NO. 1425—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—19TH AND 20TH MAY AND 6TH JUNE, 1947

COURT OF APPEAL—20TH, 25TH, 26TH AND 27TH FEBRUARY AND 5TH AND 22ND MARCH, 1948

HOUSE OF LORDS—22ND AND 23RD FEBRUARY AND 8TH APRIL, 1949

Wolfson *v.* Commissioners of Inland Revenue [1]

Sur-tax—Settlement—Covenant to pay annual sum equal to dividends received by settlor from company under his control—Terms of the settlement—"Power . . . to revoke or otherwise determine the settlement or "any provision thereof"—Finance Act, 1938 (1 & 2 *Geo.* VI, *c.* 46), *Section* 38 (1).

W held 700 *out of* 1,000 *issued shares in a private investment company, the remaining* 300 *shares being held, as to* 100 *each, by his two brothers and the trustees (himself and his solicitor) of a settlement made by his father; each share carried one vote. In March,* 1940, *W and his brothers, as settlors, entered into an irrevocable deed of covenant with trustees whereby each settlor covenanted to pay to the trustees on* 1*st April in each year during a period of seven years commencing on* 1*st April,* 1940, *such an annual sum as after deduction of Income Tax would leave a sum equal in amount to the net dividends received by him during the previous* 12 *months expiring on* 1*st April in each year upon his shares in the company. Under the deed the trustees were directed to pay to each of the beneficiaries of the trust (the sisters of W) such an annual sum as, after deduction of Income Tax, would leave* £450.

For the year to 31*st March,* 1940, *W received from the company net dividends amounting to* £17,228 15*s.* 0*d. No payment was made to the trustees on* 1*st April,* 1940, *but within the following year (ending* 31*st March,* 1941) *W paid* £14,612 10*s.* 0*d. (net) on account of his liability under the deed of covenant.*

On appeal to the Special Commissioners, W contended that the gross equivalent of the sum of £14,612 10*s.* 0*d. was admissible as a deduction for Sur-tax purposes for the year* 1939-40. *The Crown contended that the terms of the deed were such that W had power to determine the settlement or a provision thereof either by himself or with the consent of other persons since, by reason of his shareholding, he could either prevent the company from declaring a dividend during the whole period of the covenant or, with the consent of one of his brothers, he could put the company into liquidation; in the event of the exercise of such power W would or might cease to be liable to make the annual payments payable by virtue of the deed, and the sum payable under the deed must therefore be treated as income of W by virtue of Section* 38 (1) (*a*), *Finance Act,* 1938.

The Special Commissioners held that they were unable to distinguish the case from MacAndrew *v.* Commissioners of Inland Revenue, 25 T.C.

[1] Reported (K.B.) [1947] 2 All E.R. 150; (C.A.) [1948] 1 All E.R. 725; (H.L.) 65 T.L.R. 260.

500, and that the sums paid by W under the deed must be treated as his income.

Held, *that the terms of the deed of March,* 1940, *were not such that W had power to revoke or otherwise determine the settlement or any provisions thereof.*

CASE

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

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on 7th December, 1944, 26th June, 1945, and 5th October, 1945, Mr. Isaac Wolfson (hereinafter called " the Appellant ") appealed against an assessment to Sur-tax in the sum of £2,480 for the year ended 5th April, 1940.

The question for the opinion of the Court is whether the gross equivalent of a sum of £14,612 10*s.* 0*d.* (net) paid by the Appellant under a deed of covenant dated 26th March, 1940, is an admissible deduction in computing the Appellant's total income for Sur-tax purposes.

2. In 1931, a company (then called the New Central Cinema (Stamford Hill), Ltd.) was formed with the object of carrying on a cinema business. The Appellant was one of the signatories to the memorandum of association.

On 4th May, 1933, the name of this company was changed to Leonard Gordon Estates, Ltd., and since 1933 the company has been used by the Appellant and his brothers as a private investment holding company.

3. At all times material to this case the capital of Leonard Gordon Estates, Ltd. has been £1,000 divided into 1,000 shares of £1 each, which are held as follows:—

The Appellant	700	shares
Charles Wolfson	100	„
Samuel William Wolfson	100	„
Henry Arthur Chetham and Isaac Wolfson (as trustees of a settlement known as Solomon Wolfson's Settlement), ...	100	„

Each share in Leonard Gordon Estates, Ltd. carries one vote. Charles Wolfson and Samuel William Wolfson are brothers of the Appellant, Henry Arthur Chetham is his solicitor, Solomon Wolfson was the father of the Appellant.

A copy of the memorandum and articles of association of Leonard Gordon Estates, Ltd. is attached hereto, marked "A", and forms part of this Case [1].

4. The Appellant being desirous of making provision for his sisters consulted his solicitor, Mr. Henry Arthur Chetham.

5. By a deed of covenant dated 26th March, 1940, between the Appellant, Charles Wolfson and Samuel William Wolfson (thereinafter called " the settlors ") of the one part and Henry Arthur Chetham and the Appellant (thereinafter called " the trustees ") of the other part, the settlors covenanted as follows:—

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[1] Not included in the present print.

"1. Each Settlor hereby irrevocably covenants with the Trustees "that he will on the 1st day of April in each year during the period "of 7 years commencing on the 1st day of April 1940 or until his "death (whichever period shall be the shorter) pay to the Trustees an "annual sum calculated according to the provisions contained in "Clause 2 hereof each such annual sum to be held by the Trustees "upon the trusts and subject to the powers herein declared and "contained.

"2. Each annual sum hereinbefore covenanted to be paid by "each Settlor shall subject to the proviso hereinafter in this clause "contained be such an annual sum as after deduction of income tax "at the standard rate for the time being in force leaves a sum equal "in amount to the net amount in the aggregate of all dividends "received by him during the previous 12 months expiring on the said "1st day of April in each year upon the Ordinary shares of Leonard "Gordon Estates Ltd. held by him as set out in the First Schedule "hereto.

"Provided that if at any time any Settlor shall sell or otherwise "dispose for value of the said shares in Leonard Gordon Estates Ltd. "or any of them now held by him the annual sum thereafter to be "paid by that Settlor pursuant to Clause 1 hereof shall be such an "annual sum as after deduction of income tax at the standard rate for "the time being in force leaves a sum equal in amount to the net "amount of all dividends received by him during the previous 12 "months expiring on the 1st day of April in each year from any of the "said shares in Leonard Gordon Estates Ltd. as may still be held "by him together with the net amount of any other dividends or "income received by that Settlor during the said 12 months from "the reinvestment pursuant to Clause 4 hereof of the net proceeds "of such of the said shares in Leonard Gordon Estates Ltd. as have "been so sold or otherwise disposed of for value."

By clause 3 of the said deed it was provided that the trustees should stand possessed of the said annual sums paid to them by the settlors upon trust to pay to each of the beneficiaries so long as she should be living out of the sums received by them in each year ending on the 1st April such an annual sum as after deduction of Income Tax at the standard rate for the time being in force leaves £450.

By clause 5 of the said deed it was provided that any settlor should be entitled to make any of the annual payments covenanted to be paid by directing Leonard Gordon Estates, Ltd. or any other company, individual, firm, institution or concern in or with whom proceeds of sale or disposal should have been reinvested pursuant to clause 4 of the said deed to pay to the trustees on his behalf the net dividends in trust or other income upon the said shares or other investments in which net proceeds may have been reinvested.

A copy of the said deed of covenant, dated 26th March, 1940, is attached hereto, marked "B", and forms part of this Case [1].

6. For the year to 31st March, 1940, the Appellant received from Leonard Gordon Estates, Ltd. net dividends amounting to £17,228 15*s*. 0*d*. The gross equivalent of this sum of £17,228 amounts to £26,432, which is the sum which the Appellant claimed to be entitled to deduct in computing

[1] Not included in the present print.

his total income for the purposes of Sur-tax for the year ending 5th April, 1940.

7. The said sum of £17,228 15*s.* 0*d.* should have been paid to the trustees by the Appellant on 1st April, 1940, in accordance with clause 1 of the said deed of covenant.

8. On 12th November, 1940, Mr. Henry Arther Chetham received by cheque from the Appellant £10,000 and £10,000 from Leonard Gordon Estates, Ltd., making in all £20,000.

This sum of £20,000 was allocated as follows in the trust accounts:—

1940		£	s.	d.
November 12th	By cash of Mr. Isaac Wolfson on account of dividend amounting to £17,228 15*s.* 0*d.* for the year ending 31.3.39 on 700 shares in Leonard Gordon Estates, Ltd. free of tax received during 12 months ended 1.4.40	12,616	5	0
„	do. Mr. Charles Wolfson dividend on 100 shares ...	2,461	5	0
„	do. Mr. Samuel Wolfson ... dividend on 100 shares held by Mr. Chetham and Appellant as trustees	2,461	5	0
		£20,000	0	0

On 31st March, 1941, the Appellant paid a further sum of £4,612 10*s.* 0*d.* on account of his liability under the deed of covenant. This sum of £4,612 10*s.* 0*d.* together with the sum of £12,616 5*s.* 0*d.* makes up the said sum of £17,228 15*s.* 0*d.*

At the hearing before us Counsel on behalf of the Appellant limited his claim for a deduction to a sum of £14,612 10*s.* 0*d.* (net) being the sums of £10,000 and £4,612 10*s.* 0*d.* which were paid by the Appellant.

We were satisfied upon the evidence before us, including the evidence of the Appellant himself, that the Appellant paid £14,612 10*s.* 0*d.* (net) on account of his liability under the said deed of covenant.

9, As stated in paragraph 8 hereof Mr. Chetham, as trustee under the said deed of covenant of 26th March, 1940, on 12th November, 1940, received the sum of £20,000.

On 26th November, 1940, the trustees and the trustees of Solomon Wolfson's settlement lent £16,200 and £1,800 respectively to Great Universal Stores, Ltd., a company of which Appellant is the managing director.

Great Universal Stores, Ltd. purchased with the said £16,200 and £1,800 72,000 6% preference shares of £1 each in Leslie's Stores, Ltd.

On 26th February, 1941, the trustees of the said deed of covenant purchased for £16,200 64,800 of the said 72,000 shares in Leslie's Stores, Ltd. from Great Universal Stores, Ltd., the trustees of Solomon Wolfson's settlement purchasing the remaining 7,200 shares for £1,800 but the trustees were never at any time the registered holders of the said shares, which were held in the name of Lloyd's Bank nominees on behalf of the trustees.

On 16th October, 1941, the said 64,800 and the said 7,200 shares in Leslie's Stores, Ltd. were sold to Mrs. Wolfson, the wife of the Appellant, for £18,000, out of which the trustees of the two settlements purchased £4,000 National War Bonds and loaned £14,000 to Great Universal Stores, Ltd. at 5 per cent. interest.

Mrs. Wolfson having acquired in addition a large block of shares in Leslie's Stores, Ltd. sold the whole of her holding at a profit of some £111,000 to Great Universal Stores, Ltd.

10. There is attached hereto, marked "C", a copy of the income account of the Wolfson family trusts for the year ending 31st March, 1941, and the balance sheet as at 31st March, 1941 (1).

The deed of covenant income account shows how the income of the trust was allocated to the beneficiaries of the trust.

As five of the beneficiaries were living in America it was not possible to pay to them the £450 payable under clause 3 (*a*) of the said deed of covenant. Cash £450 was paid on 19th November, 1940, to the three beneficiaries who were residing in the United Kingdom.

In the cases of the remaining five beneficiaries the sums of £450 were credited to them.

The monies allocated, but not paid, to the beneficiaries were invested in the purchase of 64,800 shares in Leslie's Stores, Ltd. which were subsequently sold to Mrs. Wolfson on 16th October, 1941, as stated in paragraph 9 hereof.

11. It was contended on behalf of the Appellant that:—

(*a*) the gross equivalent of the said sum of £14,612 10*s.* 0*d.* was an admissible deduction in computing his total income for the purposes of Sur-tax for the year ending 5th April, 1940;

(*b*) the said sum was an annual payment charged upon his income which he was liable to make under the deed of covenant dated 26th March, 1940;

(*c*) the appeal should be allowed.

12. It was contended on behalf of the Crown (*inter alia*) that:—

(*a*) the terms of the said deed of covenant were such that the Appellant had power to determine the said settlement or a provision thereof either himself or with the consent of other persons, as by reason of his shareholding he could either prevent the company from declaring a dividend during the whole period of the covenants or, with the consent of one of his brothers, put the company into liquidation;

(*b*) in the event of the exercise of such power the Appellant will or may cease to be liable to make the annual payment payable by virtue of the said deed of covenant;

(*c*) the sum payable by the Appellant under the said deed of covenant must be treated as the income of the Appellant.

Section 38 (1) (*a*) of the Finance Act, 1938, was relied upon for these contentions.

(1) Not included in the present print.

13. Having considered the evidence and arguments adduced before us we decided as follows :—

In this case the Appellant claims that an annual sum payable by him under a deed of covenant dated 26th March, 1940, is a proper deduction in computing his total income for Sur-tax.

At the hearing it was agreed that the total sum claimed as a deduction was £14,612 10*s*. 0*d*. (net).

We have already decided that upon the evidence before us we are satisfied that the said sum of £14,612 10*s*. 0*d*. has been paid by the Appellant to the trustees of the deed.

The Crown oppose the Appellant's claim on the ground that the terms of the deed of 26th March, 1940, are such that the case falls within Section 38 (1) (*a*) of the Finance Act, 1938.

We are unable to distinguish this case from the case of *MacAndrew* v. *Commissioners of Inland Revenue*, 25 T.C. 500.

We therefore hold that the sums paid by the Appellant under the deed of 26th March, 1940, must be treated as the income of the Appellant.

The case is remitted to the parties for agreement of figures.

14. The correct figures of assessment in accordance with our decision having been agreed between the parties we increased the said assessment under appeal to £2,589.

15. The Appellant immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1927, Section 42 (7), and Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

N. ANDERSON,
F. N. D. PRESTON,
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94/99 High Holborn,
London, W.C.1.
12th November, 1946.

The case came before Atkinson, J., in the King's Bench Division on 19th and 20th May, 1947, when judgment was reserved. On 6th June, 1947, judgment was given against the Crown, with costs.

Sir Roland Burrows, K.C., and Mr. L. C. Graham-Dixon (Mr. Geoffrey Tribe with them) appeared as Counsel for the Appellant, and the Solicitor-General (Sir Frank Soskice, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Atkinson, J.—This is an appeal by Mr. Isaac Wolfson against a finding by the Special Commissioners that certain settlements which he made in favour of his sisters were of such a nature that he was still assessable in the amount of the income involved.

The Case states the following facts : " The question for the opinion of " the Court is whether the gross equivalent of a sum of £14,612 10*s*. 0*d*. " (net) paid by the Appellant under a deed of covenant dated 26th March,

(Atkinson, J.)

" 1940, is an admissible deduction in computing the Appellant's total in-" come for Sur-tax purposes. In 1931 a company (then called the New " Central Cinema (Stamford Hill), Ltd.) was formed with the object of " carrying on a cinema business. The Appellant was one of the signatories " to the memorandum of association. On 4th May, 1933, the name of this " company was changed to Leonard Gordon Estates, Ltd., and since 1933 " the company has been used by the Appellant and his brothers as a private " investment holding company." The capital consisted of 1,000 shares of £1 each. The Appellant, at all material times, held 700 shares; one brother, Charles, held 100 shares; another brother, Samuel, held 100 shares, and the other 100 were held by the trustees of a settlement made by the Appellant's father. Each share carried a vote.

The Appellant wanted to make provision for his sisters, and he consulted his solicitor, Mr. Chetham, who was one of the trustees of the father's settlement. That resulted in a deed of covenant, dated 26th March, 1940, being entered into between the Appellant and Charles and Samuel, all called the settlors of the one part, and Mr. Chetham and the Appellant in their capacity as trustees of the other part. The settlors each covenanted as follows: " 1. Each Settlor hereby irrevocably covenants with the " Trustees that he will on the 1st day of April in each year during " the period of seven years commencing on the 1st day of April 1940 or " until his death (whichever period shall be shorter) pay to the Trustees an " annual sum calculated according to the provisions contained in Clause 2 " hereof each such annual sum to be held by the Trustees upon the trusts " and subject to the powers herein declared and contained. 2. Each annual " sum hereinbefore covenanted to be paid by each Settlor shall subject to " the proviso hereinafter in this clause contained be such an annual sum as " after deduction of income tax at the standard rate for the time being in " force leaves a sum equal in amount to the net amount in the aggregate " of all dividends received by him during the previous 12 months expiring " on the said 1st day of April in each year upon the Ordinary shares of " Leonard Gordon Estates Ltd. held by him as set out in the First Schedule " hereto. Provided that if at any time any Settlor shall sell or otherwise " dispose for value of the said shares in Leonard Gordon Estates Ltd. or " any of them now held by him the annual sum thereafter to be paid by " that Settlor pursuant to Clause 1 hereof shall be such an annual sum as " after deduction of income tax at the standard rate for the time being " in force leaves a sum equal in amount to the net amount of all dividends " received by him during the previous 12 months expiring on the 1st day " of April in each year from any of the said shares in Leonard Gordon " Estates Ltd. as may still be held by him together with the net amount " of any other dividends or income received by that Settlor during the said " 12 months from the reinvestment pursuant to Clause 4 hereof of the net " proceeds of such of the said shares in Leonard Gordon Estates Ltd. as " have been so sold or otherwise disposed of for value." By clause 3 of the said deed it was provided that the trustees should stand possessed of the said annual sums paid to them by the settlors upon trust to pay to each of the beneficiaries so long as she should be living out of the sums received by them in each year ending on 1st April such an annual sum as after deduction of Income Tax at the standard rate for the time being in force leaves £450. By clause 5 of the said deed it was provided that any settlor should be entitled to make any of the annual payments covenanted to be paid by directing Leonard Gordon Estates, Ltd. or any other

(Atkinson, J.)

company, individual, firm, institution or concern in or with whom proceeds of sale or disposal should have been reinvested pursuant to clause 4 of the said deed to pay to the trustees on his behalf the net dividends in trust or other income upon the said shares or other investments in which the net proceeds may have been reinvested.

Then the Case finds that in the year in question, that is to say in respect of the year ending 5th April, 1940, the Appellant paid £14,612 10*s.* 0*d.* net " on account of his liability under the said deed of " covenant " to the trustees. The question is whether on that settlement Mr. Wolfson is entitled to deduct the equivalent gross sum from his profits for the purposes of Sur-tax.

The Appellant says here is a perfectly straightforward settlement made in order to provide for his sisters. He had shares in an investment company which was paying good dividends, and he wanted whatever he had got to go to them. He did not want to part with his shares—he may have had good reason. He could secure wise control over the share transactions of the company so long as he retained voting power. By covenanting to hand over a sum equal to what he received his sisters would get all the benefits, while he retained the power of seeing that this company was as successful as possible. I am told, though it does not appear in the Case, that in fact the company has been very successful.

The Respondents' case is that, while on the face of it the settlement is innocuous, if you go behind it you find that the settlor has seven-tenths of the shares of the company, and that he could prevent the payment of any dividend and let the profits of the company accumulate, and then, with the help of one brother, could wind up the company, when seven-tenths of the assets would come to him in the form of his capital.

The main question to determine is the meaning of Section 38 (1) of the Finance Act, 1938. That Section begins in this way : " (1) If and so " long as the terms of any settlement are such that—(*a*) any person has or " may have power, whether immediately or in the future, and whether with " or without the consent of any other person, to revoke or otherwise deter- " mine the settlement or any provision thereof and, in the event of the " exercise of the power, the settlor or the wife or husband of the settlor " will or may cease to be liable to make any annual payments payable by virtue " or in consequence of any provision of the settlement ; or (*b*) the settlor " or the wife or husband of the settlor may, whether immediately or in " the future, cease, on the payment of a penalty, to be liable to make any " annual payments payable by virtue or in consequence of any provision " of the settlement ; any sums payable by the settlor or the wife or husband " of the settlor by virtue or in consequence of that provision of the settle- " ment in any year of assessment shall be treated as the income of the " settlor for that year and not as the income of any other person ".

The Appellant contends that only the terms of the settlement can be looked at, and that the terms of the settlement do not give any person the power to revoke or otherwise determine the settlement or any provision thereof.

On the other hand the Crown contends that you can go further afield than the settlement, and that if in fact there is a person who can stop the dividends or wind up the company alone, or with the consent of another person, that is enough to bring the settlement within Sub-section (1) of Section 38.

(Atkinson, J.)

Reading the Section unaided by authority I should say, without much hesitation, that the contention of the Appellant is right. I think the words mean that the power must be found in the terms of the settlement. I am confirmed in that view by the following considerations. (1) The contrary view would give no effect whatever to the words in the opening line, " If " and so long as the terms of the settlement are such ". Those words might just as well not be there. (2) The contrary view would lead to results which would shock the sense of justice of any reasonable mind. For example, a settlor might settle shares in a company upon persons dependent upon him. Quite unknown to him, A and B might between them hold enough shares to put the company into voluntary liquidation. According to the Respondents, that settlement is hit by the Section, and would still be hit even if A and B acquired their shares after the date on which the settlement had been made. (3) Section 21 of the 1936 Act contains a provision as to income settled on children. The Section may not be a very easy one to understand completely, but at any rate it is clear as to when a settlement is not to be deemed to be irrevocable. I do not want to go into the Section at length; the relevant provisions as to when a settlement shall not be deemed to be irrevocable are contained in Sub-section (8) and provide that a settlement shall not be deemed to be irrevocable " if the " terms thereof provide ", and so on. It uses quite plain language. If it were the intention of the draftsman or of Parliament in extending the code relating to settlements in the Act of 1938 to make so drastic a change as that contended for by the Crown, a change which would after the passing of that Act apply to settlements already within Section 21 of the Act of 1936, surely different language would have been used, language such as, for example, " notwithstanding the terms of the settlement ", something to make it really clear that the words hitherto applicable " if the terms thereof " provide " were now to cease to apply and that the new language was to be construed as meaning " notwithstanding what the terms provide ". It seems to me that anyone desiring to express an intention of that kind, which is a complete reversal of that part of Section 21 of the 1936 Act to which I have referred, would have used some such words as those I have suggested. No one would use the words which are used in order to make a really fundamental change in the law applicable to settlements.

But I find something which I think is still more conclusive in Section 38 itself. I will put it in this way. Sub-section (1), which I have read, says in the opening words: " If and so long as the terms of any settlement are " such that (*a*) any person has or may have power ", etc., to determine and on determination ceases to be liable to make any annual payment. Sub-section (2) says : " If and so long as the terms of any settlement are such ", then we get the same provision about having power to determine a settlement, and then: (*b*) in the event of the exercise of the power, the settlor ", or his wife, " may become . . . entitled to . . . any part of the property . . . " or income, and then you come to Sub-section (3) and Sub-section (4). But neither of those Sub-sections is introduced by the words " If and so long " as the terms of any settlement are such that ". Sub-section (3) is : "If " and so long as the settlor has an interest in any income arising under " or property comprised in a settlement, any income so arising during the " life of the settlor in any year of assessment shall, to the extent to which it " is not distributed, be treated for all the purposes of the Income Tax Acts " as the income of the settlor for that year, and not as the income of any " other person ". Sub-section (4) is: " For the purpose of the last foregoing

(Atkinson, J.)

" subsection, the settlor shall be deemed to have an interest in income aris-
" ing under or property comprised in a settlement, if any income or property
" which may at any time arise under or be comprised in that settlement
" is, or will or may become, payable to or applicable for the benefit of the
" settlor or the wife or husband of the settlor in any circumstances whatso-
" ever ". There you have what seems to me to be a very striking contrast : you have the two first Sub-sections introduced by the words : " If and so " long as the terms of any settlement are such that ", and Sub-sections (3) and (4) without any such language but incorporating the words " in any " circumstances whatsoever ".

The Crown, in effect, are asking me to construe the first two Sub-sections, ignoring the words "If and so long as the terms of any settlement " are such that ", and as if the words " in any circumstances whatsoever " were in those two Sub-sections as well as in Sub-sections (3) and (4). That is, in effect, what the argument comes to. It is said you can ignore the terms of the settlement and go behind it, and if you can find " in any cir-" cumstances whatsoever " that the settlement can be determined, then the income is to be deemed to be the income of the settlor. It seems to me that, if that had been the intention of the Sub-sections (1) and (2), the language would have been very differently phrased. The contrast is so strikingly clear—you have the two Sections introduced by these words which I have to interpret in contrast with the presence of the words " in any circum-" stances whatsoever " in Sub-sections (3) and (4). Unaided by any authority on the matter that would be the view I should form, and now I must see if there is anything in any case which is inconsistent with that view.

The first case referred to was *Commissioners of Inland Revenue* v. *Payne*, 23 T.C. 610. There the point could have been raised in the simplest way, because Mr. Payne incorporated a company on 13th March, 1937, with a capital of £100. He held 95 shares himself, and had complete control of the company. By a deed of covenant in March, 1938, he covenanted with the company to pay it £72 a week, after the deduction of tax, during his life or until an effective resolution to wind up. He paid them during the following year £3,744, and then there was a resolution to wind up, and he claimed a corresponding gross sum as deduction from his income for the purpose of reducing his liability for Sur-tax. If the contention of the Crown today is right, that was a perfectly simple case. There was the covenant, you could go behind the deed, in fact the settlor was in control of the company, he could wind it up at any time and so put an end to his liability. It is precisely the same sort of case as the one with which I have to deal. But no one made any such suggestion in that case. Mr. Payne was held assessable, but because the Court took the view that, in considering what the settlement was, you were not limited to the deed of covenant, but that you could look at the whole transaction, the formation of the company, the constitution of the company, the shareholding of the company, and held that the whole transaction was the settlement; but the Court apparently took it for granted that the power had to be found within the settlement. On page 626 Sir Wilfrid Greene, M.R., deals with it : " The word in the " definition clause of ' settlement ' which is relevant to that question is the " word ' arrangement '. The word ' arrangement ' is not a word of art. It " is used, in my opinion, in this context in what may be described as a " business sense, and the question is: can we find here an ' arrangement ' as " so construed ? It is said that the only element in this transaction which

(Atkinson, J.)

"falls within the definition of 'settlement' is the deed of covenant itself. I "am unable to accept that argument. It appears to me that the whole of "what was done must be looked at; and when that is done, the true view, "in my judgment, is that Mr. Walter Payne deliberately placed himself into "a certain relationship to the company as part of one definite scheme, the "essential heads of which could have been put down in numbered para-"graphs on half a sheet of notepaper", and so on. Then: "Now, if a "deliberate scheme, perfectly clear cut, of that description is not an "'arrangement' within the meaning of the definition clause, I have difficulty "myself in seeing what useful purpose was achieved by the Legislature in "putting that word into the definition at all." Then he goes on to discuss the voting power. He says, on page 627: "The question in the present "case is not as to the bare exercise of a voting right looked at by itself. "That voting right was brought into the scheme and was an essential part "of the scheme, and it was used as the mechanism by which Mr. Walter "Payne should be in a position to bring his liability to an end. It so "happens that under the particular device adopted the method of bringing "that liability to an end was by exercise of the votes attached to his shares. "But those voting rights, used for the purpose for which they were used, "and playing the part in the scheme which they did play, are, in my "opinion, properly described in the context of this Section as a 'power'." What does all that mean? It seems to me to mean that you have got to find a power, and you have got to find a power in the settlement, but the settlement is not the mere document containing the covenant, the settlement is the whole arrangement. If you look at the whole arrangement you do see there a power carefully created for the purpose intended. All that was absolutely unnecessary if the argument of the Crown is right today. All that the Court need have said was this: There is the covenant; there is in fact the power; what more do you want, there is an end of it. That is the argument of the Crown today.

The next case, and a most important one, is *Chamberlain* v. *Commissioners of Inland Revenue,* 25 T.C. 317. There the settlor had formed an unlimited investment company, with capital divided into preference and ordinary shares, to which he transferred certain assets in consideration of the issue to him of preference capital which gave him complete control of the company. In March, 1936, he executed a settlement in favour of his wife and four children. He paid a sum of money to the trustees to be held on certain trusts, and the money was invested in the purchase of ordinary shares in the company. But that settlement contained a power to declare that the trust should cease and the trust funds should be held on trust for any one of the beneficiaries, and his wife was one of the beneficiaries. Therefore it was a settlement under which in certain events the wife might obtain benefit.

In December, 1936, the structure of the company was altered, and the capital was divided into "A", "B", "C", "D" and "E" shares, and a power was given to the company to redeem the shares on payment of a sum equal to the capital paid. The shares issued to the trustees of the settlement already in existence were designated "A" shares, and in December he executed four deeds of settlement paying the trustees equal sums of money to be invested as he should direct and to be held on irrevocable trusts for each of his four infant children. The money was invested in the purchase of the "B", "C", "D" and "E" shares of the company. In 1937-38

(Atkinson, J.)

dividends were paid. The settlor was assessed to Sur-tax for the year 1937-38 under Section 38 (2) in sums representing the difference between the company's income and the amount distributed on his preference shares. He was assessed on all the dividends paid on the ordinary shares, and also on the undistributed profit—they were deemed to be the income of the settlor.

It was agreed that the first settlement came within the Section because of the possibility of the trust fund being applied for the benefit of the settlor's wife. It was held by the Commissioners that he could be assessed in all these sums. There was no appeal as to the first settlement, but there was an appeal as to the four settlements.

One of the Crown's contentions was a contention founded upon *Payne's* case[1] that you were entitled to look at the whole transaction, not merely the settlement, but the formation of the company, and so on, the power to redeem, the power to control the payment of dividends and/or the power to wind up the company, which all amounted, it was said, to a power to determine the provisions of the settlements, and that power could and might be exercised in such a way that the settlor's wife could benefit under the March settlement. That was the position.

Section 38 is not a particularly easy one to construe. The purpose of the Section is described as: "Income arising under certain settlements to "be treated as income of settlor." Up to a point Sub-sections (1) and (2) are in precisely the same language : "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, in the event of the exercise of the power, the "settlor or the wife or husband of the settlor"—so far they are the same, and then they branch out in different ways, Sub-section (1) dealing with the case where "the settlor or the wife or husband of the settlor will or may "cease to be liable to make any annual payments", and Sub-section (2) dealing with the case where "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". In other words, Sub-section (1) deals with the case where the settlor merely ceases to be liable, Sub-section (2) deals with the case where he or his wife becomes entitled to any of the settled property. *Chamberlain's* case[2] was concerned with the latter and, in so far as it deals with the meaning and effect of the language common to Sub-sections (1) and (2), of course it is equally relevant to both Sub-sections. The event is the exercise of a power ; that power may be one to be found in the settlement, or it may be a power in fact existing, but independently of the settlement. The powers relied upon by the Crown in that case, and in the case with which I am dealing, are very much the same. They are twofold : (1) a power to prevent the payment of dividends to the trustees either by withholding dividends or by redemption of the shares ; (2) the power to wind up the direct or indirect source of the settlement income. In *Chamberlain's* case it was the company in which the trustees held shares ; in this case it is the company on whose continued existence and payment of dividends the covenant to pay depended for its value. It seems to me quite clear that the Court of Appeal in *Chamberlain's* case took the view that the power must be found in the settlement, but following *Payne's* case they also took the view that the settlement as

(1) 23 T.C. 610. (2) 25 T.C. 317.

(Atkinson, J.)

defined in the Act was not merely the contents of the four deeds but was the whole arrangement. It was said that the whole of what was done must be looked at, including the fact that the settlor had placed himself in a certain relationship with the company as part of one definite scheme. They held that the whole scheme was an arrangement and therefore a settlement, and therefore the power was within the settlement. It followed that the power to revoke or otherwise determine the settlement was to be found within the settlement itself. It further followed that the income arising under the settlement included the income of the company, and that the whole of the assets of the company constituted property comprised in the settlement, and that the appellant could be assessed with respect to the whole income of the Company. Du Parcq, L.J., gave the judgment of the Court in *Chamberlain's* case(1), and I want to read a passage, on page 324, which indicates to my mind that they were clearly accepting the view that the power had to be found in the settlement. Again, one would ask the question why all this argument about what constituted the settlement, why discuss the question whether the whole arrangement was the settlement or not if all that need be said is : There is the settlement ; it does not matter where you find the power, there it is, and that is enough. But that was not the view taken by the Court. Dealing with what happened the learned Lord Justice says : " There need be no apportioned dividend payable, be- " cause under article 3, as it stood at the material time, each class of ordin- " ary shares was to be entitled only to such dividend as the company should " from time to time in general meeting determine. Further, these shares " could be redeemed out of income in a few years, so that there need be " no loss of capital or of the future income to be enjoyed by the remaining " shareholders. After redemption, the only shareholders would be the " Appellant with his large holding of preference shares, and the trustees of " the March settlement. The next step might be a winding up of Staffa, " when all the assets of that company, after the par value of the Appellant's " preference shares had been provided, would go to the trustees of the " March settlement. Now the March settlement provided that the trustees " should have power at any time during the Appellant's life to declare that " the trusts therein declared should cease to apply to the trust fund, and " to hold the trust fund ' upon trust for . . . any one . . . of the benefic- " ' iaries', who might be the Appellant's wife. Either the redemption of the " shares or the winding up of the company, or both these acts taken to- " gether, might properly be described as a determination of a ' provision of " ' the settlement ', and the terms of the arrangement constituting the " ' settlement ', gave the Appellant power to determine provisions of the " settlement in the sense that the matter was so arranged that his voting " rights enabled him to do so."—that seems to be a very plain statement ; the terms of the arrangement gave the appellant the power to determine the provisions of the settlement—" If the power to redeem and to wind up the " company were exercised, then the wife of the settlor might become bene- " ficially entitled at least to part of the property then comprised in the " settlement. Thus the terms of Section 38 (2) appear to be completely " satisfied." I think one is justified in saying that the Court of Appeal were there clearly expressing the view that what you have to look at was the settlement, the power in the settlement, but they also took the wide view that the settlement comprised everything.

(1) 25 T.C. 317.

(Atkinson, J.)

That case went to the House of Lords, and the House of Lords did not take the latter view. They thought that the settlements in that case were the four deeds themselves and, therefore, that the assessment was bad. Their Lordships had not to consider this precise point for this reason. There the appellant had been assessed with regard to the whole income of the company. Once you took the constitution of the company out of the settlement there could be no power to make an assessment of the kind there made, and that was sufficient to dispose of the appeal.

But there is one passage in Lord Macmillan's judgment, on page 332(1), which is applicable to this case. He has just said : "It is essential to the "Crown's case that it should make out that the whole assets of the Staffa "Investment company are comprised in a settlement or arrangement made "by the Appellant within the meaning of the Statute. In my opinion the "Crown has failed to establish this." Then he says that made it unnecessary in that case to say more, but he continued : "But I may say that I "find it difficult to characterize the redemption by the Staffa Investment "company of the shares held under the trust deeds, or the winding up of "the company, as the determination of a 'provision' of the settlement." One of the matters relied on here is a power to determine the provisions of the settlement with the aid of another by winding up the company. I daresay that observation of Lord Macmillan is not perhaps a final decision; it is not, but at any rate it makes the point which is relied on here more difficult.

The next case was the case of *MacAndrew* v. *Commissioners of Inland Revenue,* 25 T.C. 500, which the Commissioners in this case held gave them no option but to decide as they did. When that case came before the Commissioners the appeal to the House of Lords in *Chamberlain's* case(1) had not been heard. *MacAndrew's* case was a perfectly simple and straightforward case. He had acquired all the shares in a private company, and he transferred all the preference shares and 5,590 ordinary shares to his wife and daughter who executed a declaration of trust declaring that they held the shares as to both capital and income for the appellant's wife and children as he should by will appoint. The remaining shares were held as to five by the appellant and five by his son. The income was accumulated and no dividends were declared. The whole of the company's income was treated as income of the appellant by virtue of Section 21 of the Finance Act, 1922, which Section gave the Commissioners power to apportion the income if a reasonable part of the profits of the company had not been divided in dividend. Then came the deed in question of July, 1940, by which the appellant's wife, his only son, and his only surviving daughter consented to the payment to the appellant of all income arising from the shares subject to the 1928 declaration of trust which had been or should be treated for the purposes of the Income Tax Acts as the income of the appellant, and the appellant covenanted to pay under the same deed of covenant to his daughter, H, as trustee for her two children, in each year commencing with the following year an amount equal to the gross of the income he should have received in that year from the company under the foregoing consent. It is a covenant which is very like the one here.

The question arose: Could he be assessed in respect of that income? Macnaghten, J., held he could. He read the relevant Sections and said this,

(1) of 25 T.C. (2) 25 T.C. 317.

(Atkinson, J.)

on page 506(1): "The contention on behalf of the Crown is that the transfer "of the shares to Mrs. MacAndrew and the deed of 11th July, 1940, con- "stituted a 'settlement' within the meaning of the Finance Act, 1938, "Section 38, and that Mrs. MacAndrew has power to determine it by "putting the company into liquidation. Both those propositions are, in my "opinion, well founded." He reads the Section again, and then he says: "That Mr. MacAndrew is a 'settlor' is indisputable. It is also indis- "putable that Mrs. MacAndrew can wind up the company and thereby "put an end to the covenant made by the Appellant." Why that case is not very satisfactory is this. First of all, it was argued in person, and secondly, there is no reference whatever to the *Chamberlain* case(2). It is quite clear that the Commissioners had decided the case on the decision of the Court of Appeal in *Chamberlain's* case. They had said: "We hold the conditions of Section 38(1) . . . are fulfilled in "this case and that the creation of the original trust, the machinery of the "company and the provisions of the deed of 11th July, 1940, constitute an "arrangement or settlement with power to revoke or otherwise determine "it. Should that power be exercised the settlor would cease to be liable "to make annual payments." It is very strange if the decision of the House of Lords had been called to the attention of Macnaghten, J., that he made no reference at all to the fact that the ground on which the Commissioners had decided the case could no longer be relied upon. I think it is very strange that no reference should be made to the *Chamberlain* case at all. It is also to be observed that even the learned Judge did not limit the settlement to the document itself, but said that the contention relied upon was "that the transfer of shares to Mrs. MacAndrew and the deed of 11th "July, 1940," both "constituted a 'settlement'". Therefore, I cannot satisfy myself that the point which has to be decided here was really present to Macnaghten, J.'s mind.

The only further case to which my attention has been drawn was the case of *Jenkins* v. *Commissioners of Inland Revenue,* 26 T.C. 265, which was decided in the Court of Appeal in October, 1944. I will put the facts in that case as simply as I can. Mr. Jenkins formed two companies, the Dilnot Investment Company and the Woodlands Investment Company. The shares of both companies were divided into classes "A" and "B". Mr. Jenkins held all the "A" shares, and the constitution of the company gave him complete control of both. In June, 1934, he settled £500 on each of three daughters by three settlements. He lent to the trustees of each settlement £6,500 free of interest, and the trustees used the £500 and the money lent in the purchase of all the "B" shares in Woodlands; Woodlands thereupon subscribed for all the "B" shares in Dilnot. The case concerned the dividends paid in the year 1936-37 and the year 1937-38. The trustees used the dividends in repaying part of the loans. Mr. Jenkins had been assessed for both years in respect of the income received by the trustees. The assessment as to the first of those two years depended upon how far the settlement was a revocable settlement within the meaning of Section 21 of the Act of 1936. The second of the two years was governed by the Act of 1938. It will be remembered that Sub-section (7) of Section 38 of the Act of 1938 provides: "The foregoing provisions of this section "shall apply for the purposes of assessment to income tax for the year "1937-38 and subsequent years and shall apply in relation to any settle-

(1) of 25 T.C. (2) 25 T.C. 317.

(Atkinson, J.)

" ment, wherever made and whether made before or after the passing of " this Act ". So that the income received in the second year was subject to Section 38 of that Act, but the income received in the year 1936-37 was only subject to Section 21 of the earlier Act. Mr. Jenkins could wind up these companies, and in that event everything would in fact have come to him.

The Commissioners decided the case in accordance with the rule in *Payne's* case(1) and the Court of Appeal's decision in *Chamberlain's* case(2). Mr. Jenkins thus failed before the Commissioners, and on appeal the case was heard by Macnaghten, J., who began by dealing with the income for the year 1936-37. He said this, at the bottom of page 275(3): " So far as " the assessment for the year 1936-37 is concerned, since the claim of the " Crown is based on the Finance Act, 1936, Section 21, and that Section " does not apply to irrevocable settlements, it was necessary for Mr. Stamp " to rely on the provisions of Sub-section (8) of that Section, which pro- " vides as follows: ' For the purposes of this section, a settlement shall not " ' be deemed to be irrevocable, if the terms thereof provide—(*a*) for pay- " ' ment to the settlor . . . of any income or assets in any circumstances " ' whatsoever during the life of any child of the settlor to or for the benefit " ' of whom any income, or assets representing it, is or are or may be " ' payable or applicable by virtue or in consequence of the settlement '. " Mr. Stamp's argument, as I understood it, was this. The Appellant can " wind up these companies whenever he pleases, and if he does so he will " revoke the settlements, because the whole of the trust fund will disappear." Then he goes through the figures saying that the argument was well founded and that the trust fund would and could be extinguished. Then he said: " Mr. Stamp argued that the Appellant, by means of the liquidation of the " two companies, could revoke the settlement. It so happens that by Sec- " tion 38 (1) (*a*) of the Finance Act, 1938, provision is made for the case " where a person has power ' to revoke or otherwise determine the settle- " ' ment '. I agree that the Appellant in this case can, by putting the two " companies into liquidation, determine the settlement otherwise than by " revocation. But I do not think it can be said that, by putting an end " to the trust fund, he revokes the settlement. The settlement still remains, " but what has happened is that the trust fund has been destroyed. It is " true that the trust fund, in the case supposed, has been destroyed by the " act of the Appellant; but I do not think that is revoking the settlement " within the meaning of Section 21 (8) of the Finance Act, 1936. I also " agree with the argument of Mr. Talbot on behalf of the Appellant that " there are no terms in the settlement which provide for the payment to " the settlor of any of the income or assets of the settlement. It is quite " true that the Appellant can get into his hands the whole of the trust " funds, but that is not by reason of any terms contained in the settlements. " It is by reason of the unhappy investment, if I may so call it, which the " trustees thought fit to make of the £500 entrusted to their care for their " infant beneficiaries. Therefore, in my opinion, Section 21 of the Finance " Act, 1936, does not apply to the settlements made by Mr. Jenkins on " 22nd June, 1934 ; and the assessment to Sur-tax made upon him for the " year 1936-37 must therefore be discharged." Why stop there? What could have been easier, if the argument for the Crown is right, than for Macnaghten, J., to have said: But this has no application to the second

(1) 23 T.C. 610. (2) 25 T.C. 317. (3) of 26 T.C.

(Atkinson, J.)

dividend, the dividend for 1937-38, because under the 1938 Act the power to wind up and so put an end to the settlement need not be found in the settlement itself.

It is clear that Mr. Jenkins had the power to do exactly what it is said Mr. Wolfson has power to do here—to knock the bottom out of the settlement in the simplest way. But no such suggestion was made in order to hit Mr. Jenkins. He was hit in respect of the year 1937-38, not under Sub-sections (1) or (2), but under (3) and (4) of Section 38. Under these Sub-sections the Crown succeeded, because there all the Court had to do was to find whether in any circumstances whatsoever any of the settlement money could go to the settlor. It was held that it could, because of the power the trustees had to use the trust moneys to repay the money lent by the settlor.

Exactly the same thing happened in the Court of Appeal. They upheld the view taken by Macnaghten, J. They began by dealing with the second year, and dealt with it simply and solely under Sub-sections (3) and (4). All that would have been quite unnecessary if the argument of the Crown today was right. But they dealt with it solely on grounds based upon those Sub-sections. Turning to the year 1936 they expressed the same view as Macnaghten, J., and Lord Greene, M.R., dealt at some length with the meaning of the word " irrevocable ". He thought that to treat the power to wind up the company as a power to revoke the settlement was placing much too wide a construction upon it(1). I need not go into that part of the judgment.

I think the view I have formed is in accord with that of the Court of Appeal on this point in *Chamberlain*'s case(2), and again in *Jenkins's* case (3). It would have been so easy, to my mind, to have dealt with the second year in *Jenkins's* case in a word if the argument advanced for the Crown today was right. As to *MacAndrew's* case(4) which was relied upon by the Commissioners, as I say I do not know what weight ought to be attached to that case, but it was decided before *Jenkins's* case, and I am not satisfied that *Chamberlain's* case was called to the learned Judge's attention; he certainly made no reference whatever to the ground upon which the Commissioners had decided the case, and which had ceased to be a valid ground.

I only want to add this. I do not think that the withholding of the dividend would revoke or otherwise determine the settlement or any provision thereof. The covenant would remain and become effective when the dividends were resumed. As to winding-up, the settlor had no power himself to wind up, he needed the co-operation of another shareholder with the requisite shareholding.

It is said that he could bring that about with the consent of another person, but I do not think he could. I think that the language is not apt for that. No mere consent can give him power to wind up the company. He needs the co-operation of another shareholder. The ability of two shareholders acting together to bring about a certain result seems to me something different from the ability of one to bring about the result with the consent of another, and I bear in mind what Lord Macmillan said in *Chamberlain's* case(5).

(1) 26 T.C., at p. 281. (2) 25 T.C. 317. (3) 26 T.C. 265. (4) 25 T.C. 500.
(5) 25 T.C., at p. 332.

(Atkinson, J.)

The conclusion I have come to is that the appeal must be allowed, and that Mr. Wolfson was not liable to be assessed for the purposes of Sur-tax in the income received under these settlements.

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

Atkinson, J.—Yes.

Mr. Tribe.—The effect of your Lordship's judgment is that the assessment is discharged, as appears from the figures in paragraph 1 of the Case.

Atkinson, J.—Yes.

The Crown having appealed against the decision in the King's Bench Division, the case came before the Court of Appeal (Tucker, Somervell and Cohen, L.JJ.) on 20th, 25th, 26th and 27th February, 1948, when judgment was reserved. The case was further argued on 5th March, 1948. On 22nd March, 1948, judgment was given against the Crown (Cohen, L.J., dissenting), with costs, confirming the decision of the Court below.

The Solicitor-General (Sir Frank Soskice, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Sir Roland Burrows, K.C., and Mr. L. C. Graham-Dixon for the Respondent.

JUDGMENT

Tucker, L.J.—By a deed of covenant dated 26th March, 1940, made between Isaac Wolfson, Charles Wolfson and Samuel Wolfson of the one part as settlors and Henry Chetham and the said Isaac Wolfson of the other part as trustees, each settlor irrevocably covenanted with the trustees that he would on 1st April in each year during the period of seven years commencing on 1st April, 1940, or until his death (whichever period should be the shorter) pay to the trustees an annual sum calculated according to the provisions contained in clause 2 of the deed, each such annual sum to be held by the trustees upon the trusts and subject to the powers declared and contained in the deed.

Clause 2 provided that each of the said annual sums covenanted to be paid by each settlor should, subject to a proviso, be such an annual sum as after deduction of Income Tax at the standard rate for the time being in force leaves a sum equal in amount to the net aggregate of dividends received by him during the previous 12 months, expiring on 1st April in each year, upon the ordinary shares of Leonard Gordon Estates, Ltd. held by him as set out in the first schedule to the deed.

There followed a proviso whereby, if any of the said shares in Leonard Gordon Estates, Ltd. should be sold or otherwise disposed of for value by any settlor, the sum payable by him should equal in amount the net amount of all dividends received during the previous twelve months from any of the shares in Leonard Gordon Estates, Ltd. still held by the settlor, together with the net amount of any other dividends or income received by that settlor during the said 12 months from the re-investment of the proceeds of the shares sold. Clause 3 provided that the trustees should stand possessed of the said annual sums paid to them by the settlors upon trust to pay to each of the beneficiaries—who were the eight sisters of the settlors—so long as she should be living, out of the sums received by them in each year, such annual sum as after deduction of Income Tax at the standard rate for the time being leaves £450.

(Tucker, L.J.)

The question in this appeal is whether the gross equivalent of a sum of £14,612 10*s.* 0*d.* paid by Isaac Wolfson under this deed is an admissible deduction in computing his total income for Sur-tax purposes.

The case has proceeded throughout, before the Special Commissioners and in the Court below, upon the basis that the deed in question is such that any sums paid thereunder would be admissible deductions, unless the Crown was right in its contention that such sums must be treated as the income of the settlor by virtue of Section 38 (1) (*a*) of the Finance Act, 1938. The relevant provisions of this Section are as follows: "If and so "long as the terms of any settlement are such that—(*a*) any person has or "may have power, whether immediately or in the future, and whether "with or without the consent of any other person, to revoke or otherwise "determine the settlement or any provision thereof and, in the event of the "exercise of the power, the settlor or the wife or husband of the settlor "will or may cease to be liable to make any annual payments payable by "virtue or in consequence of any provision of the settlement . . . any "sums payable by the settlor or the wife or husband of the settlor by "virtue or in consequence of that provision of the settlement in any year "of assessment shall be treated as the income of the settlor for that year "and not as the income of any other person".

It was not contended by the Crown that the settlement in question consisted of anything other than the deed of 20th March, 1940, so that no question arises in the present case of the application of the extended definition of "settlement" in Section 41 (4) (*b*) of the Finance Act, 1938.

The Crown's contentions are set out in paragraph 12 of the Case stated by the Special Commissioners, and were as follows :—

"(*a*) the terms of the said deed of covenant were such that the "Appellant had power to determine the said settlement or a provision "thereof either himself or with the consent of other persons, as by "reason of his shareholding he could either prevent the company from "declaring a dividend during the whole period of the covenants or, "with the consent of one of his brothers, put the company into liquid-"ation ;

"(*b*) in the event of the exercise of such power the Appellant will or "may cease to be liable to make the annual payment payable by vir-"tue of the said deed of covenant ;

"(*c*) the sum payable by the Appellant under the said deed of coven-"ant must be treated as the income of the Appellant."

In this Court, however the argument proceeded, without objection and in part at our invitation, on a somewhat wider basis. It was said that as the words "any person" must, by reason of the provisions of the Interpretation Act, be construed as including the plural, it follows that, since the sums payable are calculated in terms of the dividends received from a limited liability company, there must always at any given moment be "some "persons", whose identity can be ascertained from the register of shareholders, having the power to revoke or otherwise determine the settlement or any provision thereof, viz., a three-quarters majority of such shareholders who could put the company into voluntary liquidation, and that such a power follows necessarily under the general law from the terms of settlement so worded without the necessity of looking at any extraneous matters such as the articles and memorandum of association of the com-

(Tucker, L.J.)

pany. Alternatively, it was contended that the articles and memorandum can properly be looked at, together with any other extraneous matters requisite for the determination of the rights and liabilities of the parties under the settlement.

On the other hand the contention of the taxpayer has been throughout that any such power must be found in the settlement itself, either expressly or as a matter of construction by necessary implication from the language used. The question ultimately resolves itself into the proper interpretation to be put upon the words " if and so long as the terms of any settlement " are such that ".

Numerous possible cases were advanced on each side for the purpose of showing the curious and even absurd consequences which might follow from the adoption of the construction contended for by their opponents but I have not derived much assistance from this method of approach because it is clear that either construction might, in certain circumstances, produce results which could hardly have been contemplated by the Legislature. I turn, therefore, to the language of the Section as a whole, taken in conjunction with Section 41 (4) (*b*), for such assistance as I can find therein. In the result I have arrived at the same conclusion as Atkinson, J., and substantially for the same reasons, which may be briefly summarised as follows :

(1) If the Crown is right it seems to me there was no necessity for the words " and so long as the terms of any settlement are such that ".

(2) The language is in marked contrast to the opening words of Sub-section (3) of Section 38, which are " if and so long as the settlor has " an interest ", and the language of Sub-section (4), viz., " the settlor " shall be deemed to have an interest ", etc., and then the concluding words " in any circumstances whatsoever ".

(3) Having regard to the extended definition of Section 41 (4) (*b*) I find it difficult to think that the Legislature could have contemplated the necessity of going outside the settlement to find the power, and if such need was contemplated I think it could have been provided for in clearer language.

With regard to the wider contention based upon the calculation of sums by reference to the dividends received from a limited liability company, I have come to the conclusion that the language of Section 38 in speaking of a power to revoke or determine is not apt to include some power residing in a third party quite unconnected with the settlement, the exercise of which by him, in ignorance of the existence of the settlement, may automatically result in the destruction of the source from which the settlement derives its funds. I do not think that what I am saying in any way conflicts with the judgment of Sir Wilfrid Greene, M.R., in *Commissioners of Inland Revenue* v. *Payne*, 23 T.C. 610, where the settlement expressly provided that payments should determine on the liquidation of the company.

I have not derived much assistance from the authorities to which Atkinson, J., referred. *Chamberlain* v. *Commissioners of Inland Revenue*, 25 T.C. 317, was a case under Sub-section (2) of Section 38, and the issue was whether the property comprised in the settlement consisted of the whole assets of Staffa, and it was held that it did not.

In *Commissioners of Inland Revenue* v. *Payne*, 23 T.C. 610, the contention of the Crown that the settlement in question consisted of the deed

(Tucker, L.J.)

of covenant of 29th March, 1938, together with the whole framework of Derwent, Ltd., which was controlled by Mr. Payne, was accepted. Accordingly no question arose as to whether it was necessary or permissible to look outside the settlement to find the power. Similarly, in *MacAndrew* v. *Commissioners of Inland Revenue*, 25 T.C. 500, the settlement consisted of the transfer of shares plus the deed of 11th July, 1940. *Jenkins* v. *Commissioners of Inland Revenue*, 26 T.C. 265, was a case under Sub-sections (3) and (4) of Section 38. I do not feel that I get much support for my interpretation of the Section from the fact that in some of these cases the Crown might have relied on the point now taken in preference to the extended definition of the word " settlement ". I am, accordingly, driven back to the language of the Section itself, unaided by authority.

As in my view the power in question must be found in the settlement and derived directly therefrom, and as in the present case it is not so found, I think this appeal fails ; and accordingly I do not find it necessary to discuss the extent of Mr. Wolfson's powers either alone or with the consent of his brothers to prevent the payment of dividends by Leonard Gordon Estates, Ltd. or to put the company into liquidation, and I express no opinion whether the power to prevent the payment of dividends would amount to a power to revoke or otherwise determine the settlement or any provision thereof, or would merely operate so as to give a power to suspend an obligation under a provision which would still remain in existence.

Somervell, L.J.—The facts are set out in the Case and are summarised in the learned Judge's judgment, and I will not recapitulate them.

It was agreed by the Solicitor-General that the case had been argued below on the basis that the settlement here was the deed of covenant only. The Crown had not contended, and did not contend, that by reason of the extended definition of " settlement " in Section 41 (4) (*b*) the Court could and should look at matters outside the deed of covenant in order to decide what was the settlement. No doubt some day the Courts may have to consider whether the decision of the House of Lords in *Chamberlain* v. *Commissioners of Inland Revenue*, 25 T.C. 317, where the issues arose under Section 38 (2) of the Finance Act, 1938, affects the decision of this Court in *Commissioners of Inland Revenue* v. *Payne*, 23 T.C. 610, where the issue arose under Section 38 (1). That does not arise here, and I express no opinion upon it.

The first issue that arises in this case may be stated as follows: must the power which " any person " has to revoke or otherwise determine the settlement or any provision thereof be found in the provisions of the settlement, or is it sufficient that such power can be found whether within the settlement or not, provided of course that its exercise will bring about the consequence that the settlor or his wife or her husband will or may cease to be liable to make annual payments ?

Assume that the settlor covenants to make annual payments so long as company X remains in existence. Assume, though no doubt this is an unlikely settlement, that company X is a one-man company which A, a complete stranger to the settlor, could dissolve at any time. On the Crown's construction such a settlement would come within Section 38 (1).

I agree with Atkinson, J., that the natural meaning of " if the terms of " any settlement are such that any person has power . . . to revoke or other- " wise determine the settlement or any provision thereof " is that the power

(Somervell, L.J.)

must be found in and conferred by the terms of the settlement. The Crown relied on the difference between the present words and the words "if the "terms thereof"—that is, of the settlement—"provide", to be found in Section 21 of the Finance Act, 1936. I think one must be careful not to attach too much weight to differences in wording as between different Finance Acts, but I agree that the opening words are capable of covering the construction for which the Crown contends. I also think that the argument derives some support from the words "any person". On the other hand, the opening words and the description of the power as one to revoke or otherwise determine the settlement or any provision thereof, to my mind, lead to the construction which I believe to be right. If it had been intended that the Court was to have regard to powers not to be found in the settlement, exercisable by persons not parties to or named in the settlement, other words would, and should, have been used to make this clear. On this issue I think there is considerable force in the learned Judge's reasoning based on the contrast between the opening words of Sub-sections (1) and (2) with the wording of Sub-sections (3) and (4).

There remains an argument to which at one time I was attracted. In order to avoid certain complications which arise on the present facts, I will assume that the settlor had a seventy-six per cent. share holding and that a dissolution of the company would be a determination of the settlement. The present deed is on the basis that the settlor is a shareholder and recites the number of shares he holds, though it does not enable one to find out the proportion of that holding to the issued capital. I will assume a settlement in which that fact was recited. Would it then be right to say that its terms were such that the settlor had power to determine it? I have come to the conclusion that, in view of the opinion I have formed on what I have called the first issue, the answer to this question must be "No". The power to dissolve in such a case is a power under company law and the articles of association, and is not a power under or conferred by the settlement. If the power can be found outside the settlement so can the person, and, as I have said, I think that such a result would need clear words, which I do not myself find.

If it is said that the Legislature must have intended to cover a case in which a settlor made his annual payments dependent on the continued existence of a company which he could himself dissolve, the Legislature may have thought that such a case was covered by the extended definition of "settlement", as this Court held in *Payne's* case(1). It may be that that case is still good law. So far as it is relevant, on the basis on which the present case has been argued, I think it is, on the whole, against the Crown's argument. I agree with Atkinson, J., that the Master of the Rolls in *Payne's* case proceeded on the basis that the power must be found within the settlement.

With regard to the learned Judge's treatment of the cases to which he refers, I think there was force in the Solicitor-General's submission that the Crown's argument in the present case would not have been relevant in *Chamberlain's* case (2), or in *Jenkins* v. *Commissioners of Inland Revenue*, 26 T.C. 265. The learned Judge did not, however, base his decision on this point. He was considering the cases in order to see whether there was anything inconsistent with the conclusion at which he had arrived on the

(1) 23 T.C. 610. (2) 25 T.C. 317.

(Somervell, L.J.)

words of the Section. I agree with him that there is nothing inconsistent with his decision to be found in those cases.

I agree with Atkinson, J., that the withholding of a dividend would not revoke or otherwise determine the settlement or a provision thereof.

Atkinson, J., went on to consider the question of winding up the company. The settlor has no power himself to wind up. He must get one other shareholder, at least, to attend a meeting, and get one shareholder to vote with him or not to attend. The argument clearly proceeded on the basis that " any person " means any one individual, and that the singular does not include the plural. Before us it was suggested, applying Section 1 (1) (*b*) of the Interpretation Act, 1889, that no contrary intention appeared and that the singular, therefore, included the plural. It seems odd that this argument was not advanced earlier. In the case of *Lord Vestey's Executors and Vestey* v. *Commissioners of Inland Revenue,* 31 T.C. 1, there was considerable argument dealt with in the judgment on the basis that the words " any person " in Section 38 (2) meant a single individual. On the view I take the point has not got to be decided in the present appeal. I cannot, however, myself detect any contrary intention to displace the rule that words in the singular shall include the plural, certainly if, as I think, the power has to be found in the settlement. In the kind of case with which the Section is dealing it would be an odd result if a settlement was taken out of the Sub-section by a provision that the settlement could be revoked, say, by a power vested in the settlor and his son, or that a power vested in the settlor was subject to the consent of two other persons. It is not necessary to decide these points but, in view of the argument as advanced to us, I thought it right to refer to them.

For the above reasons I think the appeal must be dismissed.

Cohen, L.J.—As my brother Tucker has stated, the only question is whether the sums payable by the settlor under the deed of 26th March, 1940, must be treated as his income under Section 38 (1) (*a*) of the Finance Act, 1938. My brother has read that Section and called attention to the other relevant provisions in that Act, and I need not repeat them.

The contentions by which the Crown sought to apply the Act to the facts of the present case are to be found in paragraph 12 of the Case, and have also been read by my brother Tucker. It will be observed that the Crown did not contend that the " settlement " consisted of anything but the deed of covenant. They could not, therefore, rely on the decision of this Court in *Payne's* case, 23 T.C. 610, where it was held that the " settle- " ment " comprised the whole arrangement, including the formation by the settlor of the company concerned and his voting rights therein. None the less, the Commissioners decided in favour of the Crown on the basis of the *MacAndrew* case, 25 T.C. 500. Atkinson, J., reversed the decision of the Commissioners. He first considered the case apart from authority, saying : " Reading the Section unaided by authority I should say, without " much hesitation, that the contention of the Appellant is right. I think the " words mean that the power must be found in the terms of the settlement. " I am confirmed in that view by the following considerations. (1) The con- " trary view would give no effect whatever to the words in the opening " line ' If and so long as the terms of the settlement are such '. Those words " might just as well not be there. (2) The contrary view would lead to " results which would shock the sense of justice of any reasonable mind.

(Cohen, L.J.)

" For example, a settlor might settle shares in a company upon persons " dependent upon him. Quite unknown to him, A and B might between " them hold enough shares to put the company into voluntary liquidation. " According to the Respondents, that settlement is hit by the Section, and " would still be hit even if A and B acquired their shares after the date " on which the settlement had been made "(1). He then went on to compare the language of Section 38 (1) (*a*) with that of Section 21 (8) of the 1936 Act, which provides that a settlement shall not be irrevocable " if the terms " thereof provide " and so on. He said that it was plain that under the last mentioned Section the relevant position must be found within the document and that, if the Legislature had not intended the power referred to in Section 38 (1) (*a*) also to be found within the document, it would have said so in unmistakable language. He also relied on the contrast between the language in Sub-sections (1) and (2) of Section 38 and that in Sub-sections (3) and (4), ending this portion of his judgment with these words: " There " you have what seems to me to be a very striking contrast: you have the " first two Sub-sections introduced by the words: 'If and so long as the " ' terms of any settlement are such that ', and Sub-sections (3) and (4) " without any such language but incorporating the words ' in any circum- " ' stances whatsoever '."(2)

The learned Judge then proceeded to consider the authorities, and said that, with the exception of *MacAndrew's* case, 25 T.C. 500, they support his conclusion, since in his view the argument relied on by the Crown in the case now before us would have been decisive in the Crown's favour, but it was not even raised. This is, I think, true of *Payne's* case, 23 T.C. 610, but it is not correct as regards the other two cases referred to by the learned Judge—*Chamberlain's* case, 25 T.C. 317, and *Jenkins's* case, 26 T.C. 265. Those were both cases under Section 38 (2), not Section 38 (1), and the Crown necessarily failed because they were unable to show that any property comprised in the settlement would pass to the settlor or his or her spouse as a result of any exercise of a power of revocation.

Atkinson, J., rejected *MacAndrew's* case as unsatisfactory, because he was not satisfied that the question whether the power need be found in the settlement was ever present to the mind of the learned Judge who decided it. With this comment I agree, and I do not rely on the decision in the conclusion I am about to state.

I am unable to agree with the learned Judge that the power referred to in Section 38 (1) (*a*) need be found in the settlement itself. I think that the use of the words " if the terms of the settlement are such " instead of the words " if the terms of the settlement provide ", *prima facie*, contemplates a different approach to the settlement. Under the latter words, unless the power is found in the settlement itself, the Section would not be brought into operation. Under the former words you must look at the settlement and if, looking at the settlement in the light of the general law, you know that a power must exist in some person or persons, then I see no reason why the Section should not operate. It seems to me to follow that any settlement framed as the settlement before us is framed must necessarily fall within the mischief of the Section. Wherever the annual payment is to be measured by and conditional on the payment of dividends by a company, it necessarily follows that some person or persons has or may

(1) Page 149 *ante*. (2) Page 150 *ante*.

(Cohen, L.J.)

have power to determine that liability, since the company can be put into liquidation by the requisite majority of shareholders passing a special resolution under Section 225 of the Companies Act, 1929.

Atkinson, J., seems to have thought that the words "any person" in Section 38 (1) (*a*) must be construed in the singular and not as including the plural, and if this were right the reasoning I have indicated would break down. But in my opinion there is no justification for such a conclusion. Section 1 (1) of the Interpretation Act, 1889, so far as material, provides that in every Act passed after the year 1850, unless the contrary intention appears, words importing the singular shall include the plural, and I can find nothing in the context of the present Section indicating a contrary intention.

In arriving at this conclusion I have not ignored the observations of Lord Romer in *Chamberlain's* case, 25 T.C. 317, at page 335, when he said: "I must confess that, with all respect to the Commissioners, it passes "my comprehension how the structure of a company can form part of a "settlement". These words were *dicta*, and seem inconsistent with the views of the Master of the Rolls in *Payne's* case (1), but accepting them as correctly stating the law I think it is quite consistent with Lord Romer's view to have regard not to the construction of a particular company but to the general law, in considering whether the effect of the terms of a settlement is such that any person has power to determine it. If so regarded, it is plain that the settlement will completely cease to have effect on the liquidation of the company. The settlement is, in my opinion, within the mischief of Section 38, for by exercising the power to place the company in liquidation some person or persons effectively determine the operation of the settlement.

I do not feel impelled to a different conclusion by any of the three considerations stated by Atkinson, J. I do not think the view I have formed necessarily means that I give no effect to the words "If and so long "as the terms of the settlement are such". True it is that, applied to the facts of the present case, the effect would be the same if they were not there; but the operation of the Section is not limited to cases where the liability to pay the annual sum is measured by and conditional on the payment of dividends. In other cases it seems to me the position might be that the power exists but does not appear from a perusal of the settlement in the light of the general law. Be that as it may, I do not think we are justified in placing what I regard as a strained meaning on the language of the Section merely because, giving the words in question their natural meaning, they are surplusage.

Unlike the learned Judge, I am not shocked by the conclusion to which I have come. It is true that it does lead to the result that a settlement in similar form to the present would be hit by the Section although the company, the dividend on the shares of which formed the measure of obligation, was under the control of persons independent of the settlor and perhaps unknown to him; but such a settlement is, I think, a very rare phenomenon, and the Legislature may well have thought it desirable to frame the Section in wide language in order to prevent evasion.

I have already dealt with the argument based on a comparison between Section 38(1) (*a*) of the 1938 Act and Section 21 (8) of the 1936 Act. I

(1) 23 T.C. 610.

(Cohen, L.J.)

would add that the language of the former Sub-section seems to me to be a half-way house between that of the latter Sub-section and the very wide language of Section 38 (4) of the 1938 Act.

I was at one time doubtful whether the ground on which I have reached my conclusion was sufficiently raised before the Commissioners or the learned Judge in the Court below, but Sir Roland did not rest his case on this ground. He recognised that the point was one of pure law, the decision on which could not be affected by any further findings of fact by the Commissioners, and could therefore properly be decided by this Court, even though it had not been raised in the Court below—Atkin, L.J., in *Avelino Aramayo and Company* v. *Ogston* (1), [1925] 1 K.B. 86, at page 109.

For those reasons I would have allowed the appeal and restored the decision of the Commissioners.

Tucker, L.J.—In the result the appeal will be dismissed, with costs.

Mr. Hills.—I am instructed to ask your Lordship for leave, if my client thinks right, to appeal.

Sir Roland Burrows.—I have nothing to say.

Tucker, L.J.—Yes.

Mr. Hills.—If your Lordship pleases.

The Crown having appealed against the decision in the Court of Appeal, the case came before the House of Lords (Lords Simonds, du Parcq, Normand, Morton of Henryton and Reid) on 22nd and 23rd February, 1949, when judgment was reserved. On 8th April, 1949, judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Solicitor-General (Sir Frank Soskice, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Sir Roland Burrows, K.C., and Mr. L. C. Graham-Dixon for the Respondent.

Consideration of report from the Appellate Committee.

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

Question put:

That the report of the Appellate Committee be now considered.

The Contents have it.

Lord Simonds.—My Lords, I have to inform the House that the Appellate Committee have considered the appeal, *Commissioners of Inland Revenue* against *Wolfson,* and have reported that in their opinion the appeal should be dismissed.

My Lords, this appeal raises a question on Section 38 (1) of the Finance Act, 1938, upon which there has been a difference of opinion in the Court of Appeal.

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(1) 9 T.C. 445, at p. 497.

(Lord Simonds)

The facts, which are fully stated by the Commissioners for the Special Purposes of the Income Tax Acts, are very simple.

The Respondent, Isaac Wolfson, was at all material times the holder of 700 ordinary shares of £1 each in a company called Leonard Gordon Estates, Ltd. which had been used by him and his brothers as a private investment holding company. The capital of the company was £1,000 and the remaining 300 shares were held as to 100 by his brother Charles Wolfson, as to 100 by his brother Samuel William Wolfson and as to the remaining 100 by the trustees (of whom the Respondent was one) of a settlement known as Solomon Wolfson's settlement.

Being minded to make provision for his sisters, on 26th March, 1940, the Respondent entered into a deed of covenant of that date to which he and his brothers, who were therein called "the settlors", were parties of the one part, and one Henry Arthur Chetham and he as trustees were parties of the other part. By this deed each settlor irrevocably covenanted with the trustees that he would on the first day of April in each year during the period of seven years from 1st April, 1940, or until his death (whichever period should be the shorter) pay to the trustees an annual sum calculated according to the provisions contained in clause 2 thereof, such annual sum to be held by the trustees upon the trusts and subject to the powers therein declared and contained. The method of calculation was as follows: "Each "annual sum hereinbefore covenanted to be paid by each settlor shall "subject to the proviso hereinafter in this clause contained be such an "annual sum as after deduction of income tax at the standard rate for the "time being in force leaves a sum equal in amount to the net amount in "the aggregate of all dividends received by him during the previous 12 "months expiring on the said 1st day of April in each year upon the "Ordinary shares of Leonard Gordon Estates, Ltd. held by him as set out "in the First Schedule hereto." There followed a proviso dealing with the event of the settlor selling or otherwise disposing for value of his shares but not with the event of his disposing of them gratuitously, and a further clause provided for the reinvestment of the proceeds of sale or disposal for value of such shares. The deed also contained trusts for the benefit of the settlors' sisters, who are therein described as the beneficiaries, or their children or next of kin.

Your Lordships will not be troubled with any details of figures in this case. It is sufficient to say that it is conceded for the purposes of this appeal that a net sum of £14,612 10*s.* 0*d.* was received by the trustees in discharge of the Respondent's liability under the deed for the year ending 5th April, 1940. The claim of the Respondent was limited to the deduction from his income for Income Tax purposes of the gross sum representing this sum of £14,612 10*s.* 0*d.* and there is no question but that he is entitled to deduct such a sum unless the provisions of Section 38 (1) (*a*) of the Finance Act, 1938, are operative in regard to it. The Special Commissioners, conceiving that they were bound by the decision of Macnaghten, J., in *MacAndrew's* case, 25 T.C. 500, held that the deduction was not permissible. But their decision was reversed by Atkinson, J., whose judgment was upheld by the Court of Appeal (Tucker and Somervell, L.JJ., Cohen, L.J., *dissentiente*).

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

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

(Lord Simonds)

> " (*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, in the event of the exercise of the " power, the settlor or the wife or husband of the settlor will or " may cease to be liable to make any annual payments payable " by virtue or in consequence of any provision of the settlement; " . . . any sums payable by the settlor or the wife or husband of " the settlor by virtue or in consequence of that provision of the " settlement in any year of assessment shall be treated as the " income of the settlor for that year and not as the income of any " other person: Provided that, where any such power as is referred " to in paragraph (*a*) of this subsection cannot be exercised within " the period of six years from the time when the first of the annual " payments so referred to becomes payable, and the like annual " payments are payable in each year throughout that period, the " said paragraph (*a*) shall not apply so long as the said power " cannot be exercised."

It is contended on behalf of the Crown that the sums received by the Respondent during the relevant year of assessment and accounted for to the trustees of the deed must be treated as his income under Section 38 (1) (*a*), because the terms of the deed were such that he (either by himself or with others or with the consent of others) had power to revoke or otherwise determine the settlement or a provision thereof and thereby would or might cease to be liable to make the annual payment payable under the deed. It is common ground that the " settlement " consists of the deed of 26th March, 1940, alone. It is therefore the terms of that deed alone that have to be considered. In support of their contention it was said by learned Counsel for the Crown that the settlor as the holder of seven-tenths of the shares of Leonard Gordon Estates, Ltd. (which I will call " the company ") was in a position to determine how much of the profits of the company should be distributed in any year by way of dividend. He might, if he thought fit, by the exercise of his majority vote prevent any dividend being declared during the whole period for which his covenant was operative. Thus, it was said, he could determine the settlement or a provision thereof. It was further urged that, as the holder of seven-tenths of the shares, he could, by procuring the co-operation or indeed the abstention of another shareholder holding a sufficient number of votes, secure the passing of a special resolution for winding-up the company. This too, it was said, was a power to determine the settlement or a provision thereof.

My Lords, the main part of the argument has revolved round the simple words " If and so long as the terms of any settlement are such that ". On the one hand it is said that it is only in the terms of this settlement that one may look for the power which the Sub-section describes, that the words bear the same meaning as the words " if and so long as the terms " of the settlement provide ". On the other hand it is said that they have a meaning which, to do justice to the argument of the learned Solicitor-General, I will state in his own words. This was his formula: " If the " settlement is so framed that its immediate impact on the circumstances " in relation to which it was executed produces the result that some per- " sons, whether settlors or others, get the power, whether by the exercise " of some independent right they already possess or however else, to revoke

(Lord Simonds.)

"and thus finally cancel or otherwise bring to an end the continued hap-"pening of something for which the settlement provides."

My Lords, between these alternatives I must unhesitatingly adopt the former. I am not greatly influenced by the absurd results which flow from an adoption of the latter, though it would appear to cover every covenant that ever was entered into, since in this view the covenantee has power by releasing the covenantor from his liability to put an end to the settlement. I am chiefly influenced by the consideration that if it had been intended that regard should be had to powers not to be found in the settlement exercisable by persons not parties to or named in the settlement nothing could have been easier than to say so. I agree with both Tucker and Somervell, L.JJ., and Atkinson, J., in thinking that the language of Sub-sections (3) and (4) provides a valuable contrast to that employed in Sub-section (1).

It was urged that the construction that I favour leaves an easy loop-hole through which the evasive taxpayer may find escape. That may be so; but I will repeat what has been said before. It is not the function of a court of law to give to words a strained and unnatural meaning because only thus will a taxing section apply to a transaction which, had the Legislature thought of it, would have been covered by appropriate words. It is the duty of the Court to give to the words of this Sub-section their reasonable meaning and I must decline on any ground of policy to give to them a meaning which, with all respect to the dissentient Lord Justice, I regard as little short of extravagant. It cannot even be urged that unless this meaning is given to the Section it can have no operation. On the contrary, given its natural meaning it will bring within the area of taxation a number of cases in which by a familiar device tax had formerly been avoided.

As I have already noted, in this case the "settlement" consists of the deed of covenant alone. It is therefore unnecessary to consider the cases in which, the settlement being held to consist of a number of documents and transactions, it was found that the power to revoke or determine was among the terms of the settlement. The question whether the Court may look outside the terms of the settlement did not arise. Of such cases *Payne's* case, 23 T.C. 610, is an example. I would expressly reserve the question how far such decisions can be regarded as correct after the decision of this House in *Chamberlain's* case, 25 T.C. 317.

Nor do I think it necessary in this case to determine whether, if it could be regarded as a "term of the settlement" that the settlor had power to dictate whether any and what dividend should be declared, that would amount to a power to determine the settlement, nor yet whether, if it is such a term that the settlor can with the consent or co-operation of other shareholders wind up the company, that would be such a power. These are questions which may have to be determined in other cases in which they are decisive. For the purposes of this appeal it is sufficient to say, affirming the judgment of the Court of Appeal, that the terms of the deed of 26th March, 1940, are not such that the Respondent has power to revoke or otherwise determine the settlement or any provision thereof. I move accordingly that the appeal be dismissed with costs.

Lord du Parcq.—My Lords, I concur in the report of the Appellate Committee and in the motion which my noble and learned friend has proposed from the Woolsack.

Lord Normand.—My Lords, the relevant provisions of Section 38 of the Finance Act, 1938, are already before the House. So also are the material clauses of the deed of covenant. It is desirable to bring to notice at the outset that in this case the "settlement" and the deed of covenant are one, and that it is not found or maintained by the Appellants that Leonard Gordon Estates, Ltd. should be included in the "settlement" by virtue of the definition in Section 41 (4) (*b*).

The Appellants' case depends on the contentions that in the enquiry whether "any person has or may have power . . . to revoke or otherwise "determine the settlement or any provision thereof" it is permissible to look outside the terms of the settlement for the "power" and for the "person" who may exercise it, and to treat as a revocation or determination of the settlement or of a provision thereof the frustration of the obligation to make the annual payment under clause 1 which would result from the liquidation of the company, the dividends of which are the measure of the sums to be paid. These contentions do not hinge on the settlor's control of the company with or without the aid of his brothers. Cohen, L.J., in his dissenting judgment concisely states the principle of the Appellants' case thus: "Wherever the annual payment is to be meas-"ured by and conditional on the payment of dividends by a company, it "necessarily follows that some person or persons have or may have power "to determine that liability, since the company can be put into liquidation "by the requisite majority of shareholders passing a special resolution under "Section 225 of the Companies Act, 1929."(1)

The Appellants relied on the opening words of Section 38 (1), "If and "so long as the terms of any settlement are such that" and contrasted them with the words "if the terms of the settlement provide that", which are to be found in Section 21 of the Finance Act, 1936. It is on this contrast that Cohen, L.J., founds his dissenting judgment. But with great respect I find the similarity of meaning between the two phrases more striking than the contrast of the words. There is, and here I agree with Somervell, L.J., an ambiguity in the opening words of Sub-section (1), and standing by themselves they are not insusceptible of the meaning for which the Appellants contend. But a power to "revoke or otherwise determine the settle-"ment" or a term thereof points rather to a power to be found within the settlement than to a power to be found in external circumstances; and the contrast with the opening words of Sub-section (3) of the same Section is to my mind more relevant and cogent than the contrast with the words in a Section of the earlier Finance Act. The opening words of Sub-section (3) are "If and so long as the settlor has an interest . . ." and they are obviously selected because it was intended, not that the "interest" should be limited to one created or provided by the settlement, but that it should include an "interest" independent of the terms of the settlement. As Tucker, L.J., pointed out, if the Appellants' case is right there was no necessity for the words "and so long as the terms of any settlement are "such that"; indeed the Appellants' case would be much stronger if these words were absent. The Solicitor-General conceded that the meaning for which he was contending would be correctly expressed if Sub-section (1) ran somewhat as follows: "If and so long as any person is or may be "able so to act . . . as to revoke" etc. I would not make too much of his assent to this paraphrase; nevertheless the reference to the terms of the settlement in this Sub-section, and the omission of such a reference in Sub-section (3), are significant. I therefore agree with the majority of the

(1) Page 164 *ante*.

(Lord Normand.)

Court of Appeal that the power and the person who may exercise it must be found within the settlement. On the second contention put forward by the Appellants, it is, I think, not appropriate to describe as a revocation or a determination of the settlement or of one of its provisions the effect which the liquidation of the company could have in making abortive the obligation to pay annual sums under clause 2 of the settlement.

In general the Appellants' argument overstrains the language of the Sub-section, though it may at no point be plainly inconsistent with it. More than once it was urged that unless the argument was accepted the Sub-section would be nugatory or easily evaded. That the Sub-section will be nugatory I see no reason to think, and I have little doubt that it was framed to deal with and has successfully dealt with settlements of a certain type which had come to the notice of the Inland Revenue. That it may be easily evaded is possible. That is a consideration which is irrelevant to its proper interpretation, and there is the practical answer that it may be easily amended; but that that is for Parliament not the Courts.

Of the cases cited I think that *MacAndrew* v. *Commissioners of Inland Revenue*, 25 T.C. 500, alone may be inconsistent with the conclusion to which I have come. The report of this case is not satisfactory, but I assume, what was stated by Counsel in this appeal, that according to the Crown's case the deed of 11th July, 1940, alone constituted the settlement. On that assumption *MacAndrew's* case was on all fours with the present case and must be regarded as wrongly decided.

I would dismiss the appeal.

Lord Morton of Henryton.—My Lords, I can express my views very briefly as I am in agreement with the judgments of the majority in the Court of Appeal.

In my view no settlement comes within Section 38 (1) (*a*) of the Finance Act, 1938, unless the power described in that Sub-section is found in, and conferred by, the terms of the settlement. This seems to me to be the natural meaning of the words used. The Solicitor-General sought to rely upon the difference in wording between the opening words: "If and so "long as the terms of any settlement are such that" and the phrase: "if "the terms of the settlement provide" which is to be found in Section 21 (8) of the Finance Act, 1936. It would indeed be a trap for the taxpayer if the legislature intended the scope of taxation to be extended by some subtle difference in meaning between "the terms of the settlement are "such that" and "the terms of the settlement provide", and for my part I think that the two phrases have the same meaning.

The view which I have expressed as to the construction of Section 38 (1) (*a*) is fatal to the Crown's contentions in this case, for it is plain that the deed of covenant of 26th March, 1940, does not come within the Sub-section so construed, and the Crown concedes that the only document to be considered in the present case is the deed of covenant. This concession distinguishes the present case from *Commissioners of Inland Revenue* v. *Payne*, 23 T.C. 610, and *MacAndrew* v. *Commissioners of Inland Revenue*, 25 T.C. 500, and it is unnecessary to consider whether either of these cases was rightly decided.

As to the other questions raised in argument, I agree with Somervell, L.J., and Atkinson, J., that if the Respondent were to use his majority shareholding to withhold the payment of a dividend by Leonard Gordon

(Lord Morton of Henryton.)

Estates, Ltd. in any year he would not thereby "revoke or otherwise determine the settlement or any provision thereof". Every clause in the settlement would remain in full force, and the only result would be that the "annual sum" mentioned in clause 2 would be nil in that year. I have not found it necessary to form a concluded view upon any other question.

I would dismiss the appeal.

Lord Reid.—My Lords, I think that this appeal should be dismissed for the reasons which your Lordships have given. In particular I would express my agreement with my noble and learned friend Lord Simonds that it is not the function of a court of law to give to words a strained and unnatural meaning because only thus will a taxing section apply to a transaction which, had the Legislature thought of it, would have been covered by appropriate words.

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

Questions put:

That the report of the Appellate Committee be agreed to.

The Contents have it.

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Harris, Chetham & Co.]

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