HIGH COURT OF JUSTICE (CHANCERY DIVISION)—27TH JULY, 1955

COURT OF APPEAL—8TH AND 11TH JUNE, AND 2ND JULY, 1956

HOUSE OF LORDS—3RD, 4TH AND 25TH JULY, 1957

Saunders

v.

Commissioners of Inland Revenue[1]

Surtax—Settlement—Trustees empowered to release capital in excess of stated sum—Power to determine provision of settlement—Finance Act, 1938 (1 & 2 *Geo.* VI, *c.* 46), *Sections* 38 (2) *and* 41 (4) (*b*).

On 25th July and 13th August, 1951, *the Appellant transferred two sums of* £100 *and* £25,000 *respectively to trustees to hold on trusts declared in an instrument of the former date. The trustees were empowered,* inter alia, *at any time during the Appellant's life, with his consent, to pay any part of the capital of the trust funds absolutely to any member of a specified class which included his wife, provided that they left at least* £100 *of capital subject to the trusts. They invested* £25,000 *and left* £100 *uninvested.*

The income from the trust investments was included in the Appellant's total income for Surtax purposes for the year 1951–52 *on the ground that it was to be treated as his income under Section* 38 (2) *of the Finance Act,* 1938. *On appeal to the Special Commissioners the Appellant contended,* inter alia, *that the two sums constituted one settlement and that there was no power to determine a provision of that settlement. The Commissioners dismissed the appeal, holding that the two sums were comprised in one settlement but that there was power to determine a provision thereof within the meaning of Section* 38 (2).

In the High Court the Crown agreed that the case should be decided on the footing that there was only one settlement.

Held, *that there was no power in the settlor's lifetime to revoke or determine the settlement or any provision thereof.*

CASE

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

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 9th November, 1953, Henry Arthur Waldron Saunders, hereinafter called " the Appellant ", appealed against an additional

[1] Reported (Ch. D.) [1956] Ch. 283; [1955] 3 W.L.R. 930; 99 S.J. 873; [1955] 3 All E.R. 274; 220 L.T.Jo. 242; (C.A.) [1956] Ch. 509; [1956] 3 W.L.R. 547; 100 S.J. 586; [1956] 3 All E.R. 83; 222 L.T.Jo. 50; (H.L.) [1957] 3 W.L.R. 474; 101 S.J. 645; [1957] 3 All E.R. 43; 224 L.T.Jo. 95.

assessment to Surtax made upon him for the year 1951–52 in the sum of £4,167.

2. The question for determination before us was the application of the provisions of Section 38 (2), Finance Act, 1938, to a settlement made by the Appellant on 25th July, 1951.

3. A copy of the deed of settlement, marked "A", is attached to and forms part of this Case(1).

The trustees of the settlement are Gordon Waldron Saunders, Ethel Grace Saunders (the wife of the Appellant) and Raymond Henry Pumfrey.

Clause 1 of the deed provides that the trustees shall invest the sum of £100 (which was transferred to the trustees by the Appellant on 25th July, 1951), and any further sum or sums which the Appellant may thereafter transfer or cause to be transferred to the trustees, in or upon authorised investments with power to vary the investments.

Clause 2 defines the term "the trust funds" as including the said sum of £100 and any further sum or sums which the settlor may transfer to the trustees, and provides that the trustees shall hold the trust funds upon the trusts and subject to the powers and provisions thereinafter declared and contained.

Clause 3 provides that during an "appointed period" the trustees shall pay, divide or apply the income of the trust funds (less any portion thereof the capital whereof shall have been appointed under clause 4 of the deed) to or between or for the maintenance, support or benefit of any one or more to the exclusion of the other or others of the specified class as the trustees shall in their absolute discretion determine.

Clause 4 of the deed is as follows:—

> "4. It shall be lawful for the Trustees at any time or times during the appointed period but subject to the consent in writing of the Settlor during his life and thereafter at their absolute discretion to pay or apply any part or parts of the capital of the Trust Funds to or for the benefit of all or any one or more to the exclusion of the other or others of the specified class freed and released from the trusts concerning the same Provided Always that during the life of the Settlor any exercise by the Trustees with such consent as aforesaid of the power in this clause contained shall be subject to the limitation that the capital of the Trust Funds remaining subject to the trusts of this Settlement immediately after such exercise shall be of a value of not less than one hundred pounds."

The members of the specified class of persons are set out in the schedule to the deed and included therein is Ethel Grace Saunders, the wife of the Appellant.

4. As stated above, £100 was transferred by the Appellant to the trustees of the settlement on 25th July, 1951. A further sum of £25,000 was so transferred on 13th August, 1951, making a total cash sum of £25,100 as then comprising the trust funds and as subject to the trusts of the settlement. The trustees invested a sum of £25,000 in 250,000 2*s*. ordinary shares in H. A. Saunders, Ltd. A sum of £100 was left uninvested.

In the year ended 5th April, 1952, the gross income arising under the settlement was £4,166 13*s*. 4*d*.

5. It was contended on behalf of the Appellant that:

(*a*) the aforementioned sums of £100 and £25,000 together constitute one settlement for the purposes of Part IV of the Finance Act, 1938;

(1) Not included in the present print.

(*b*) the property comprising for the time being the trust funds is not itself a provision of the settlement, within the meaning of Section 38 (2) of the Finance Act, 1938;

(*c*) in any event, there is no power in the aforementioned clause 4 or elsewhere in the said deed to determine a provision of the settlement, within the meaning of the said Section 38 (2);

(*d*) the provisions of the said Section 38 (2) do not apply to the said settlement;

(*e*) alternatively, if the two transfers of the sums of £100 and £25,000 respectively each constitutes a settlement for the aforesaid purposes, then neither is one the provisions of which are such that the said Section 38 (2) applies thereto; and

(*f*) the assessment appealed against should be discharged.

6. It was contended on behalf of the Crown that:

(*a*) each of the transfers of £100 and £25,000 to the trustees is a settlement as being a disposition or arrangement within the meaning of Section 41 (4) (*b*), Finance Act, 1938;

(*b*) the terms of the settlement of £25,000 are such that the income arising thereunder is to be treated as income of the settlor under Section 38 (2) of that Act;

(*c*) even if the aforesaid transfers were comprised in one settlement, the terms of that settlement are such as to bring it within the provisions of the aforementioned Section 38 (2); and

(*d*) the appeal should be dismissed.

7. We, the Commissioners who heard the appeal, gave our decision in writing as follows.

(1) Having considered the evidence before us and the arguments addressed to us we are of opinion that the sums of £100 and £25,000 are comprised in one settlement the terms of which are set out in the deed of 25th July, 1951.

(2) It being accepted by the Crown that the deed of settlement contains no power to revoke or otherwise determine the whole of the settlement made thereunder, the issue before us resolves itself into the question whether the terms of that settlement are such that the trustees have power to revoke or otherwise determine "any provision thereof".

Lord Simonds pointed out in *Berkeley* v. *Berkeley*, [1946] A.C. 555, at page 580, that the word "provision"

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

We have come to the conclusion that there is nothing in the terms of the statutory provisions of which the phrase in question forms part to constrain us to adopt a limited meaning of the word "provision". The word being wide enough to embrace the result ensuing from a written instrument, we do not feel justified in excluding that meaning.

(3) By virtue of clause 4 of the deed of settlement the trustees have power, subject to certain conditions, to pay or apply any part or parts of the capital of the trust funds to or for the benefit of all or any one or more of the specified class as defined in the schedule to the deed, with the limitation that the capital of the trust funds shall not be reduced

below £100. This power of the trustees to remove from the settlement the whole of the property save £100 seems to us quite clearly to be a power to determine a provision of the settlement in the sense of the second of the two meanings given by Lord Simonds.

The settlor's wife is a member of the specified class referred to and in the event of the exercise of the discretionary power of the trustees she may become entitled to part of the property comprised in the settlement.

(4) For these reasons we hold that the appeal fails. We leave figures to be agreed.

We subsequently determined the appeal by reducing the additional assessment for the year 1951–52 to £4,153.

8. 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 Income Tax Act, 1952, Sections 229 (4) and 64, which Case we have stated and do sign accordingly.

W. E. Bradley,
F. Gilbert, } Commissioners for the Special Purposes of the Income Tax Acts.

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

14th April, 1954.

The case came before Wynn-Parry, J., on 27th July, 1955, when judgment was given in favour of the Crown, with costs.

Mr. A. P. L. Barber appeared as Counsel for the taxpayer, and Mr. Geoffrey Cross, Q.C., Sir Reginald Hills and Mr. E. B. Stamp for the Crown.

Wynn-Parry, J.—In the Case stated by the Special Commissioners they expressed the view that the two sums of £100 and £25,000 were comprised in one settlement, the terms of which were set out in the deed of 25th July, 1951, and for the purpose of this appeal (but, as I understand it, only for the purpose of this appeal) the Revenue does not seek to challenge this conclusion. That really leaves only one very short point in dispute, which turns, to my mind, entirely on the construction of Section 38 of the Finance Act of 1938 and clause 4 of the settlement in question.

Clause 4 is in these terms:

> "It shall be lawful for the Trustees at any time or times during the appointed period but subject to the consent in writing of the Settlor during his life and thereafter at their absolute discretion to pay or apply any part or parts of the capital of the Trust Funds to or for the benefit of all or any one or more to the exclusion of the other or others of the specified class freed and released from the trusts concerning the same".

Then follows the proviso:

> ". . . during the life of the Settlor any exercise by the Trustees with such consent as aforesaid of the power in this clause contained shall be subject to the limitation that the capital of the Trust Funds remaining subject to the trusts of this Settlement immediately after such exercise shall be of a value of not less than one hundred pounds."

(Wynn-Parry, J.)

Section 38 (1) deals with payments in the nature of income and, as was pointed out by Mr. Barber, down to a certain point the language of that Sub-section is exactly the same as the language employed in Sub-section (2), which is designed to deal with capital. Mr. Barber urged upon me that I should not place on the word " provision " a different meaning in Sub-section (2) from that to be given to it in Sub-section (1), and I certainly have no intention of doing so, as I quite accept that the principle should be applied that in the Section that word should be given the same meaning wherever it occurs. Having regard, therefore, to the fact that I propose to put the same meaning on the word in both Sub-sections, it will be sufficient if I confine my analysis to Sub-section (2), which is the Sub-section applicable in this case.

The Sub-section opens with the words

> " If and so long as the terms of any settlement are such that— "

and I agree with Mr. Cross that the phrase " the terms " there merely means the language employed. Then paragraph (*a*) of the Sub-section proceeds as follows :

> " 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 ".

Now it was urged on behalf of the Appellant that the word " provision " must mean some written part of the instrument and cannot have the alternative meaning that was applied by the House of Lords in *Berkeley* v. *Berkeley*, [1946] A.C. 555. In the course of his speech (at page 580) Lord Simonds, as did in slightly different language the others of their Lordships, pointed out that the word " provision "

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

The Special Commissioners took the view that on the true construction of Section 38 (2) of the Finance Act, 1938, " provision " was in its context wide enough or capable of bearing the second of the two meanings mentioned by Lord Simonds. It is contended, however, on behalf of the Appellant that that is not so.

Now it appears to me that the problem is to be solved by considering the phrase

> " to revoke or otherwise determine the settlement or any provision thereof ".

If the word " provision " is to be confined to having the sense of a clause or proviso, a defined part of a written instrument, then it appears to me that it would have been unnecessary to have included in the Sub-section the words " or otherwise determine ", for the use of the verb " revoke " would have sufficed, that being from the conveyancer's point of view the natural word to use, whether the revocation was to cover the whole of the settlement or only specific parts of it. The word " determine " appears to me to be an inapt word to use where the object is to provide a power to bring to an end, so far as its operation is concerned, a defined part of a written instrument. On the other hand I must, if I can, give effect to the words " or otherwise determine ", because they are clearly put in deliberately for the purpose of achieving something further than would be achieved if only the verb " revoke " were present in the Sub-section. It appears to me that the word " determine " is an apt word to use where the power contemplated is to bring to an end some benefits provided by the settlement. That construction is, I think, reinforced, as Mr. Cross pointed out, when

one comes to consider the proviso to Sub-section (2) of Section 38. If that construction is not to be applied it is difficult to see that that proviso could have any operation at all.

Looking, therefore, merely at the Sub-section, and neither helped nor embarrassed by authorities, I should come to the conclusion that the decision of the Special Commissioners was correct. I can see nothing in the language of Section 38 (1) which would prevent the construction which I have placed on Sub-section (2) being placed on the language of Sub-section (1); nor do I find in any of the authorities quoted to me which deal with problems arising under Section 38 (1) anything to prevent the construction which I have placed on Sub-section (2) being placed on Sub-section (1).

I come to this conclusion not basing myself on the judgment of Danckwerts, J., in the recent case of *Commissioners of Inland Revenue* v. *Countess of Kenmare*[1], because it may be said that there is a possible ground for distinguishing that case from this: namely, that there was a possibility, however remote, in that case that the whole of the trust funds might find their way back to the settlor; and although that possibility was regarded as being very remote by Danckwerts, J., he did mention it in that part of his judgment where he was arriving at his conclusion as to the effect of Section 38 (2). But as I read his judgment I think it is a fair conclusion that even apart from that consideration his Lordship would have come to the same conclusion, and therefore, although I do not base myself on that judgment, I think it is one which—certainly to a very great extent, if not the whole way—supports the construction of Section 38 (2) which I have adopted.

Therefore, for those reasons, in my view this appeal fails.

Mr. Geoffrey Cross.—Your Lordship dismisses the appeal with party and party costs?

Wynn-Parry, J.—Yes.

The taxpayer having appealed against the above decision, the case came before the Court of Appeal (Singleton, Morris and Romer, L.JJ.) on 8th and 11th June, 1956, when judgment was reserved. On 2nd July, 1956, judgment was given unanimously against the Crown, with costs.

Mr. L. C. Graham-Dixon, Q.C., and Mr. A. P. L. Barber appeared as Counsel for the taxpayer, and Mr. Geoffrey Cross, Q.C., Sir Reginald Hills and Mr. E. B. Stamp for the Crown.

Singleton, L.J.—This is another case arising under Section 38 of the Finance Act, 1938, the Section which deals with settlements under which any person

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

It is said on behalf of the Crown that the settlement made by Mr. Henry Arthur Waldron Saunders on 25th July, 1951, is such a settlement and that in the event of the exercise of the power given to the trustees of the settlement the wife of the settlor may become entitled to the whole or part of

---

[1] Page 383 *ante*.

(Singleton, L.J.)

the property then comprised in the settlement or of the income arising from the whole or part of it, and that thus the income falls to be treated as the income of the settlor for the year of assessment 1951–52. The decision of the Special Commissioners that the taxpayer's appeal failed was upheld by Wynn-Parry, J., on 27th July, 1955. The taxpayer appeals to this Court.

The settlement is made between the settlor of the one part and his son, wife and solicitor of the second part. I read the recital:

> "Whereas the Settlor is desirous of making such irrevocable provision as is hereinafter contained for the benefit of the specified class (the meaning of which expression is set out in the Schedule hereto) and for the purpose of effectuating such desire has transferred to the Trustees the sum of One hundred pounds";

and I read the first five clauses of the settlement:

> "1. The Trustees shall invest the said sum of One hundred pounds and any further sum or sums which the Settlor may hereafter transfer or cause to be transferred to the Trustees in or upon any investments hereinafter authorised and may at any time or times and from time to time (but subject to the consent in writing of the Settlor during his life and afterwards at their absolute discretion) transpose any such investments or any further investments or property which the Settlor may hereafter cause to be transferred to the Trustees or which may for the time being be subject to the trusts hereof into any others of the nature herein authorised.
>
> 2. The Trustees shall hold the said sum of One hundred pounds and any further sum or sums or further investments or property as aforesaid and the investments for the time being representing the same and any augmentations thereof and additions and accretions thereto (hereinafter called 'the Trust Funds') upon the trusts and subject to the powers and provisions hereinafter declared and contained.
>
> 3. During the period commencing at the date of this Deed and ending at the expiration of twenty years after the death of the last survivor of the persons who are now members of the specified class and of the lineal descendants of His Late Majesty King George V living at the date hereof (hereinafter called 'the appointed period') the Trustees shall pay divide or apply the income of the Trust Funds (less any portion thereof the capital whereof shall have been appointed under the provisions hereinafter contained) to or between or for the maintenance support or benefit of any one or more to the exclusion of the other or others of the specified class as the Trustees shall in their absolute discretion determine.
>
> 4. It shall be lawful for the Trustees at any time or times during the appointed period but subject to the consent in writing of the Settlor during his life and thereafter at their absolute discretion to pay or apply any part or parts of the capital of the Trust Funds to or for the benefit of all or any one or more to the exclusion of the other or others of the specified class freed and released from the trusts concerning the same Provided Always that during the life of the Settlor any exercise by the Trustees with such consent as aforesaid of the power in this clause contained shall be subject to the limitation that the capital of the Trust Funds remaining subject to the trusts of this Settlement immediately after such exercise shall be of a value of not less than one hundred pounds.
>
> 5. At the expiration of the appointed period the Trustees shall hold the Trust Funds or so much thereof as shall remain subject to the trusts hereof for such person or persons as would under Part IV of the Administration of Estates Act 1925 have become entitled to the Trust Funds at the death of the Settlor if he had died absolutely entitled to the Trust Funds intestate a widower and domiciled in England and his death had occurred immediately before the death of the last survivor of the specified class now living such persons if more than one to take the same respective shares and interests in the Trust Funds as they would have taken under the said Part IV of the said Act in the events aforesaid."

The only other part of the settlement to which I need refer is the schedule, in which there is a definition of the expression "the specified class" which

embraces (*a*) the wife of the settlor, (*b*) the issue of the settlor, (*c*) the spouses, widows and widowers of any issue of the settlor, and many others.

The sum of £100 was transferred by the Appellant to the trustees on the date of the settlement. A further sum of £25,000 was transferred to them by the Appellant on 13th August, 1951. £25,000 was invested by the trustees in ordinary shares in H. A. Saunders, Ltd.; £100 remained uninvested. In the year ending 5th April, 1952, the gross income arising under the settlement was £4,166 13*s.* 4*d.*

The decision of the Special Commissioners is stated in this way in paragraph 7 (2), (3) and (4) of the Case:

> "7. We, the Commissioners who heard the appeal, gave our decision in writing as follows. . . . (2) It being accepted by the Crown that the deed of settlement contains no power to revoke or otherwise determine the whole of the settlement made thereunder, the issue before us resolves itself into the question whether the terms of that settlement are such that the trustees have power to revoke or otherwise determine 'any provision thereof'. Lord Simonds pointed out in *Berkeley* v. *Berkeley*, [1946] A.C. 555, at page 580, that the word 'provision' ' is a word of diverse meanings which slide easily into each other. It may mean a clause or proviso, a defined part of a written instrument. Or it may mean the result ensuing from, that which is provided by, a written instrument or part of it.' We have come to the conclusion that there is nothing in the terms of the statutory provisions of which the phrase in question forms part to constrain us to adopt a limited meaning of the word 'provision'. The word being wide enough to embrace the result ensuing from a written instrument, we do not feel justified in excluding that meaning. (3) By virtue of clause 4 of the deed of settlement the trustees have power, subject to certain conditions, to pay or apply any part or parts of the capital of the trust funds to or for the benefit of all or any one or more of the specified class as defined in the schedule to the deed, with the limitation that the capital of the trust funds shall not be reduced below £100. This power of the trustees to remove from the settlement the whole of the property save £100 seems to us quite clearly to be a power to determine a provision of the settlement in the sense of the second of the two meanings given by Lord Simonds. The settlor's wife is a member of the specified class referred to and in the event of the exercise of the discretionary power of the trustees she may become entitled to part of the property comprised in the settlement. (4) For these reasons we hold that the appeal fails."

That is supported by the judgment of Wynn-Parry, J., [1956] Ch. 283, at page 289[1]:

> "It appears to me that the problem is to be solved by considering the phrase 'to revoke or otherwise determine the settlement or any provision thereof'. If the word 'provision' meant only a clause or proviso, a defined part of a written instrument, it would have been unnecessary to include in the subsection the words 'or otherwise determine', for the use of the verb 'revoke' would have sufficed, that being from the conveyancer's point of view the natural word to use, whether the revocation was to cover the whole of the settlement or only specific parts of it. The word 'determine' appears to me to be an inapt word to use where the object is to provide a power to bring to an end the operation of a defined part of a written instrument. On the other hand, I must, if I can, give effect to the words 'or otherwise determine', because they are clearly put in deliberately for the purpose of achieving something further than the word 'revoke' alone. The word 'determine' seems to me to be an apt word to use where the power contemplated is to bring to an end some benefits provided by the settlement. As Mr. Cross, for the Crown, pointed out, that construction is, I think, reinforced by the proviso to section 38 (2), which it is difficult to see as having any operation at all without it. Looking, therefore, merely at the subsection and neither helped nor embarrassed by authorities, I should come to the conclusion that the decision of the Special Commissioners was correct. I can see nothing in the language of section 38 (1), or in the authorities cited on problems arising under that subsection, which would prevent the construction which I have placed on subsection (2) being placed on the language of subsection (1)."

---

[1] *See* pages 420-1 *ante*.

(Singleton, L.J.)

Section 38 (2) of the Finance Act, 1938, contains somewhat drastic provisions as to income arising under certain settlements. If the settlement is one to which Sub-section (2) (*a*) and (*b*) applies,

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

The question for determination arises under Sub-section (2) (*a*) and, in particular, under the words "or any provision thereof". Sub-section (2) (*a*) reads:

> "(2) If and so long as the terms of any settlement are such that—(*a*) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof".

It was urged on behalf of the Appellant that in this context the word "provision" can only mean a written clause in the document. On the other side it was submitted by Mr. Cross that "provision" in Section 38 (2) means the result ensuing from that which is provided by a written instrument or part of it—that one cannot determine a document, while one can determine a provision made for someone; and it was claimed that the word "provision" as used in the Section had different meanings, indeed, that it had different meanings in the two places in which it is used in Sub-section (1) (*a*). It was not suggested that there was any power to revoke the settlement or any provision thereof.

In *Berkeley* v. *Berkeley*, [1946] A.C. 555, there are passages upon the meaning of the words "any provision, however worded" in Section 25 (1) of the Finance Act, 1941. Lord Simon, at pages 565–6, said:

> "The crucial question is what is the meaning of the phrase 'any provision, however worded'. It may mean, as the Court of Appeal thought, the words which define a benefit and which are contained in the document or oral contract referred to in the section. Or it may mean the benefit conferred by such a document or oral contract. If it bears the first of these meanings, it is to be found in the language of the document or oral contract and is necessarily of the same date, being in effect equivalent to a clause. If it means the second, its date will be the date when the benefit is conferred. Either meaning is possible in construing para. (*a*) and para. (*c*) of the section, but I am forced to the conclusion that only the second meaning is possible when construing para. (*b*), and if this is so in construing para. (*b*), the same meaning must be given to the words when applying para. (*a*) and para. (*c*). Thus, 'any provision, however worded' must be understood in all cases to refer to a benefit conferred and not to the words conferring it."

I draw attention to the necessity of reading the words in the same sense throughout the Section. Lord Porter in a dissenting speech said, at page 575:

> "It is true that the word 'provision' has more than one meaning. It may be used to indicate the thing provided or the words by which provision is made, and it was urged that in this section it bore the first meaning. It was, it was said, 'made' when it came into operation; until then it was but inchoate. No doubt it was *contained* in the second codicil, but it was not *made* until the testator's death. The argument is attractive, but takes, I think, too technical a view. 'Provision' in the section appears to be used in the second sense mentioned above. The expressions 'however worded', 'stated amount', 'contained in' all seem to point to the language rather than what the language brings about. The Court of Appeal so thought in *In re Waring*(1) and I agree with their view".

(1) [1942] Ch. 426.

Lord Simonds said, at pages 580–1 :

> "That the section is not very artistically drawn I would be prepared to agree. In particular little skill is shown in the use of the word 'provision'. That is a word of diverse meanings which slide easily into each other. It may mean a clause or proviso, a defined part of a written instrument. Or it may mean the result ensuing from, that which is provided by, a written instrument or part of it. Our section opens with the words 'subject to the provisions of this section' and in this phrase either or both of the meanings I have given may be intended. Then comes the phrase 'provision however worded', where the first meaning would seem more apt, though the second is well enough. Thirdly, the word is used in the context of (*a*) 'contained', (*b*) 'made' and (*c*) 'varied', and here though either meaning is appropriate to (*a*) or (*c*) it is the second meaning only which is appropriate to (*b*). I have said enough to show that it is not safe to build upon the fine shades of meaning of the word 'provision', but the balance is, I think, in favour of giving to the expression 'being a provision which was made before' the second meaning that I have indicated. For one does not speak of 'making' a provision, if by provision one means a clause or section."

Mr. Graham-Dixon drew our attention to two short passages from the report in the House of Lords of *Wolfson* v. *Commissioners of Inland Revenue*, 31 T.C. 141: from the speech of Lord Normand, at page 170, where he said :

> "But a power to 'revoke or otherwise determine the settlement' 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 from the speech of Lord Morton at pages 171–2.

Now, I feel satisfied that the words "of any provision of the settlement" at the end of Section 38 (1) (*a*) and in Section 38 (1) (*b*) mean a clause in the document, as I have said in my judgment in *Commissioners of Inland Revenue* v. *Countess of Kenmare*[1]. The word "provision" ought to be given the same meaning throughout the Section. For this reason I do not accept the submission of Mr. Cross. A person who is given power to revoke a settlement or any provision thereof may do so by a document in writing. If he is also given power to determine the settlement or any provision thereof, one way in which he can do that, assuming the power, is by taking away the whole of the settled fund, or the whole of the settled fund available for the purposes of the particular provision. That would be a determination. The power of trustees to pay out or to withdraw a part—I emphasise a part—of the capital fund is not a determination of the settlement or of any provision thereof; it is something envisaged by the terms of the settlement. The balance remains subject to the trusts of the settlement.

In the case under appeal the trustees are given power by clause 4 to make payments of capital, subject to the consent of the settlor during his life, to persons within the specified class so long as the capital of the settled fund does not fall below £100 during the settlor's lifetime. The result is that, with the necessary consent, they may make payments out of £25,000, retaining only £100. It looks somewhat strange. Still, I cannot see that in principle there is any difference between such a case and one the other way round in which there is power to pay out only £100, so as not to reduce the capital below £25,000. It is obviously an effort to get round Section 38 (2) of the Act.

In the circumstances of this case there was not, in my opinion, power to revoke or to determine the settlement or any provision thereof. I would allow the appeal.

---

(1) *See* page 396 *ante*.

Morris, L.J.—The question raised in this appeal is whether Section 38 of the Finance Act, 1938, applies to a settlement made by the Appellant on 25th July, 1951. The settlor transferred the sum of £100 to the trustees on the day that the settlement was made. The settlor had the power but not the obligation to transfer further sums to the trustees. The settlor did, in fact, transfer a further sum of £25,000 to the trustees on 13th August, 1951. The power of the trustees to release capital pursuant to clause 4 is subject to the limitation that, during the life of the settlor, the remaining capital of the trust funds, after any exercise of the power, must be of a value of not less than £100.

It does not seem to me that it can be said in this case that there is any power either to revoke or to determine the settlement during the lifetime of the settlor. The question which arises is whether there is in that period a power to determine any provision of the settlement. This raises the issue as to what the word " provision " means. In my judgment in *Commissioners of Inland Revenue* v. *Countess of Kenmare*[1] I expressed my opinion that there was in that case a power to determine the settlement. I further expressed my views as to the meaning in the context of Section 38 (2) of the word " provision ". I do not repeat what I there expressed. Mr. Graham-Dixon referred to the speeches in the House of Lords in *Wolfson* v. *Commissioners of Inland Revenue*, 31 T.C. 141. Though no occasion there arose for submissions in regard to, and considered opinion in regard to, the meaning of the word " provision ", it is of importance to note the way in which the word was read by Lord Normand at pages 170–1, and by Lord Morton at page 172.

In the present case it is to be noted that the trust funds comprise the sum of £100 and any further sum or sums which the settlor might later transfer and the investments for the time being representing the same or any augmentations and additions and accretions. But it was not the income from the whole of the trust funds that would go under clause 3 to one or more of the members of the specified class. It was the income from the trust funds " less any portion thereof the capital whereof shall have been appointed under the provisions " of clause 4. Similarly, what the trustees were, at the expiration of the appointed period, to hold for certain persons pursuant to clause 5 were the trust funds " or so much thereof as shall remain subject to the trusts ". But clause 4 limited the power of applying capital during the life of the settlor so that trust funds should remain which should be " of a value of not less than £100 ". If no further sums had been or were to be transferred, but if the original £100 had been invested and if the investments had appreciated, there could still be application of capital under clause 4 always provided that during the life of the settlor trust funds remain which immediately after the exercise of the power are of a value of not less than £100. Therefore, the problem which arises does not arise merely because of the power of the settlor to transfer further sums to the trustees.

After the death of the settlor but during the appointed period there would not seem to be any limitation imposed upon the trustees in exercising their power to apply any part or parts of the capital to or for the benefit of one or more members of the specified class. If all was applied, then all the capital would be freed and released from the trusts. The operation of clause 3 would then come to an end. Clause 5 would never come into operation. It seems to me, therefore, that the trustees will have power in the future to determine the settlement. They will also, I consider, have power in the future to determine a provision of the settlement, whether the word " provision " is used to denote that which is provided or to denote

(1) *See* pages 398–401 *ante*.

a clause or part of the settlement deed or agreement. The terms of Section 38 (2) (*a*) are therefore, in my judgment, satisfied. But these unlimited powers cannot be exercised during the lifetime of the settlor and so neither he nor his wife can in the event of the exercise of these unlimited powers become beneficially entitled. The terms of Section 38 (2) (*b*) are therefore not satisfied. If, therefore, the period after the death of the settlor is considered, the provisions of Section 38 (2) do not apply.

It is next necessary to consider the position in the period of the lifetime of the settlor. If during that time the trustees apply capital pursuant to their powers under clause 4 they must leave capital of a value of not less than £100. They could exercise their power so that the settlor's wife became to some extent beneficially entitled. Section 38 (2) (*b*) would on this footing be satisfied. The real question which, therefore, arises in this appeal is whether the power which the trustees may exercise during the settlor's lifetime comes within the words of Section 38 (2) (*a*). The power would certainly not be one either to revoke or to determine the settlement. But would the exercise of the power determine a provision of the settlement? It seems to me that clause 5 of the settlement would not be affected. So also the operation of clause 3 of the settlement would not be affected if capital were withdrawn. The clause would merely operate in regard to less capital. If the word " provision " denotes a clause, then clause 3 would not be determined. But the Crown submit that the word " provision " refers to what is provided by or effected by the settlement; they submit that each £1 of the trust fund should be regarded as subject separately to the trusts so that the withdrawal of any capital is a determination *pro tanto* of the " provision " of the settlement. But clause 3 of the settlement only operates upon the trust funds less any portion thereof the capital whereof shall have been appointed under the provisions of clause 4. Hence the " provision ", even on the Crown's interpretation, must be the income on whatever trust funds there are. The submission of the Crown further fails if the word " provision " denotes, as in my judgment it does, a clause or part of the settlement deed or agreement.

For these reasons I consider that the case is not brought within the provisions of Section 38 (2) and I would allow the appeal.

Romer, L.J.—On this appeal, as in *Commissioners of Inland Revenue* v. *Countess of Kenmare*[1], a question arises as to the applicability of Section 38 (2) of the Finance Act, 1938, to the income of a settlement. The settlement now in question was made on 25th July, 1951, by Mr. H. A. W. Saunders, and it originally comprised only £100. A further £25,000, however, was brought into the settlement by Mr. Saunders on 13th August, 1951, to be held upon the trusts thereof. Clause 3 of the settlement provided that during the period therein specified, which will in all probability last for a pretty considerable time,

> " the Trustees shall pay divide or apply the income of the Trust Funds (less any portion thereof the capital whereof shall have been appointed under the provisions hereinafter contained) to or between or for the maintenance support or benefit of any one or more to the exclusion of the other or others of the specified class as the Trustees shall in their absolute discretion determine."

The " specified class " consists of a number of persons who were named in the schedule to the settlement, one of whom is the settlor's wife. By clause 5 of the settlement it is provided that

> " At the expiration of the appointed period the Trustee shall hold the Trust Funds or so much thereof as shall remain subject to the trusts hereof "

for the settlor's statutory next-of-kin as therein mentioned.

---

(1) Page 383 *ante*.

(Romer, L.J.)

Between clause 3 and clause 5 is inserted the clause upon which the Crown relies. It empowers the trustees at any time or times during the appointed period, but subject to the settlor's written consent during his lifetime, to pay or apply any part or parts of the capital of the trust funds to or for the benefit of any one or more of the specified class freed and released from the trusts concerning the same; but subject to the limitation that during the settlor's life the capital of the trust funds remaining subject to the trusts of the settlement immediately after the exercise of the power should be of a value of not less than £100. It is not contended for the Crown that under clause 4 the trustees have any power of revocation, but it is said that they have power to determine the settlement or a provision thereof during his lifetime in such a way that the whole trust funds except £100 may become payable to the settlor's wife; and that, accordingly, Section 38 (2) applies, with the result that for the purposes of Surtax the whole income from the trust funds falls to be treated as Mr. Saunders' income except such as is properly attributable to £100. This contention succeeded both before the Special Commissioners and before Wynn-Parry, J., on appeal from them.

For my part I am unable to accept the contention of the Crown. The settlement has obviously been very carefully and skilfully drawn and, in my judgment, the draftsman has succeeded in saving the settlor in this case from liability to tax under Section 38 (2). As no question of revocation arises, no part of the income of the trust fund can be treated under the Sub-section as Mr. Saunders' income unless the trustees have power to determine the settlement or any provision thereof. Now, so long as any part of the fund remains in the hands of the trustees and subject to the operation of the trusts declared by clauses 3 and 5 respectively, it cannot be said, in my opinion, that the settlement has been determined; and as at least £100 will always remain during the settlor's lifetime subject to the operation of those trusts, it follows that the trustees have no power to determine the settlement.

The question therefore narrows itself down to whether the trustees have power to determine any provision of the settlement. As in *Lady Kenmare's* case[1] so in this, I find it unnecessary to come to any final view as to whether the word " provision " in Section 38 (2) means " clause " or " result "; for in my judgment the trustees have no power under clause 4 of the settlement to determine in the lifetime of the settlor any part of the written instrument or any benefit which the settlement confers. Even if the trustees were to exercise the power which they are given to its uttermost neither clause 3 nor clause 5 of the settlement would be determined; for the former clause would continue during the settlor's lifetime to govern the income of the £100 which would still remain subject to the trusts of the settlement, whilst at the settlor's death the corpus of that sum would still be within the operation of the trusts declared by clause 5. Can it then be said that any result or benefit deriving from clauses 3 or 5 would be determined if the trustees exercised their power to its fullest extent? It is true that each time capital was withdrawn under the power there would be less income in future available for the specified class and less capital available to the settlor's next-of-kin at the expiration of the appointed period. Under clause 3, however, the specified class are only given the income from such capital as is not withdrawn by the trustees under clause 4; the settlor has not provided

(1) Page 383 *ante*.

any beneficial interest for them in the income of capital that is withdrawn and, therefore, any decrease of income which follows upon a withdrawal is due rather to the qualified terms in which the income was given than to the power conferred by clause 4. Similarly, the beneficial interest of the statutory next-of-kin under clause 5 is expressly confined to so much of the trust funds as shall remain subject to the trusts of the settlement at the expiration of the appointed period ; and I cannot see how that interest is in any way determined by the withdrawal of capital in pursuance of clause 4. The beneficial interest provided for the next-of-kin is, in my opinion, in no way affected by the exercise of the clause 4 power, although such exercise naturally diminishes the value of the fund which the next-of-kin would otherwise have taken ; in other words, withdrawals of capital quantify the beneficial interest but do not determine it.

As, therefore, the trustees have no power, in my judgment, either to determine the settlement or any clause thereof or any beneficial result to which the settlement gives rise, the case does not, in my opinion, come within Section 38 (2) of the Act. I accordingly agree that the appeal should be allowed.

Mr. A. P. L. Barber.—The appeal will be allowed with costs, my Lord?

Singleton, L.J.—Yes, with costs here and below, I suppose.

Mr. Barber.—My Lord, yes.

Sir Reginald Hills.—I think my learned friend will agree that the case must be remitted to the Special Commissioners to adjust the assessment, because I believe there is admittedly some liability to Surtax. I think my friend will probably agree?

Mr. Barber.—My Lord, yes, that is so.

Singleton, L.J.—Then the case is remitted to the Special Commissioners.

Sir Reginald Hills.—To adjust the assessment in accordance with your Lordships' judgments?

Singleton, L.J.—To adjust tax, yes.

Sir Reginald Hills.—I am instructed to ask for leave to appeal in this case.

Singleton, L.J.—I think it would be only fair, as we gave leave in the other case[1]. Is it a case which affects other claims? I suppose it probably is, is it not? It is a general question. I am wondering whether, in a case of this kind—Romer, L.J., reminds me—you ought to make some terms or consider making some terms.

Sir Reginald Hills.—I should have thought, with respect, as we have the decision of the Special Commissioners and the Judge below in our favour, that the Crown would be entitled, unless there is some reason otherwise, to have an unconditional leave.

Singleton, L.J.—Yes, you may have your leave to appeal. We do not impose any conditions.

Sir Reginald Hills.—If your Lordship pleases.

---

[1] Commissioners of Inland Revenue *v.* Countess of Kenmare, page 383 *ante*.

The Crown having appealed against the above decision, the case came before the House of Lords (Viscount Simonds and Lords Reid, Cohen, Keith of Avonholm and Somervell of Harrow) on 3rd and 4th July, 1957, when judgment was reserved. On 25th July, 1957, judgment was given against the Crown, with costs (Lords Keith of Avonholm and Somervell of Harrow dissenting).

Mr. Geoffrey Cross, Q.C., Sir Reginald Hills and Mr. E. B. Stamp appeared as Counsel for the Crown, and Mr. John Pennycuick, Q.C., and Mr. Roderick Watson for the executors of the taxpayer (who had died since the decision of the Court of Appeal).

Viscount Simonds.—My Lords, this appeal by the Commissioners of Inland Revenue again raises the question of the scope and meaning of Section 38 (2) of the Finance Act, 1938. The relevant facts are not in dispute.

By a deed dated 25th July, 1951, and made between the original Respondent to this appeal (who has since died but will be referred to as "the Respondent") of the one part and Gordon Waldron Saunders, Ethel Grace Saunders (the Respondent's wife) and Raymond Henry Pumfrey as trustees of the other part, it was recited that the Respondent was desirous of making such irrevocable provision as was thereinafter contained for the benefit of the specified class (an expression defined in the schedule and including the Respondent's wife) and for the purpose of effectuating such desire had transferred to the trustees the sum of £100; and it was provided by clause 1 that the trustees should invest as therein directed the said sum and any further sums which the Respondent might thereafter transfer to them; by clause 2 that the trustees should hold the said sums and the investments for the time being representing the same upon the trusts thereinafter declared; by clause 3 that they should during the period therein specified pay, divide or apply the income thereof less any portion thereof the income whereof should have been appointed under the provisions thereinafter contained to or between or for the maintenance, support or benefit of the members of the specified class as the trustees might determine; and by clause 5 that at the expiration of the appointed period the trustees should hold the trust fund or so much thereof as should remain subject to the trusts thereof upon trust for the next-of-kin of the Respondent as therein defined. The specified class was a large one and nothing need be said about it except that it included the Respondent's wife.

I have so far not mentioned clause 4, upon which this case hangs. It was in the following terms:

> "4. It shall be lawful for the Trustees at any time or times during the appointed period but subject to the consent in writing of the Settlor during his life and thereafter at their absolute discretion to pay or apply any part or parts of the capital of the Trust Funds to or for the benefit of all or any one or more to the exclusion of the other or others of the specified class freed and released from the trusts concerning the same Provided Always that during the life of the Settlor any exercise by the Trustees with such consent as aforesaid of the power in this clause contained shall be subject to the limitation that the capital of the Trust Funds remaining subject to the trusts of this Settlement immediately after such exercise shall be of a value of not less than one hundred pounds."

The proviso to this clause, which might otherwise seem inexplicable, is in fact easily explained. Its avowed purpose is that the settlement may escape from Section 38 of the Finance Act, 1938. The question for your Lordships

is whether it is successful in its purpose, as the Court of Appeal, allowing an appeal from Wynn-Parry, J., have held that it is.

Before turning to the Act of Parliament it only remains to be said that within a few days after the execution of the deed the Respondent transferred a sum of £25,000 (making £25,100 in all) to the trustees, who invested it in 250,000 ordinary shares of 2*s.* each in H. A. Saunders, Ltd., that in the year ended 5th April, 1952, the gross income arising under the settlement was £4,166 13*s.* 4*d.* and that an additional assessment to Surtax which included this income was made upon the Respondent.

This assessment was founded on Section 38 (2) of the Finance Act, 1938, which is, so far as is relevant, in the following terms:

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

It is clear that an exercise of the power contained in clause 4 during the Respondent's lifetime might result in his wife becoming beneficially entitled to a part of the property comprised in the settlement. The single question is whether the power is a power to "revoke or otherwise determine the settlement or any provision thereof". The answer given by the Respondent is that it is not, because always there must be £100 left in the settlement and so long as it is there neither the settlement nor any provision thereof can be properly described as revoked or otherwise determined. This, it was claimed, was the natural and literal meaning of the words, and the observations which fell from myself and others of your Lordships in *Wolfson* v. *Commissioners of Inland Revenue*, 31 T.C. 141, were called in aid. I am assuredly not going to depart from the fair meaning of words in a taxing Section in order that tax may be exacted. It it not so easy to say what is a fair meaning of the relevant words.

I must first clear out of the way one argument which was, I think, given undue weight in the Court of Appeal. The question being whether there is a power to revoke or determine a settlement or any provision thereof, it is not, in my opinion, proper to attribute continuance or non-determination to the settlement or any provision thereof because the power itself still subsists. What is relevant is whether and in what sense the trusts declared by clause 3 and clause 5 have been determined. The power, though it may for some purposes like a power of advancement be regarded as part of the trusts of the settlement, is in this connection to be regarded as something independent of the beneficial trusts which it may itself determine. It was upon the meaning of the word "provision" that the decision of the majority of the Court of Appeal largely turned. Thus, Singleton, L.J., thought that the words "of any provision of the settlement" at the end of Section 38 (1) (*a*) and in Section 38 (1) (*b*) meant a clause in the document and that the word "provision" ought to be given the same meaning in Section 38 (2). He therefore could not accept the argument of Counsel for the Crown. Morris, L.J.,

(Viscount Simonds.)

too, though not ignoring other aspects of the case, concluded by saying(1):

> "The submission of the Crown further fails if the word 'provision' denotes, as in my judgment it does, a clause or part of the settlement deed or agreement."

My Lords, the meaning of the word "provision" in an Act of Parliament was discussed in this House in *Berkeley* v. *Berkeley*, [1946] A.C. 555, and it was then necessary to determine which of two possible meanings it bore in that Act, namely a clause in a document (in that case a will) or a benefit conferred by that clause or document. But it was pointed out in that case that the two meanings very easily slid into each other, and I doubt, with great respect, whether in the present case the distinction need be preserved. It was indeed patent that learned Counsel for the Respondent accepted the view that in its present context the word meant indifferently a clause or a beneficial interest; he candidly admitted that a clause could not be determined without also determining the beneficial interest which it created and *vice versa*. Rather he was concerned to maintain that no beneficial interest, assuming that to be the meaning of "provision", was determinable within the Section.

The issue is thus brought within narrow limits. It is whether the words "revoke or otherwise determine the settlement or any provision thereof" are satisfied if the settlement is in part revoked, or more appositely if a beneficial interest created by the settlement is in part determined. Let me take a concrete case. The beneficial interest which is said to be liable to be determined is the life interest of A in a capital fund of £100,000: the trustees in the exercise of their power withdraw from the trust £10,000 or £50,000 or £90,000. Upon such withdrawal is the beneficial interest of A determined? Is there on each withdrawal a new beneficial interest created and on the next withdrawal a new determination? Alternatively, is each pound or other unit of the trust income to be regarded as a separate provision, so that upon the withdrawal of the relevant capital it can be said that a provision for A has been determined? I do not think that either of these explanations is plausible. Yet one or other of them must be adopted if a provision of the settlement or a beneficial interest created by it is to be regarded as determined by the diminution of it in greater or less degree. The problem may be stated in a slightly different way, perhaps more attractive to the Crown's case. I can well imagine that a beneficiary for whom the handsome provision of (say) £5,000 a year has been made would say, upon finding it cut down to £50 a year, that he no longer enjoyed the provision he formerly had. Colloquially, he was no longer provided for. But he would in fact be provided for though on a less handsome scale and it would be a provision made by the settlement. Therefore the same question would have to be asked: has the earlier provision been determined and a new one substituted? Or would it be more accurate to say that the provision made for him had been not determined but diminished? This is to put in other words the question that I asked earlier: does the word "revoke" include partial revocation and the word "determine" include partial determination? I do not think that it does. A purist would, I think, say that there can be no such thing as a partial determination of a single provision. An end is an end and there is no part left. At any rate, nothing could be easier than to use words appropriate to the revocation or determination of part of a provision if it were intended to cover the reduction of a provision for any person or body of persons, and I think

(1) *See* page 427 *ante*.

that I should not be justified in giving a strained meaning to the words which the Legislature has preferred to use. I do not ignore that the Sub-section contemplates that the interest of the beneficiary may be in a part of the settled property, but it appears to me that this is indecisive, for the "provision" made for him may be in whole determined but extend to part only of the settled property. Since writing this opinion I have had the advantage of reading the opinion of my noble and learned friend Lord Reid, and I agree with what he has written on this part of the case.

I have come therefore to the conclusion that the appeal must be dismissed. The Crown must pay the costs.

Lord Reid.—My Lords, in a plain and obvious attempt to evade the provisions of Section 38 (2) of the Finance Act, 1938, and avoid liability for Surtax, the late Mr. Saunders made a settlement on 25th July, 1951, and the question in this case is whether that attempt has been successful. On that date he transferred to trustees £100 and directed them to hold that sum and any further sum which he might thereafter transfer to them for the benefit of a specified class of beneficiaries including his wife. On 13th August, 1951, he transferred a further sum of £25,000 to the trustees. The settlement contained this provision:

> "4. It shall be lawful for the Trustees at any time or times during the appointed period but subject to the consent in writing of the Settlor during his life and thereafter at their absolute discretion to pay or apply any part or parts of the capital of the Trust Funds to or for the benefit of all or any one or more to the exclusion of the other or others of the specified class freed and released from the trusts concerning the same Provided Always that during the life of the Settlor any exercise by the Trustees with such consent as aforesaid of the power in this clause contained shall be subject to the limitation that the capital of the Trust Funds remaining subject to the trusts of this Settlement immediately after such exercise shall be of a value of not less than one hundred pounds."

It is not disputed that apart from this proviso the terms of clause 4 would bring this case directly within the scope of Section 38 (2): the trustees would have power immediately to determine the whole settlement by freeing the whole of the trust funds from the trusts of the settlement and paying them to the settlor's wife. I shall not repeat here what I have said in *Commissioners of Inland Revenue* v. *Countess of Kenmare*[1] about the word "determine". Section 38 (2) clearly provides that in such a case the whole of the income from the trust fund must be treated as the income of the settlor. But the proviso requires that, so long as the settlor survives, at least £100 must be retained by the trustees and must remain subject to the trusts of the settlement. £100 is no doubt a comparatively small sum, but it is capable of being invested and of yielding an income, and I do not think that it can be treated as negligible. Accordingly, in my opinion the presence of the proviso prevents the trustees' power from being a power to determine the settlement.

The question therefore is whether the power, limited as it is by the proviso, can be said to be a power to revoke or otherwise determine any provision of the settlement. It has not been argued that the word "determine" can mean anything else than "bring to an end". It cannot mean "modify" or "diminish". Accordingly, the Sub-section cannot apply unless there is power to bring something to an end. The presence of the word "revoke" does not help because the phrase used is "revoke or otherwise determine". The word "otherwise" shows that revoking is regarded as

(1) *See* page 411 *ante*.

(Lord Reid.)

one method of determining or bringing to an end either the settlement or any provision thereof. There has been much argument about the meaning of the word " provision ". In the first place the word " thereof " makes it clear that the Sub-section is referring to something that can properly be called a provision of the settlement. And, secondly, the provision must be of such a nature that the result of determining it will or may be that the settlor or his wife becomes beneficially entitled to the whole or a part of the property comprised in the settlement or of the income arising from it. " Settlement " is defined in Section 41 as follows:

> " the expression ' settlement ' includes any disposition, trust, covenant, agreement or arrangement ",

and a provision of a settlement would normally mean some part of it. But, as was pointed out in *Berkeley* v. *Berkeley*, [1946] A.C. 555, " provision " is often used in the sense of what is provided, and I think that if a settlement gives a beneficial right to X that right can properly be said to be a provision of the settlement. It is therefore necessary to examine the beneficial rights given by this settlement and to see whether the exercise of the power could properly be said to determine any of them.

Clause 3 leaves it to the discretion of the trustees to pay the income from the trust fund to or for behoof of any one or more members of the specified class but requires them to distribute the income annually. Clause 5 makes provision for distributing the fund or what remains of it at the end of the appointed period. During the lifetime of the settlor there must always remain £100 the income from which must be distributed in terms of clause 3. After his death and during the remainder of the appointed period the trustees may pay away the whole of the trust fund ; if they do not, then at the end of the appointed period clause 5 comes into operation. I do not think it necessary to consider clause 5 further because, if paying away part of the trust fund under clause 4 does not determine any provision of clause 3, *a fortiori* it does not determine any provision of clause 5.

Clause 3 directs the trustees to apply the income of the trust funds

> " less any portion thereof the capital whereof shall have been appointed under the provisions hereinafter contained ".

I attach no importance to those words. Clauses 3 and 4 must be read together, and without these words clause 3 could only operate on the income of what capital remained at the time. Nor do I think that it makes any difference that no particular member of the specified class can demand any part of the income, it being for the trustees to determine to which members the income shall be paid. Perhaps, if any preference were given to one or more members, diminution of the trust fund could result in the rights of the others being determined, but that is not the case here. This case seems to me to be the same as it would be if clause 3 had simply directed the trustees to pay the income from the trust fund to AB.

I ask the question: what " provision " is brought to an end by reducing the amount of the trust fund from £25,100 to £100? Two suggestions were made by Council for the Crown. The first was that the depletion of the trust fund by exercising the powers in clause 4 would essentially alter the nature of the " provisions " so that it could properly be said that the original provisions had been determined and new and different provisions had come into existence with regard to what was left of the trust fund. Apart from the artificiality of this conception I see one fatal objection to it. *Berkeley* v. *Berkeley* is an example of a case where it is material to

determine the date when a provision was made. On this view the date when provisions operating at a particular time came into being would not be 1951 but would be the last date when the trustees paid away capital under clause 4. That, in my view, cannot be right. Moreover, who makes the new provisions with regard to the capital remaining in the settlement? They must surely flow from the settlor, and I find it very difficult to construe the settlement as authorising the trustees to make new provisions whenever they pay away capital. It might perhaps be said that payment of small sums would not determine the old provisions but that payment of more than 99 per cent. of the trust fund does determine them. But suppose the trustees pay away the capital £1,000 at a time. At what stage are the old provisions determined and new ones substituted? I am quite unable to accept this suggested way of finding that provisions are determined or brought to an end.

The Crown's alternative suggestion was that each pound (or, I suppose, each penny) of the trust fund is a separate provision so that, if £x is released from the settlement, x provisions are determined and $25{,}100 - x$ provisions remain unaltered. This appears to me to be an even more artificial conception than the last, and I ask what happens if the value of the trust fund appreciates. Does each £1 provision become a provision of £1 1*s.* or does the appreciation create a number of new £1 provisions? If so, who makes these provisions? And if the trust fund depreciates in value does each provision become one of 19*s.* or do some just disappear? And, if depreciation results in each £1 provision becoming a provision of 19*s.*, why does paying out 5 per cent. of the trust fund under Clause 4 not have the same result but cause a number of provisions to determine while the rest remain unaltered? I find it equally impossible to adopt this suggestion.

There is one other argument for the Crown that I must notice. The second condition for the application of the Sub-section, set out in Section 38 (2) (*b*), is that, in the event of the exercise of the power, the settlor will or may become beneficially entitled to the whole or any part of the property; and, where the exercise of the power only entitles the settlor to a part of the property, the next part of the Sub-section provides that any income arising from "a corresponding part of that property" shall be treated as the income of the settlor. It is said that this throws light on the meaning of "revoke or otherwise determine the settlement or any provision thereof" in the first condition set out in Section 38 (2) (*a*). I do not think so. The Sub-section requires two conditions to be satisfied—those set out in paragraphs (*a*) and (*b*) of Section 38 (2)—and it is not difficult to imagine cases where both conditions are clearly satisfied although only a part of the trust fund reverts to the settlor or his wife. In the first place the settlement may be wholly determined but only part of the trust fund may revert: the settlement may provide that, in the event of power to determine it being exercised, half the trust fund shall revert to the settlor and the rest go to his issue. Or, secondly, a provision of the settlement may be wholly determined but only part of the trust fund be affected by that: for example, a settlor might settle property on his four children in equal shares and reserve power to revoke the interest of one child but not of the others. The exercise of such a power would wholly bring to an end the provision in favour of one child but the result would be that only part of the property, one-quarter, would revert to the settlor. This argument for the Crown seems to me to be based on the view that condition (*a*) must be so construed that it must be held to apply whenever condition (*b*) is satisfied. I see no reason why that should be so. In the present case condition (*b*) is satisfied because, in the event of the exercise of the power, part of the settled property will revert to the settlor. But that seems to me

(Lord Reid.)

to throw no light on the question whether condition (*a*) is also satisfied. I therefore adopt the simple explanation of this case that when part of the capital is paid away—or for that matter is lost by depreciation of investments —the provisions of the settlement remain the same but their value to the beneficiaries decreases. That would be so whether one takes the word "provision" to mean a part of the settlement or a right given by the settlement. If that be true, then nothing would be determined or brought to an end by paying away part of the trust fund and therefore there is no room for the application of Section 38 (2).

If the words of a Statute are reasonably capable of two interpretations it is right to adopt that which will prevent evasion provided that this course does not lead to some other difficulty or injustice. But in this case I can find no interpretation favourable to the Crown which can survive analysis. In a case like the present one may well be tempted to strain words, but for two reasons I do not think that that would be right. In the first place I see no way of construing the Sub-section, even by straining words, which would bring this case within its scope without at the same time bringing in genuine cases which Parliament may well have desired and might now desire to exclude. For example, trustees may have power to return capital to the settlor for certain specific purposes and it may be unlikely that any substantial sum could ever be paid back to him, but nevertheless it may be possible that in some improbable event the power would extend to a large proportion of the trust fund. Are the words of the Act to be strained to bring in such cases? And if they are, how is condition (*b*) to be applied? Is the proportion of the trust income which is to be treated as the income of the settlor to correspond to the largest proportion of the trust fund which the exercise of the power may enable the trustee to repay to the settlor, using the word "may" in the sense which I have explained in the *Countess of Kenmare's* case[1]? It appears to me that it ought to be for Parliament to consider how far, if at all, such cases should come within the scope of this legislation, and that it may be a difficult task to amend the Sub-section so as to reach a just result.

That brings me to my second reason. It is sometimes said that we should apply the spirit and not the letter of the law so as to bring in cases which, though not within the letter of the law, are within the mischief at which the law is aimed. But it has long been recognised that our Courts cannot so apply taxing Acts, and I venture to repeat what I said in *Wolfson* v. *Commissioners of Inland Revenue*, 31 T.C. 141, at page 172:

> "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."

Indeed, I am not at all sure that, if the Legislature had foreseen the device used in this case, it would have been easy to find appropriate words which would cover it without also covering cases which ought to be excluded. I am therefore of opinion that this appeal should be dismissed.

Lord Cohen.—My Lords, I agree generally with the observations both of the noble and learned Lord on the Woolsack and of the noble and learned Lord, Lord Reid. I will therefore limit myself to dealing with the one point on which I am inclined to differ from them.

---

(1) *See* page 411 *ante*.

(Lord Cohen.)

It relates to the meaning of the word " provision " in Section 38 (2) of the Finance Act, 1938. I agree with Lord Reid that if a settlement gives a beneficial right to X that right can, in common parlance, be said to be a provision of the settlement. But where the word is used in a Statute it has to be construed in the context of the Statute as a whole and in particular in the present case in the context of the whole of Section 38. I agree with Singleton, L.J., that the word " provision " in the phrase " of any provision of the settlement " which is to be found at the end of Section 38 (1) (*a*) and at the end of Section 38 (1) (*b*) must mean a clause in the document. *Prima facie* the same word should be given the same meaning throughout the Section, and although the rule is not absolute I see no sufficient reason for giving a different meaning to " provision " where that word occurs in Section 38 (2). I do not pursue the matter further, since on this construction it is plain that it cannot be said that the operation of any clause of the settlement would be determined—that is, put an end to—by the exercise of the power conferred by clause 4 of the settlement. Clauses 3 and 5 would continue to operate on the £100 which must be left in the settlement.

For these reasons I agree that the appeal should be dismissed.

Lord Keith of Avonholm.—My Lords, it seems to me reasonably clear that when the Finance Act, 1938, by Section 38, refers to a power

> " to revoke or otherwise determine the settlement or any provision thereof "

it is referring to a settlement or provision conferring a benefit or benefits. In many cases it will matter nothing whether one construes " provision " as meaning the words in a settlement conferring a benefit or the benefit conferred by terms in a settlement. If a settlement is revoked or determined the benefits conferred fall with it and so also if the words of a clause conferring a benefit are revoked or determined. Difficulty arises only where, as here, the power to revoke or determine is limited to a power to revoke or determine part of the benefit made in favour of a particular person or persons. In speaking of part of a benefit I mean of course not part of a number of separate benefits but part of what may be thought to be a single benefit.

My Lords, the settlement here has been skilfully drawn. The trusts of the settlement apply only to whatever is to be found in the trust fund at any time. Allowing for the full exercise by the trustees of the powers given to them by clause 4 of the settlement, the trust fund can never fall below £100 in value. Thus the provision, it is said, even if " provision " be read as meaning benefit conferred, never changes. The settlor has conferred nothing more than the income and the capital of what the trustees choose to leave in the trust fund, subject to the minimum of £100. This view found favour with Morris and Romer, L.JJ., in the Court of Appeal.

This, I think, is to take too narrow a view. The Act is not concerned, in my opinion, with subtleties of conveyancing. It is directed to securing that

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

where there exists in any person the specified power of revocation or determination with the result of taking out of the settlement the whole or part of the property or income of the settled fund for the benefit of the settlor or the settlor's wife or husband. Looking at the whole language of Section

(Lord Keith of Avonholm.)

38 (2) I am impelled to the view that removing a part of the settled fund from the trusts of the settlement for the benefit of the settlor or his wife is a determination of a provision of the settlement.

To state the position in another way, the reality of the transaction, in my opinion, was that the settlor made two provisions, one a provision of the income and capital of so much of the settled fund as should be at any time above £100 in value, which was subject to the trustees' power of determination under clause 4 of the settlement, and the other a provision of the income and capital of £100, which was not subject to this power of determination. As the power of determination could be exercised in favour of the settlor's wife nothing more was necessary to bring into operation the effect of Section 38 (2) of the Statute. I would allow the appeal.

Lord Somervell of Harrow.—My Lords, the reference in Section 38 (2) (*b*) to "any part of the property" shows that the Sub-section was intended to cover powers by the exercise of which the beneficial interest in part only of the settled property went to the settlor or the settlor's wife or husband. The taxpayer in the present appeal agreed that if in the present case the settlement had provided for a total revocation, £25,000 going to the settlor and £100 to charity, the settlement would have been within the Section. It is said not to be within the Section because the £100 is left in the settlement; there is no total revocation or determination.

The words "any provision thereof" show that it was intended to cover powers the exercise of which fell short of total revocation or determination of the whole settlement, considered, of course, apart from the "term" which confers the power. If there had been in this case one clause which conferred the discretionary power on the trustees in respect of the £25,000 and another clause which conferred the discretionary power on the trustees in respect of the £100, I find difficulty in seeing how the argument for the taxpayer could start. It is said, however, that where, as here, the trusts on the funds are declared in one clause, there is not a revocation or determination of any provision of the settlement if any funds, however small, are left subject to the trusts. No provision, it is said, has been revoked or determined. I do not think that in its context in this clause "provision" can be so construed. I am giving, I think, a natural meaning to the word as applied to a settlement. What are the provisions of a settlement? The first matter with which the answerer would naturally deal would be the amount of the settled fund. I think a provision is revoked or determined if, as in the present case, £25,000 is taken out of the settlement. The question of construction does not, of course, turn on the amount taken out. I would allow the appeal.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Henry Pumfrey & Son; Solicitor of Inland Revenue.]

(85689) Wt. 46—A4461 6m 12/57 DL/IL/18