant under the option in clause 6 of the heads of agreement (exhibit 3) or clause 5 of the formal agreement (exhibit 4), assuming that the Sanderson loan had then been repaid.

(*c*) There is annexed hereto, marked "10", and forming part of this Case([1]), a document being an analysis of the Sanderson loan. The "Total" figure of I £210,888, the cost of acquiring the accretions, which appears under the heading "Value [of] other purchases" in exhibit 8, appears in the last column of this

([1]) Not included in the present print.

exhibit. The line "Balance to next year (per balance sheet)" shows the running down of the Sanderson loan to the figure of £63,579 at 30th June 1961. A

The reference to subvention payments introduces a complication which we think needs an explanation, although as we understand the matter it is not strictly relevant to this Case. It will be remembered that under the terms of the heads of agreement (exhibit 3) and of the formal agreement (exhibit 4) Yorkshire's income was to be devoted solely to the service and repayment of the Sanderson loan. Yorkshire was instructed by Sanderson (whose nominees held the two issued Yorkshire shares) to make subvention payments to a member of the Sanderson group. These payments could not be made if Yorkshire was to abide by the terms of the two above-mentioned agreements as to the application of its income, so the arrangement was that Yorkshire should make the subvention payments and receive from Sanderson a free gift of an amount which, together with the income tax repayment Yorkshire would receive in respect of the subvention payments, would be equal to those payments. B C

A copy of sheets from Yorkshire's cash account showing how the repayments of and interest on the Sanderson loan and the gifts from Sanderson were dealt with is not annexed hereto, but is available if the Court requires it. From these sheets it appears that during the year to 30th June 1962 the Sanderson loan was reduced by a further £37,300 to the figure of £26,279, the repayment being made out of dividends on Bulmer shares amounting to £37,402 net. D

(*d*) There is annexed hereto, marked "11", and forming part of this Case([1]), a summary of Yorkshire's profit and loss accounts for the period from 21st December 1954 to 30th June 1960. From this document it will appear how this question of subvention payments was dealt with by Yorkshire in these profit and loss accounts. To take as an example Yorkshire's profit and loss account for the year to 30th June 1959. From the profit after tax of £22,372 8*s*. 5*d*. there is deducted a subvention payment of £22,594 8*s*. 2*d*. after deduction of tax, producing a debit balance of £221 19*s*. 9*d*. A balance of £43,081 11*s*. 2*d*. is brought forward from the previous year, and to this is added the gift from the parent company of £19,381 11*s*., producing a credit balance of £62,241 2*s*. 5*d*. E F

11. There is annexed hereto a document, marked "12", and forming part of this Case([1]), which is relevant to one of the Appellant's contentions. It purports to show that on various assumptions it would have taken 8·6 years from 29th March 1956 to repay the Sanderson loan out of the net dividends received by Yorkshire on its holding of Bulmer shares. Neither in the heads of agreement (exhibit 3) nor in the formal agreement (exhibit 4) is there any provision that the Sanderson loan must be repaid only out of these net dividends. G

12. It was contended on behalf of the Appellant:

A

As regards the preliminary point:

[This point not having been pursued in the High Court, the contentions are not reproduced.] H

B

(1) That the transactions described above did not constitute a settlement within the meaning of s. 411(2) of the Income Tax Act 1952: this was a commercial transaction without any element of bounty, the scheduled parties sold their shares for a price and such a sale was not a settlement within the meaning of the said s. 411(2). I

(2) (*a*) That if there was such a settlement it was not within the terms of

([1]) Not included in the present print.

A s. 404(2) of the said Act, in that no person had, within the meaning of that subsection, any power to revoke or otherwise determine the settlement or any provision thereof.

(*b*) If the option provided for in clause 6 of the heads of agreement (exhibit 3) and in clause 5 of the formal agreement (exhibit 4) was a power to revoke, within the meaning of s. 404(2), the proviso to this subsection applied, in that B on the facts the said option could not be exercised within six years of the dates of either of the above-mentioned agreements.

(3) That if there was such a settlement, it was not within the terms of s. 405, in that no party to the settlement had any interest in any income arising under or in any property comprised in the settlement.

(4) That if there was such a settlement, it was not within the terms of C s. 415 (which applies only to surtax) in that any income which arose under the settlement was income from property of which the settlors had divested themselves absolutely, within the meaning of s. 415(1)(*d*).

(5) As alternatives:

(*a*) that if any income accrued to the scheduled parties from the settlement, it accrued only to 12th January 1955, the date of the heads of agreement (exhibit D 3), or

(*b*) only to 29th March 1956, the date of the formal agreement (exhibit 4), or

(*c*) only to 31st December 1956, the date of the first supplemental agreement (exhibit 5), in that this agreement provided by clause 1 that the whole of the net income of Yorkshire should be applied to the servicing and repayment of the E Sanderson loan.

C

(1) If there is here a settlement within the meaning of s.411(2) of the Income Tax Act 1952, then Sanderson was itself a settlor in relation to that settlement.

(2) By virtue of the combined effect of ss. 411(2) and 409 of the Income Tax Act 1952, the shares in Bulmer purchased with the Sanderson loan ("the accre- F tions", para. 9(3) hereof) constitute property originating from Sanderson and not from the individual settlors.

(3) Accordingly, income arising under the settlement from the accretions is not to be treated under ss. 404, 405 or 415 of the Income Tax Act 1952 as income of the Appellant or of any of the Appellants in the five associated appeals.

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

G A

As regards the preliminary point:

[This point not having been pursued in the High Court, the contentions are not reproduced.]

B

(1) That there was a settlement within the meaning of s. 411(2) of the Income H Tax Act 1952 consisting of the formation of Yorkshire, the heads of agreement of 12th January 1955 (exhibit 3) and the formal agreement of 29th March 1956 (exhibit 4); that the property comprised in the settlement was either the original Bulmer shares and the accretions or, if the contentions at A were correct, only the accretions; and that the settlors were the scheduled parties.

(2) (*a*) That this settlement was within the terms of s. 404(2) in that the I scheduled parties had power to revoke or determine the settlement. This power was contained in clauses 6, 7 and 10 of the heads of agreement of 12th January

1955 (exhibit 3) and clauses 5 and 9 of the formal agreement of 29th March 1956 (exhibit 4). In the event of the exercise of this power to revoke or determine the settlement, the scheduled parties would become beneficially entitled to the whole of the property comprised in the settlement.

(*b*) That is was not impossible for the said power to be exercised within six years, and accordingly the proviso to s. 404(2) did not apply.

(3) That this settlement was within the terms of s. 405 in that, for the reasons mentioned in sub-para. (2) above, the scheduled parties had an interest in the income arising under, and in the property comprised in, the settlement.

(4) That the settlement was within the terms of s. 415 in that, for the reasons mentioned in sub-para. (2)(*a*) above, income arising under the settlement and payable to Yorkshire was not income from property of which the settlors had divested themselves absolutely by the settlement.

(5) That accordingly the dividends from the original Bulmer shares settled by each scheduled party and from a rateable appropriate proportion of the accretions fell to be treated as the income of that scheduled party for tax purposes.

14. The following cases were cited to us:—*Grey* v. *Commissioners of Inland Revenue* [1959] 3 All E.R. 603; [1960] A.C. 1; *Elliott* v. *Pierson* [1948] Ch. 452; *Shaw* v. *Foster* (1872) L.R. 5 H.L. 321; *Parway Estates Ltd.* v. *Commissioners of Inland Revenue* (1958) 37 A.T.C. 164; *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners* [1958] A.C. 549; *Plews* v. *Samuel* [1904] 1 Ch. 464; *Shepheard* v. *Walker* (1875) L.R. 20 Eq. 659; *Commissioners of Inland Revenue* v. *Morton*(1) 24 T.C. 259; *Chamberlain* v. *Commissioners of Inland Revenue* (1943) 25 T.C. 317; *Hood Barrs* v. *Commissioners of Inland Revenue* (1946) 27 T.C. 385; *Lord Vestey's Executors* v. *Commissioners of Inland Revenue* (1949) 31 T.C. 1; *Thomas* v. *Marshall* (2) 34 T.C. 178; *Santley* v. *Wilde* [1899] 2 Ch. 474.

15. We, the Commissioners who heard this appeal, took time to consider our decision, and gave it in writing on 10th April 1963 as follows:

All these appeals were heard together: the question arises whether the Appellants were all settlors under one settlement, and it is not practicable to give a separate decision in respect of each Appellant.

Preliminary Point

[The preliminary point not having been pursued in the High Court, this part of the Commissioners' decision is not reproduced.]

Section 411(2) "*Settlement*"

The question whether there is any settlement within the meaning of s. 411(2) arises in connection with all the other sections involved in this case.

We hold that there was an arrangement within the meaning of the above-mentioned section, and therefore a settlement for the purposes of all the sections we have to consider (for convenience we refer to this settlement as "the arrangement").

We further hold that each of the Appellants is a "settlor" in relation to the arrangement.

It follows that we reject the Appellants' contention that the fact that the original Bulmer shares were sold to Yorkshire takes the arrangement out of s. 411(2).

The arrangement consisted of all the matters set out or referred to in the heads of agreement, and in the subsequent main agreement.

(1) 1941 S.C. 467. (2) [1953] A.C. 543.

Section 404(2) "*Power to revoke*"

A For the purpose of this section we have to consider whether under the terms of the arrangement "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 arrangement or any provision thereof.

The provisions of the heads of agreement differ from those of the main agreement in that clause 7 of the heads of agreement does not appear in the B main agreement. In our view a power to revoke the arrangement, within the meaning of the above-mentioned section, is contained in clauses 6, 7 and 10 of the heads of agreement. Under clause 6 the Appellants on exercising their option will receive, not only their original Bulmer shares, but also any further Bulmer shares which may have been purchased under the arrangement ("accretions"). There is nothing in the terms of the arrangement to prevent the repay- C ment of the Sanderson loan out of sources other than the dividends on the Bulmer shares. The exercise of this option will bring the whole arrangement to an end. Under clause 7 the Appellants can purchase their original Bulmer shares together with any accretions at a price which will not be related to the market price of these shares, and again the whole arrangement will come to an end. Under clause 10, as soon as the Sanderson loan has been repaid, Sanderson must D —not may—sell the two £1 issued shares in Yorkshire at par, thus giving the Appellants an interest in their original Bulmer shares and in the accretions. Again, this transaction will bring the whole arrangement to an end; and again, there is nothing in the terms of the arrangement to prevent the repayment of the Sanderson loan out of sources other than the dividends on the Bulmer shares.

As regards the proviso to s. 404(2), we think that the impossibility of E exercising the power of revocation must be provided for by the terms of the arrangement. The amount of the dividends which Bulmer may pay is not, in our opinion, any term of the arrangement; and in any event, as we have already said, the repayment of the Sanderson loan need not depend on these dividends, nor is it provided in the arrangement that it must so depend.

Our views on the power of revocation contained in clauses 6 and 10 of the F heads of agreement apply to clauses 5 and 9 of the main agreement. Our views on the "six-year" point are the same for both agreements.

Section 405

For the purposes of this section we have to consider whether each of the Appellants has an interest in any income arising under or property comprised in the arrangement. (We leave the question of the extent of the "income arising" G and "property comprised", in relation to each of the Appellants, till later.) To decide this question, we have to determine whether, under subs. (2), any income or property which may at any time arise under or be comprised in the arrangement will or may become payable to or applicable for the benefit of each of the Appellants in any circumstances whatsoever. Our views on this section are covered by what we have said on s. 404(2), in that on the exercise of the power H of revocation property comprised in the arrangement will be payable to or applicable for the benefit of the Appellants. We reject the Appellants' contention that the provisos (i) or (ii) to s. 405(2)(*a*) apply.

Section 415

This section imposes surtax liability only, and in this case it will apply to the Appellants unless, under s. 415(1)(*d*), the income arising under the arrangement I is income from property of which they had divested themselves absolutely.

We deal later with the question of the extent of the "income arising" in relation to each Appellant. Such income is, we hold, not income from property

of which the Appellants had divested themselves absolutely; the property in question is the Bulmer shares, and under the terms of the arrangement all of these shares could become applicable for the benefit of the Appellants in one or other of the events we have described. A

Property comprised in, and income arising under, the arrangement in relation to each Appellant—Section 409 B

It follows from the views we have expressed that the original Bulmer shares were property that each of the Appellants provided directly, within the meaning of s. 409(5)(*a*).

We think that the accretions represent property indirectly provided by the Appellants, within the meaning of s. 409(5)(*a*). When we look at the arrangement which the Appellants made, we find that they had arranged for money to be borrowed at a commercial rate of interest for the purpose of buying the accretions and for the repayment of that money; they were only able to make these arrangements by parting temporarily with the beneficial interest (which, of course, carried the dividends) in their original Bulmer shares. C

The appeals fail, and we leave the figures to be agreed.

16. We were informed that the parties were not able to agree figures without a further hearing, and this further hearing took place on 20th February 1964. D

17. On behalf of the Appellant it was pointed out to us that in the course of the argument at the previous hearings the point had been taken on behalf of the Appellant that, if there was a settlement within the meaning of s. 411(2), Sanderson should be considered to be a settlor. This point had been taken, not only by way of illustration of the strange results of a decision that there was such a settlement, but also as having some bearing on the question of the quantum of the assessments on the parties, which we had left open: the inclusion of Sanderson among the number of settlors would affect the quantum of the assessments on the scheduled parties. E

18. It was admitted on behalf of the Appellant that on the supposition that there was a s. 411(2) settlement the question whether Sanderson should be considered to be a settlor and the implications involved in that question had been extensively canvassed during the previous hearings. It was also admitted that the last paragraph of our decision was capable of the construction that we had decided this question of Sanderson's position against the Appellant. F

19. (*a*) On behalf of the Appellant we were asked whether we would be prepared to hear further argument on this question: if we were not, whether we would be minded to make some addition to our decision. G

(*b*) On behalf of the Commissioners of Inland Revenue it was contended that by the terms of our decision we had decided this question, and we were asked not to hear any further argument on it.

20. We took time to consider the matters raised at this hearing, and gave our decision in writing on 20th April 1964 as follows: H

In our decision of 10th April 1963 we held that "the original Bulmer shares" together with the "accretions" constituted the property comprised in the settlement, and that each of the Appellants was a settlor. We also held that the Appellants had directly provided the original Bulmer shares and had indirectly provided the accretions.

For the purposes of s. 409 there has to be discovered what property originated from the Appellants, i.e. the settlors. Subsection (5)(*a*) of that section I

A provides that property originating from a settlor is property which he has provided directly or indirectly.

We have clearly decided that question, and in our view that decision means that the income from all the Bulmer shares is the income of the Appellants. We think that to entertain further argument on this question would be to reopen a matter which was fully argued before us at the original hearing, and we are B not prepared to do this.

We determine the appeals as follows:

1954–55 additional assessment reduced to £88
1955–56 assessment increased to £12,586
1956–57 additional assessment reduced to £8,973
1957–58 additional assessment reduced to £10,860
C 1958–59 additional assessment reduced to £11,227
1959–60 assessment reduced to £16,417.

21. The Appellant immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and on 30th April 1964 required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act 1952, ss. 229(4) and 64, which Case we D have stated and do sign accordingly.

22. The questions of law for the opinion of the Court are:

(1) Whether we were right in holding that there was a settlement within the meaning of s. 411(2) of the Income Tax Act 1952 and that the Appellant and the other persons whose appeals we heard together with his (see para. 2 hereof) were settlors.

E (2) If there was such a settlement, whether we were right in holding that there was such power of revocation as to bring the settlement within the terms of s. 404(2) of the said Act.

(3) If there was such a settlement, whether we were right in holding that each of the settlors had an interest in any income arising under or property comprised in the settlement, within the meaning of s. 405 of the said Act.

F (4) If there was such a settlement, whether we were right in holding that, in relation to each settlor, the income arising under the settlement was not income from property of which the settlor had divested himself absolutely by the settlement, within the meaning of s. 415 of the said Act.

(5) If there was such a settlement, whether the income which was to be treated as the income of the Appellant under the said ss. 404(2), 405, and 415 G included the dividends from the accretions (para. 9(3) hereof), or whether it extended only to the dividends from the original Bulmer shares.

(6) If, however, there was no such settlement, whether we were right in holding that the beneficial interest in the original Bulmer shares did not remain in the Appellant (and the other persons whose appeals we heard together with his), but was transferred to Yorkshire.

H

R. W. Quayle
R. A. Furtado
} Commissioners for the Special Purposes of the Income Tax Acts

Turnstile House
94–99 High Holborn
London W.C.1
8th March 1965

(2) *Lady (Florence) Bulmer* v. *Commissioners of Inland Revenue* A
(3) *Kennedy* v. *Commissioners of Inland Revenue*
(4) *P. H. Oates* v. *Commissioners of Inland Revenue*
(5) *A. R. Oates and Others* v. *Commissioners of Inland Revenue*
(6) *Macaulay* v. *Commissioners of Inland Revenue*

These Cases related to other parties to the transaction described in the first Case. The facts, the contentions of the parties and the decision of the Commissioners were the same as those in the first Case. B

The cases came before Pennycuick J. in the Chancery Division on 13th, 14th and 15th July 1966, when judgment was reserved. On 20th July 1966 judgment was given against the Crown, with costs.

[1]*Raymond Walton Q.C.* and *Roderick Watson* for the Appellants. The question is whether there is a settlement within the Income Tax Act 1952, s. 411(2); if so, who are the settlors and what is the property? Despite the width of the words of s. 411(2), transactions which are wholly commercial with no element of bounty are not covered. If the words are taken literally almost nothing would escape. If a property is sold with an option for the vendor to repurchase, there would be a revocable settlement within s. 404, with the result that the income would be treated as the income of the vendor throughout. Some limitation is inevitable. This part of the Income Tax Acts has no application where a transaction is commercial from start to finish. Running through all the authorities is an implication of bounty. Lord Moncrieff in *Commissioners of Inland Revenue* v. *Morton*[2] interpreted a settlement as charging property in favour of someone. He clearly contemplated the conferring of a benefit. Lord Macmillan in *Chamberlain* v. *Commissioners of Inland Revenue*[3] agreed with Lord Moncrieff and implied that a sale for money or money's worth would not be a settlement. Lord Simonds in *Lord Vestey's Executors* v. *Commissioners of Inland Revenue*[4] said that the property comprised in the settlement is that property alone in which some beneficial interest is created: see also *per* Lord Normand[5], Lord Morton[6] and Lord Reid[7]. C D E

In s. 409(5)(*a*), "provided" indicates an element of bounty. Where a person has given full value for property, or has given property for full value, he has not provided. In the Finance Act 1894, s. 2(1)(*d*), "provided" is restricted in this way: see *Lethbridge* v. *Attorney-General*[8] and *per* Lord Loreburn[9]. Another analogous case is *Ward* v. *Commissioners of Inland Revenue*[10]. F

Two cases have been fought on the issue of commerciality. *Copeman* v. *Coleman*[11] was concerned with the predecessor of s. 403. The Crown argued[12] that there had been no commercial purchase of the shares. Lawrence J.[13] during argument suggested that the section did not apply to a bona fide commercial transaction. From start to finish the case was fought on the issue of whether the transaction was a bona fide commercial transaction, on any other view three-quarters of the argument would have been unnecessary. *Commissioners of Inland Revenue* v. *Leiner*[14] was concerned with s. 401; in that case the requirement of some element of bounty was again assumed. G H

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(1) Argument reported by Thoedore Wallace, Esq., Barrister-at-Law.
(2) (1941) 24 T.C. 259. (3) (1943) 25 T.C. 317, 331–2. (4) (1949) 31 T.C. 1, 82.
(5) *Ibid.* 88. (6) *Ibid.* 107. (7) *Ibid.* 120. (8) [1907] A.C. 19. (9) *Ibid.* 23.
(10) [1956] A.C. 391. (11) 22 T.C. 594; [1939] 2 K.B. 484. (12) [1939] 2 K.B. 484, 488.
(13) *Ibid.* 490. (14) (1964) 41 T.C. 589.

A Here there was no element of bounty to any of the parties. Yorkshire got nothing out of it; its expenses were paid, but at the end of the day it was left with the Sanderson loan paid off and an option for the scheduled parties to purchase back all the assets; Yorkshire was but a piece of machinery. Sanderson made the loans, but were paid a proper rate of interest; there was a possible obligation to buy the scheduled parties' shares but by relation to the market B value. The scheduled parties sold their shares at under value, but they had an option to repurchase at the same price at the end of the day. There was an urgent need to defeat the takeover. One of the elements was a security arrangement in that Yorkshire bought the shares at under value so that it would have a reserve to cover the Sanderson loan.

If it is held that Part XVIII of the Act of 1952 does apply to such a trans- C action, the next questions are: who are the settlors and what is the property? All parties to the 1956 agreement must be settlors within s. 411(2). Anyone from whom property comprised in the settlement originates must be a settlor under s. 409. Sandersons provided the loan used to buy the acquired shares; Sandersons were a party to the arrangement, therefore Sandersons must be a settlor.

[PENNYCUICK J. What if Yorkshire had borrowed from the bank?]

D The bank would have been a settlor if it was a party to the arrangement.

[PENNYCUICK J. Do the words "or undertaken to provide" in s. 411(2) make any difference?]

The arrangement might not have gone well. Sandersons risked losing cash; it is possible that the shares would have had to be bought at a very high price. The scheduled parties risked their shares.

E [PENNYCUICK J. As it turned out the scheduled parties have got a very valuable asset from the income of the shares.]

That is why the test of commerciality is so important. If aimed at a tax advantage it would not have been a bona fide commercial transaction.

It is said that the provisions of clause 5 of the agreement are caught by s. 404(2). But the concept of revocation makes no sense where it is a question F of exercising a contractual right where there is no element of bounty. In *Vestey's* case, Lord Simonds [1] protested against the idea of the determination of a lease being treated as revocation. There is no income payable to or applicable to the benefit of any of the scheduled parties within the meaning of ss. 405 and 415 because it is purchased for full value.

Roderick Watson, following. If a wide view of s. 411 is taken Sandersons G must be a settlor within s. 409. Section 409(1) lays down that the position of Sandersons must be examined as if they were the only settlors. The acquired shares were bought with money loaned by Sandersons and thus must originate from Sandersons.

E.J. Goulding Q.C., *J. Raymond Phillips* and *J. P. Warner* for the Crown. Treating Yorkshire as part of the machinery, it is not suggested that there is H any element of bounty between the parties. The legal position of Yorkshire was that of a trustee. The arrangement had two elements: as between Sanderson and the scheduled parties it was really a mortgage under which the mortgagee had the possession and income of the mortgaged property which was to be applied in reducing the principal of the loan; secondly, there was a pooling arrangement between the scheduled parties in the hope that the ultimate value I of their shares would improve and their position would be safeguarded.

(1) 31 T.C. 1, 82.

Does an absence of bounty preclude the application of Part XVIII of the Act of 1952? Most dispositions give rise to no tax consequences under that Part even if they *are* "settlements". If a disposition is caught by one of the sections, is it to be taken out by reading in the words "containing some element of bounty" which are not contained in the Act? If a number of individuals agree to transfer their holdings to a pool and allow the pool to plough back the income for ten years and then distribute the assets, there would be no element of bounty. It would be surprising indeed if the income was not subject to surtax, even supposing the right of the individuals to share in the proceeds to be subject to some contingency, e.g. surviving for the ten years. The proper course is to take the definition literally and then see if any of the sections bite: see *per* Lord Reid in *Vestey's* case([1]). Here it could be said that the property was charged with rights in favour of the other scheduled parties.

In testing hypothetical examples s. 409 must be kept in mind. If a sale is a settlement, both the property sold and the price paid are property comprised in the settlement. The vendor provides the property but gets the price, which represents the property in his hands under subs. (5)(*b*); alternatively there is a reciprocal arrangement under subs. (7)(*a*). The result is that no income will be deemed to be the income of either party to an ordinary sale with an option of repurchase (the example put for the Appellant) unless it is his already.

The meaning of settlement in the predecessor of ss. 397 and 403 was considered in *Thomas* v. *Marshall*([2]): see in particular Donovan J.'s([3]) consideration of Lord Macmillan's judgment in *Chamberlain's* case([4]). The section might be initially wide but the ultimate operation of the statute was not so wide. [Reference was made to the judgment of Evershed M.R.([5])] Everything said by Lord Morton([6]) about "transfer of assets" in s. 403 applies to "arrangement" in s. 411.

[PENNYCUICK J. This case was not directed to the question of bounty or commerciality.]

The argument was addressed to the correct way of construing a section such as this. It was directed at avoiding reading in the words of the definition wherever the word "settlement" appears.

In *Leiner's* case([7]) Plowman J. was not asked to decide whether a bona fide commercial transaction could be a settlement; the Judge merely applied the construction presented by the parties as common ground between them: otherwise he would have had to consider *Chamberlain's* case and *Thomas* v. *Marshall*. Plowman J.'s remarks should be treated as *obiter*. *Leiner's* case was directed to the meaning of "provided" rather than "settlement".

The taxpayer's next point was concerned with what property, if any, the taxpayer had provided. This is devoid of any real authority although *Leiner's* case touched on it. If no qualification is read into "settlement" it is hard to see why any should be read into "provided". The estate duty authorities are not analogous. Under the Finance Act 1894, s. 3, duty is not payable if the property passes by reason of a bona fide purchase for full consideration.

Sandersons provided the £2 subscription for the shares in Yorkshire—that was *de minimis*. They also provided the loan; the income originating from that provision was the interest. It would be strange to regard the shares purchased by means of the loan as originating from the loan: what was the position when

(1) 31 T.C. 1, 120. (2) 34 T.C. 178; [1953] A.C. 543. (3) 34 T.C. 178, 186.
(4) 25 T.C. 317. (5) 34 T.C. 178, 193. (6) *Ibid.* 185–6. (7) 41 T.C. 589.

A the loan was paid back? The shares purchased both with the loan and the dividends were indirectly provided by the scheduled parties.

They brought about the purchase by putting into the arrangement their original shares and directing the dividends on those shares to the servicing and repayment of the loan used to buy the further shares. The additional shares were provided at the cost of the accumulated income on the shares provided by the B scheduled parties.

On s. 404(2) it was suggested that fulfilment of the terms of an arrangement could not be a determination of it; but see *Jamieson* v. *Commissioners of Inland Revenue*, *per* Lord Reid([1]). Under clause 5 of the formal agreement each of the scheduled parties could determine the settlement, as far as concerned him, once the Sanderson loan was repaid. The stipulated payment by him was only a C cancellation of the debt due to him.

Sections 405 and 415 only operate if there is the necessary non-exclusion of the settlor. The words in the two sections are closely similar. It is suggested that s. 415(1)(*d*) is not satisfied; the shares are recoverable eventually; this is so even if the Crown's contention on s. 404(2) fails. The effect of the agreement was to constitute Yorkshire a trustee of the property it held from time to time, D to carry out the agreed terms for the benefit of Sandersons and the scheduled parties.

[PENNYCUICK J. It is not open to the Crown to raise the point now that Yorkshire was a trustee. On the documents there was a sale, that was not challenged before the Commissioners.]

Once the facts are found it is a question of law whether there is a trust.

E [PENNYCUICK J. Is a lease of a house at a rackrent an arrangement?]

Yes. The property is on the one hand the house and on the other hand the right to the periodic rent. If the tenant sublets there is a new arrangement, but the original arrangement still exists. The house is still the property comprised in the first arrangement. The term of years is the property in the new arrangement.

Warner, following. The argument that the acquired shares were "provided F by" Sandersons ignores two factors: (i) the terms of the arrangement as to the destination of the income and (ii) the terms of the arrangement as to the eventual return of capital. As to (i): the income from the cash put in by Sanderson, i.e. the interest on Sandersons' loan, was paid to them, whereas the dividends on the scheduled parties' shares were left in. As to (ii): Sandersons could at any time require Yorkshire to sell sufficient shares to repay the loan. In contrast the G contribution of the scheduled parties was irrecoverable until the arrangement was brought to an end.

"Provided directly or indirectly" should be construed according to its ordinary meaning. The meaning of the phrase in the Finance Act 1938, s. 50, was considered in *Curzon Offices Ltd.* v. *Commissioners of Inland Revenue*, *per* Macnaghten J.([2]). There is a parallel between the position of Regis Property H Co. there and the scheduled parties here. It is too unsophisticated to stop at the original provider of the money particularly in view of s. 409(5)(*a*).

Walton, in reply. *Copeman's* case ([3]), where the commerciality point was introduced, was before the whole fasciculus of sections was re-enacted by Parliament in 1943.

([1]) 41 T.C. 43, 70; [1964] A.C. 1445.
([2]) [1944] 1 All E.R. 163, 606 (C.A.). ([3]) 22 T.C. 594.

Pennycuick J.—These are appeals by a small group of taxpayers against a decision of the Special Commissioners in relation to certain transactions in the 4*s*. shares of Bulmer & Lumb (Holdings) Ltd. (to which I will refer as "Bulmer") which took place in 1955. The Crown claimed surtax under the provisions contained in Chapter III of Part XVIII of the Income Tax Act 1952 in respect of the income arising from these shares for the years 1954–55 to 1959–60 inclusive. The appeals were first heard by the Special Commissioners in July 1962, but there was a number of adjournments and further hearings.

The Special Commissioners have found the facts and set out their conclusions in a carefully prepared Case Stated. This is a lengthy document and it will be convenient at this stage to summarise shortly the history of the matter. This summary is not intended as a complete statement, for which it is necessary to look at the Case Stated and the annexed documents. Bulmer is a public company which holds the shares in a group of woollen companies. In the autumn of 1954 the Appellants, together with relatives and associates, held about 30 per cent. of the shares in Bulmer. Some of them were directors. At that time the board of Bulmer observed indications of a threatened takeover bid and ascertained that the attempt was being made by a company known as Illingworth, Morris & Co. Ltd. The Appellants, after an unsuccessful counter-attack, devised, in connection with another public company known as Sanderson, Murray & Elder (Holdings) Ltd. (to which I will refer as "Sanderson"), a scheme with a view to obtaining for themselves sufficient additional shares in Bulmer to make a takeover impossible. Sanderson was not an associated company but had friendly business relations with Bulmer and was anxious to assist in defeating a takeover. The basic terms of the scheme were as follows. Sanderson should incorporate a small subsidiary company, described as "the finance company". Sanderson required the scheme to be operated through a subsidiary company because it did not wish it to be known that it was buying shares in Bulmer. Sanderson should make a loan to the finance company with a limit of £400,000 (afterwards reduced to £250,000) at a commercial rate of interest, later fixed at 5 per cent. With this loan the finance company should buy up shares in Bulmer in the market. The Appellants should sell their shares in Bulmer to the finance company for a purchase price which was to be left outstanding as an interest-free loan. The finance company should apply the dividends from these shares (to which I will refer as "the original shares"), and also from the shares to be purchased in the market (to which I will refer as "the acquired shares"), in servicing the loan from Sanderson, i.e., first, by way of payment of interest and, second, by repayment of principal. When the loan had been repaid the Appellants should have an option to purchase back the original shares and also to purchase the acquired shares from the finance company, the total purchase price to be a sum equal to the loan representing the price payable by the finance company to the Appellants for the original shares. The Appellants also would then buy from Sanderson the shares in the finance company at par. There were to be certain further options and certain restrictions on dealings by the finance company in shares in Bulmer. On 21st December 1954 a company now known as Yorkshire Investment Co. Ltd. (to which I will refer as "Yorkshire") was incorporated as the finance company for the purposes of the scheme. Yorkshire had an issued capital of £2 held by nominees of Sanderson. The scheme was effectuated by heads of agreement dated 12th January 1955, which were superseded by a more formal agreement (not in identical terms) dated 29th March 1956. There were also amending agreements.

In anticipation of the heads of agreement, the Appellants caused to be transferred to Yorkshire a total of 552,262 shares in Bulmer at a price of 5*s*.

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A per share, i.e., £138,065 10*s*. in all. This price was below the current market price, then 11*s*. per share. The low price was fixed upon the request of Sanderson, which wished to show creditors at as low a price as possible in the balance sheet of Yorkshire. The figure was of little practical importance to the Appellants, since the price was to remain outstanding without interest and would cancel out against the price at which they would ultimately buy back the original and B acquired shares. Over the period from December 1954 to June 1961 Yorkshire purchased in the market shares in Bulmer at a total price of £210,888, which sum was advanced to Yorkshire by Sanderson. These shares were not in fact sufficient to procure the desired control of Bulmer. That company from time to time paid dividends, which were applied by Yorkshire in servicing the loan from Sanderson. There were two bonus issues of shares in Bulmer which affected both C the original and the acquired shares. The figures will be found in the Case Stated and the annexed documents.

The Crown claim surtax on the dividends paid by Bulmer on the original and acquired shares for the five years under appeal. Part XVIII of the Income Tax Act 1952 is headed "Special Provisions for Taxation of Settlors, etc. in respect of settled or transferred income". Chapter III of Part XVIII is headed D "Revocable Settlements, Settlements where Settlor Retains an Interest, etc." Section 404(2) is in the following terms:

> "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 E 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 F a corresponding part of any such income, as the case may be, shall be treated for all the purposes of this Act 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 G property, or from property representing that property, so long as the power cannot be exercised." Section 409: "(1) In the case of any settlement where there is more than one settlor, this Chapter shall, subject to the provisions of this section, have effect in relation to each settlor as if he were the only settlor. (2) References in this Chapter to the property comprised in a settlement include, in relation to any settlor, only property originating from H that settlor and references in this Chapter to income arising under the settlement include, in relation to any settlor, only income originating from that settlor . . . (5) References in this section to property originating from a settlor are references to—(*a*) property which that settlor has provided directly or indirectly for the purposes of the settlement; and (*b*) property representing that property; and (*c*) so much of any property which repre- I sents both property provided as aforesaid and other property as, on a just apportionment, represents the property so provided . . ." Section 411(2): "In this Chapter, 'settlement' includes any disposition, trust, covenant, agreement or arrangement, and 'settlor', in relation to a settlement, means

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any person by whom the settlement was made; and a person shall be deemed for the purposes of this Chapter to have made a settlement if he has made or entered into the settlement directly or indirectly, and in particular (but without prejudice to the generality of the preceding words) if he has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement."

I should read two other sections. Section 405(1):

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

Then s. 415(1), which comes in Chapter V:

"Where, during the life of the settlor, income arising under a settlement made on or after the tenth day of April, nineteen hundred and forty-six, is, under the settlement and in the events that occur, payable to or applicable for the benefit of any person other than the settlor, then, unless, under the settlement and in the said events, the income either . . . (*d*) is income from property of which the settlor has divested himself absolutely by the settlement; or (*e*) is income which, by virtue of some provision of this Act not contained in this Chapter, is to be treated for the purposes of this Act as income of the settlor, the income shall be treated for the purposes of surtax as the income of the settlor and not as the income of any other person".

The Crown claim that the dividends on the Bulmer shares are caught by s. 404(2) and also by ss. 405 and 415, these sections being read in conjunction with the explanatory provisions in s. 409 and the definition in s. 411.

The contentions of the parties as advanced before the Special Commissioners are set out in the Case Stated as follows:

[His Lordship then read or summarized the contention of the parties, paras. 12 and 13 of the Case Stated, at pages 14 to 16 *ante*, the decision of the Special Commissioners, para. 15 of the Case Stated, at pages 16 to 18 *ante*, and the questions of law for the opinion of the Court, para. 22 of the Case Stated, at page 19 *ante*. He then continued:]

The Crown at no time raised before the Special Commissioners the contention that the true nature of the transaction between the parties is not to be found in the documents which they executed, nor have they given notice of any new point. It follows that in order to determine the taxable character of the dividends on the Bulmer shares one must look at the legal effect of the documents and ascertain the rights and liabilities created by them: see *Commissioners of Inland Revenue* v. *Duke of Westminster*(1) [1936] A.C. 1.

Mr. Goulding, for the Crown, contended before me that on the true view of the position Yorkshire was no more than a trustee, holding the original and acquired shares in a fiduciary capacity for the Appellants and Sanderson as its *cestuis que trust* according to their respective interests under the agreements. I do not doubt that the ultimate reality of the transaction was that Sanderson lent money to the Appellants on the terms that the loan should be applied in the acquisition of additional shares in Bulmer and should be secured upon and serviced out of the dividends arising from the original and acquired shares. It

(1) 19 T.C. 490.

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A would have been open to the Crown if so advised to raise before the Special Commissioners a contention that the documents were a cloak or sham designed to cover a mortgage by the Appellants in favour of Sanderson carried out through the medium of Yorkshire as trustee. If they had raised and established such a contention different results might have flowed as regards taxation. The Crown raised no such contention and it seems to me that it is not open to them to do B so now. Apart from mere procedural objections, such a contention would have involved issues of fact to be determined upon evidence before the Special Commissioners. I am bound to treat the parties as having entered into contracts in the terms of the documents. Under those terms the relation of the Appellants and Yorkshire is that of vendor and purchaser with an option to repurchase in certain events and on certain terms. That relation is fundamentally different C from that of trustee and *cestui que trust*. I must apply the provisions of Chapter III of Part XVIII accordingly.

I have mentioned this point by way of preface to the next point, which I have now to consider. The basis of the claim on the part of the Crown is that the transaction constituted an "arrangement" between the Appellants and Sanderson within the meaning of Chapter III of Part XVIII. (Yorkshire was D admittedly introduced into the arrangement merely as part of the machinery for carrying it out, and it does not appear to matter whether or not Yorkshire is described as a party to the arrangement.) The Appellants contended before the Special Commissioners, as appears from the Case Stated, and now contend, that this was a commercial transaction without any element of bounty and as such falls outside Chapter III of Part XVIII. Counsel who appeared for the E Appellants before the Special Commissioners did not, I am told, refer them to *Copeman* v. *Coleman*(1) [1939] 2 K.B. 484, nor, of course, could he have referred them to *Commissioners of Inland Revenue* v. *Leiner* 41 T.C. 589, which was not decided until 1964. The Special Commissioners cannot therefore be criticised in any way if they failed to see the significance of this contention on behalf of the Appellants, and they made no finding of fact upon it, except perhaps very F indirectly. In the event it has turned out to be an issue of prime importance in the case.

Copeman v. *Coleman* [1939] 2 K.B. 484 was decided under s. 21 of the Finance Act 1936. That section was the predecessor of s. 397 of the Income Tax Act 1952, and contains a definition of "settlement" as including "any disposition, trust covenant, agreement, arrangement or transfer of assets": cf. the definition G in s. 403 of the Income Tax Act 1952, which is the same as s. 411 with the addition of the words "transfer of assets". The headnote to the *Coleman* case sets out the terms of a complicated transaction by way of a voluntary disposition. In the argument for the Crown, the Attorney-General, at page 488, says: "There was no commercial purchase of the shares." Then, during the argument of counsel for the taxpayer, at page 490, Lawrence J. intervened with the words:

H "Is not the limitation to be read into those words—'not being a bona fide commercial transaction'?"

The learned Judge, at page 492(2), says:

> "The Crown contends that, on the facts of this case, only one conclusion can be reached—namely, that this transaction by which these shares were created and allotted to the preference shareholders, including the I children, was not a bona fide commercial transaction and was a 'settlement' within the definition in subs. (9)."

(1) 22 T.C. 594. (2) *Ibid*., at p. 599.

(Pennycuick J.)

Then, at page 494([1]): A

"It is true that the Commissioners, who decided in favour of the respondent, have not found as a fact that this transaction was not a bona fide commercial transaction. They have expressed their decision without making any specific finding upon this topic, simply allowing the claims. In my opinion it is impossible to come to any other conclusion but that this was not a bona fide commercial transaction, and it appears to me that there B was a 'disposition' within the meaning of the definition in subs. (9), or an 'arrangement' in the nature of a 'disposition' within the meaning of that subsection. I am also of opinion that the respondent was a settlor within the meaning of clause (*c*). I am unable to see how the word 'indirectly' can be limited in the way which is suggested so as to exclude the settlements which are made through the interposition of a company." C

The last paragraph of the judgment would not today be put quite as the learned Judge puts it, having regard to the decision in *Thomas* v. *Marshall*([2]), to which I will refer, but there is no doubt that the judgment proceeded from the premise that the section before him only applied to a transaction which is not a bona fide commercial transaction.

In *Commissioners of Inland Revenue* v. *Leiner* 41 T.C. 589 the Crown based D its claim on Chapter II and also Chapter III of Part XVIII. The facts, which are complicated, are summarised in the headnote and set out in full in the judgment. At page 596, Plowman J. says:

". . . it is common ground that it is implicit in the fasciculus of Sections of which Section 401 forms a part that some element of bounty is necessary to make the Sections apply and that a *bona fide* commercial transaction E would be excluded from their operation: see *Copeman* v. *Coleman*, 22 T.C. 594." Then, lower down the same page: "The arrangement in my view must be looked at as a whole, and looked at in this way, I find it impossible to say that the Respondent did not provide the trustees with an income of £2,040 a year in the sense in which the word 'provided' is used in Section 401 of the Act; that is to say, as importing an element of bounty. The F transaction, taken as a whole, was not, in my judgment, one which, from the point of view of the Respondent, can be described as a commercial arrangement, because he was liable to pay £2,040 per annum without any compensating advantage to him."

So in that case Plowman J., following the *Coleman* case, proceeded on the premise that the sections before him applied only to a transaction which is not G a bona fide commercial transaction. It seems to me that in this Court I ought to adopt the premise on which the two decisions which I have cited proceed and treat the section as inapplicable to a bona fide commercial transaction. It is true that in each case this premise was accepted by the Crown without argument. Again the premise was not strictly necessary to the decision, i.e., the Court could have proceeded on the basis that, whatever might be the position H in the case of a bona fide commercial transaction, the particular transaction before it was not a transaction of that nature. Nevertheless, the earlier decision has stood for nearly 30 years and in each case the Judge accepted, and indeed insisted on, the premise.

Mr. Goulding, for the Crown, placed great reliance on the decision of the House of Lords in *Thomas* v. *Marshall* 34 T.C. 178 as negativing what was said I

([1]) 22 T.C. 594, at p. 601. ([2]) 34 T.C. 178; [1953] A.C. 543.

(Pennycuick J.)

A in the *Coleman* case([1]) and afterwards in the *Leiner* case([2]). The *Thomas* case([3]) was concerned with an outright gift. The House of Lords rejected the contention that the definition of a settlement in the provisions corresponding to s. 402 of the Income Tax Act 1952 must be restricted to a disposition having an effect comparable to that of a settlement and held that it embraced an outright gift: see, in particular, *per* Lord Morton of Henryton, at page 202:

B "My Lords, in the words used by Lord Greene, M.R., in *Hood Barrs* v. *Commissioners of Inland Revenue*, 27 T.C., at p. 402, this is a 'subversive suggestion' as to the meaning and operation of such an interpretation clause as Sub-section (9) (*b*), and I cannot accept it. The object of the Sub-section is, surely, to make it plain that in Section 21 the word 'settlement' is to be enlarged to include other transactions which would not be regarded C as 'settlements' within the meaning which that word ordinarily bears. Its effect is that wherever the word 'settlement' occurs in Section 21 one must read it as 'settlement, disposition, trust, covenant, agreement, arrangement or transfer of assets', and if 'by virtue or in consequence of' any of these transactions or deeds income is paid to or for the benefit of a child of the settlor, Section 21 comes into operation."

D That decision is, of course, conclusive as to the proper construction of the definition. On the other hand, the House of Lords were not concerned with dispositions other than by way of bounty, and I do not think their decision can fairly be treated as negativing the entirely different kind of implied restriction upon the definition of "settlement" which was adopted in the *Coleman* case. That case does not appear even to have been cited in the *Thomas* case.

E I would only add on this point that there is no doubt that, where the context so requires, the Court may imply some restriction upon the scope of general words in a Statute: see Halsbury's Laws of England, 3rd edn., vol. 36, at page 396. In the case of this definition, i.e. the definition of "settlement", it must, I think, be at any rate legitimate to hold that a sufficient context exists for a restriction in the scope of the definition. Indeed, unless one implies some F restriction, the definition, standing where it does in this Part of the Act, represents as odd a provision as one would anywhere find in a taxing Statute. Chapter headings, unlike marginal notes, are admissible upon the construction of a Statute.

I think that in all the circumstances my proper course is to follow what was said in the *Coleman* and *Leiner* cases without expressing any independent G conclusion of my own.

It remains to be considered whether the scheme adopted by the Bulmer shareholders and Sanderson in the present case represented a bona fide commercial transaction. The Special Commissioners, naturally enough upon the course which the case took before them, did not make a finding upon this point. In order to avoid a remission, with further delay and expense, I accepted the H invitation of both Counsel to make the necessary finding based upon the primary facts as found by the Special Commissioners. It seems to me abundantly clear that the transaction between the Appellants and Sanderson was indeed a bona fide commercial transaction. Again, in case that imports in any respect a different test, it is clear that there was no element of bounty as between the Appellants and Sanderson. Indeed, Mr. Goulding so concedes. To avoid I misunderstanding, in the extraordinarily wide field covered by such words as

([1]) 22 T.C. 594. ([2]) 41 T.C. 589. ([3]) 34 T.C. 178.

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"agreement" and "arrangement" one may well find a commercial transaction between A and B and then, built into that, so to speak, a transaction by way of bounty between A and C; but there is nothing of that kind here. The only conceivable element of undervalue in the case, to which Mr. Goulding rightly did not attach weight, was the low price paid by Yorkshire for the original shares, but this element loses almost all significance when one remembers, first, that the price was fixed so low at the instigation of Sanderson and, second, that the resulting debt was interest-free and fell to be set off against the price payable by the Appellants when their option to repurchase came to be exercised. Clearly the Appellants did not intend to confer a bounty either on Yorkshire or on Sanderson. It may be that the transaction has been framed—largely, it appears on the instigation of Sanderson—in such a way as to procure tax advantages to the Appellants, but that circumstance does not of itself prevent it from being a *bona fide* commercial transaction or import any element of bounty.

A

B

C

I propose to allow the appeal on this short ground. It would not be useful for me to express *obiter* whatever views I may have formed as to how the provisions in Chapter III of Part XVIII, if they apply at all, could be made to fit (1) the original shares and (2) the acquired shares. The difficulties in respect of the acquired shares are formidable.

D

Watson—Would your Lordship direct that in the case of each of the six appeals the assessments under appeal should be remitted to the Special Commissioners to be adjusted in accordance with your Lordship's judgment?

Pennycuick J.—That is proper, Mr. Warner?

Warner—That would be right, yes.

Watson—My Lord, I apply in each of the six cases for costs.

E

Pennycuick J.—Are you going to say anything about costs?

Warner—No, my Lord.

Pennycuick J.—Very well.

[Solicitors:—Cameron, Kemm & Co.; Solicitor of Inland Revenue.]