
COURT OF APPEAL—17TH AND 18TH NOVEMBER, 1954

HOUSE OF LORDS—7TH AND 8TH NOVEMBER, AND 8TH DECEMBER, 1955

Bambridge

v.

Commissioners of Inland Revenue⁽¹⁾

Income Tax and Surtax—Avoidance of tax by transfer of assets abroad—Transfers by third party—Whether rights acquired after death of third party under settlement or will made by him were acquired “by means of” the transfers in conjunction with “associated operations”—Finance Act, 1936 (26 Geo. V & 1 Edw. VIII, c. 34), Section 18.

In 1933 the Appellant's father and mother each sold certain Canadian and United States investments to a Canadian company in consideration of shares and non-interest-bearing redeemable debentures in the company. In 1934 each of them made a revocable settlement of the shares and debentures received by them respectively under which the income was payable to the settlor for life with remainder to the other spouse for life and on the death of the surviving spouse the income was payable to the Appellant for life.

The father died in 1936 without having revoked his settlement and after the death of the mother in 1939 the income from the fund settled by him became payable to the Appellant for life.

The mother revoked her settlement in 1937 and became absolutely entitled to the shares and debentures settled by her. On her death the Appellant became entitled under her will, which was made in 1938, to a life interest in the income of her residuary estate, which included the shares and debentures in question.

Assessments to Income Tax and Surtax for the years 1948-49 and 1949-50 were made on the Appellant under Section 18, Finance Act, 1936, in respect of the income of the Canadian company. On appeal to the Special Commissioners it was contended on behalf of the Appellant that Section 18 did not apply because the deaths of her father and mother were neither “transfers of assets” nor “associated operations” within the meaning of the Section; alternatively, that her mother's will was not an “associated operation” and her interest under that will should be disregarded for the purpose of the assessments in question. The Special Commissioners dismissed the appeal.

Held, that the decision of the Special Commissioners was correct.

⁽¹⁾ Reported (Ch. D.) [1954] 1 W.L.R. 1265; 98 S.J. 699; [1954] 3 All E.R. 86; 218 L.T.Jo. 120; (C.A.) [1954] 1 W.L.R. 1460; 98 S.J. 851; [1954] 3 All E.R. 682; 218 L.T.Jo. 322; (H.L.) [1955] 1 W.L.R. 1329; 99 S.J. 910; [1955] 3 All E.R. 812.

CASE

Stated under the Income Tax Act, 1952, Sections 64 and 229 (4), 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.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 27th November, 1952, Mrs. Elsie Bambridge (hereinafter called "the Appellant") appealed against assessments to Income Tax and Surtax as under:—

1948-49—Income Tax £8,681; Surtax £26,018.

1949-50—Income Tax £10,783; Surtax £40,000.

The grounds of the appeal were that the assessments purporting to be made on the Appellant under Case VI of Schedule D, Income Tax Act, 1918, and Section 18, Finance Act, 1936, in respect of the income of a company resident abroad were not competent and the amounts of the said assessments ought not to be included in the total income of the Appellant for Surtax purposes.

2. The following documents were produced and admitted or proved at the hearing of the appeal:—

(1) copy of a memorandum of agreement dated 14th December, 1933, between the Royal Trust Company, of Montreal, and Kamouraska Investments, Ltd., of Charlottetown, Prince Edward Island;

(2) copy of a memorandum of agreement dated 14th December, 1933, between the Royal Trust Company and Kamouraska Investments, Ltd.;

(3) bundle of documents relating to the issue of debentures by Kamouraska Investments, Ltd.;

(4) copy of the by-laws of Kamouraska Investments, Ltd.;

(5) copy of a deed of settlement made 12th January, 1934, between Joseph Rudyard Kipling and the Royal Trust Company;

(6) copy of the will and probate thereof dated 7th March, 1940, of Caroline Kipling;

(7) copy of an indenture made February, 1915, between Rudyard Kipling, Caroline Kipling and the Sussex Investment Co., Ltd.

Such of the above documents as are not attached to and do not form part of this Case are available for the use of the High Court if required⁽¹⁾.

3. We found the following facts admitted or proved on the evidence adduced at the hearing of the appeal:—

(1) Early in 1915, the Appellant's father, the late Rudyard Kipling (hereinafter called "Mr. Kipling") and his wife Mrs. Caroline Kipling (hereinafter called "Mrs. Kipling") formed Sussex Investment Co., Ltd. (hereinafter referred to as "Sussex"), a company incorporated in the Province of Nova Scotia, Canada.

(2) In February, 1915, Mr. Kipling and Mrs. Kipling, who was an American, sold to Sussex certain shares, stocks, bonds and securities then held in trust for them respectively by the Royal Trust Company of Montreal in the Province of Quebec (hereinafter called "the Royal Trust Company"), as bare trustees. As consideration for the said sales Mr. Kipling (or his nominees) was allotted 690 fully paid-up and non-assessable shares of the capital stock of Sussex and Mrs. Kipling was allotted 300 such shares.

⁽¹⁾ None of these documents is included in the present print.

(3) By 1925 the shareholding in Sussex was as follows:—

Mr. Kipling	...	...	...	297 shares
Mrs. Kipling	...	...	...	440 ..
The Appellant	...	...	...	250 ..
The Canadian directors	...	...	...	3 ..
				990 ..

The Appellant's shares had been given to her as to 195 by Mr. Kipling on 1st March, 1915, and as to 55 by Mrs. Kipling on 1st January, 1925. Mr. Kipling transferred at an early date after the sale agreement 3 shares to the Canadian directors of the company.

(4) On 14th December, 1933, Mr. and Mrs. Kipling sold their respective holdings of 297 and 440 shares in Sussex to Kamouraska Investments, Ltd. (hereinafter referred to as "Kamouraska").

(5) On 5th July, 1936, the Appellant sold her 250 shares in Sussex to Kamouraska for £32,565 2s. 7d. in cash. Thereafter Kamouraska held all the shares in Sussex except the three shares held by the Canadian directors as above mentioned.

(6) In October, 1937, Sussex was put into liquidation and since at that date Kamouraska held all the shares (except three) in Sussex, almost all the assets of Sussex were transferred to Kamouraska. The distribution took effect as on 31st December, 1937.

(7) Prior to the death of Mr. Kipling on 18th January, 1936, 737/990ths of the income of Sussex was deemed to be his income under the provisions of the Finance Act, 1936, Section 18, on the basis that he and Mrs. Kipling held between them 737 out of 990 issued shares. After the death of Mr. Kipling 300/990ths of the income of Sussex was deemed to be the income of Mrs. Kipling under the said provisions, on the basis of her original shareholding of 300 shares.

(8) In 1933 Mr. and Mrs. Kipling formed Kamouraska Investments, Ltd. (hereinafter referred to as "Kamouraska"), a company incorporated in the Province of Prince Edward Island, Canada.

(9) On 14th December, 1933, Mr. and Mrs. Kipling, respectively, sold certain shares and securities then held in trust for them by the Royal Trust Company as bare trustees to Kamouraska. These comprised all their Canadian and United States investments. As consideration for the said sales, Mr. Kipling was allotted 5,000 class "B" \$5 shares of Kamouraska's capital stock and \$824,000 non-interest-bearing redeemable gold debentures and Mrs. Kipling was allotted 5,000 class "B" shares and \$822,000 similar debentures. The debentures were repayable on 1st December, 1953, at \$110 per \$100 but in certain circumstances they were redeemable at an earlier date. The form of debentures was varied from time to time. Kamouraska also allotted 50 \$5 8 per cent. cumulative preferred "A" shares to officials of the Royal Trust Company.

(10) The rights attached to the various classes of shares in Kamouraska include, *inter alia*, the following:—

(i) cumulative preferred "A" shares (as provided in by-law "C"):—

(a) preferential dividend of 8 per cent.:

- (b) on liquidation, \$10 per share before any payments are made to the holders of any other shares but no participation in surplus assets ;
 - (c) one vote per share but no right to vote on any resolution for the winding-up of the company or to vary the rights of the " B " shares ;
- (ii) class " B " shares (as provided in by-law " D ") :—
- (a) participation in the distributed profits of the company after payment of the preferential dividend ;
 - (b) assets of the company on liquidation subject to the rights of the shareholders of the preferred " A " shares ;
 - (c) one vote per share upon any resolution for the winding-up of the company or alteration of the rights of the " B " shares but no other voting powers ;
 - (d) power to summon a meeting in order to consider a resolution to wind up.

(11) On 12th January, 1934, Mr. and Mrs. Kipling entered into identical settlements made in accordance with the laws of the Province of Prince Edward Island. Under these settlements all their class " B " shares and debentures in Kamouraska were transferred to the Royal Trust Company as trustees. The principal trusts of the settlements were to pay the whole of the income to the settlor during his (or her) life, on the death of the settlor to pay the whole of the income to the other spouse during his (or her) life, and on the death of the surviving spouse to pay the whole of the income to the Appellant during her life. The trustees had power in their unfettered discretion to raise and pay capital for the benefit of the life tenant for the time being. The Appellant had a general power of appointment by deed over the trust funds. She exercised this power in favour of her husband, but he is dead and there is therefore no effective appointment under this power. The settlements were revocable by deed by the settlors with the consent of the trustees. A copy of the deed of settlement made 12th January, 1934, between Mr. Kipling and the Royal Trust Company is attached to and forms part of this Case (marked " A " ⁽¹⁾).

(12) On 18th January, 1936, Mr. Kipling died, without having revoked his above-mentioned settlement, and consequently the income from the fund settled by him became payable to Mrs. Kipling during her life.

(13) On 16th June, 1937, Mrs. Kipling revoked her above-mentioned settlement, and consequently she became absolutely entitled to the 5,000 class " B " shares and the outstanding debentures in Kamouraska settled by her under her above-mentioned deed of settlement.

(14) Prior to the death of Mr. Kipling on 18th January, 1936, the whole income of Kamouraska was deemed to be his income under the provisions of the Finance Act, 1936, Section 18. After his death, and until Mrs. Kipling's death, one-half of the income of Kamouraska (on the basis of approximately the income appropriate to the assets transferred by her) was deemed to be her income under the said provisions.

(15) On 19th December, 1939, Mrs. Kipling died and thereupon the income from the fund settled by Mr. Kipling in 1934 became payable to the Appellant during her life.

(¹) Not included in the present print.

(16) At the date of Mrs. Kipling's death the fund settled by Mr. Kipling consisted of the 5,000 class "B" shares and \$707,500 debentures in Kamouraska. This amount of \$707,500 was reduced to \$436,000 by reason of the payment of Estate Duty payable on the cesser of Mrs. Kipling's life interest. A great proportion of this sum was raised by the sale of capital assets. There have been further redemptions, substantially out of income of the debentures in Kamouraska settled by Mr. Kipling, and the fund settled by him now consists of the 5,000 class "B" shares and \$197,500 debentures.

(17) Under the will of Mrs. Kipling the Appellant became entitled to a life interest in the income of her residuary estate. A copy of Mrs. Kipling's will dated 6th December, 1938, and probate thereof dated 19th February, 1940, is attached to and forms part of this case (marked "B" ⁽¹⁾).

(18) The residuary estate of Mrs. Kipling included 5,000 class "B" shares and \$679,500 debentures in Kamouraska, to which Mrs. Kipling was absolutely entitled at the date of her death by virtue of the revocation of her settlement of 12th January, 1934, hereinbefore referred to in paragraph (13). The said debentures still form part of the residuary estate.

4. It was contended on behalf of the Appellant that

(1) Section 18 of the Finance Act, 1936, did not apply to the present case unless the Appellant, by virtue only of a transfer of assets either alone or in conjunction with associated operations, acquired rights by virtue of which she had power to enjoy income of Kamouraska ;

(2) as regards the part of the income of Kamouraska appropriate to the shares and debentures of Kamouraska settled by Mr. Kipling on the 12th January, 1934 :

(i) the Appellant acquired such rights as are mentioned in contention (1) not by virtue only of the making by Mr. Kipling of the agreements dated February, 1915, and 14th December, 1933, and the settlement dated 12th January, 1934, but by virtue of those transactions and the subsequent deaths of Mr. and Mrs. Kipling in the Appellant's lifetime ;

(ii) the deaths of Mr. and Mrs. Kipling in the Appellant's lifetime were neither transfers of assets nor associated operations within the meaning of the said Section 18 ;

(iii) the said part of the income of Kamouraska was not within the scope of the said Section 18 and could not be deemed to be income of the Appellant for the purposes of the Income Tax Acts ;

(3) as regards the part of the income of Kamouraska appropriate to the shares and debentures of Kamouraska which belonged to Mrs. Kipling at the time of her death :

(i) the Appellant acquired such rights as are mentioned in contention (1), not by virtue only of the making by Mrs. Kipling of the agreements dated February, 1915, and 14th December, 1933, the making and revocation of her settlement dated 12th January, 1934, and the making of her will, but by virtue of those transactions and the subsequent death of Mrs. Kipling, with her will unrevoked, in the lifetime of the Appellant ;

(¹) Not included in the present print.

- (ii) the death of Mrs. Kipling, with her will unrevoked in the lifetime of the Appellant was neither a transfer of assets nor an associated operation within the meaning of the said Section 18 ;
 - (iii) the said part of the income of Kamouraska was not within the scope of the said Section 18 and could not be deemed to be income of the Appellant for the purposes of the Income Tax Acts ;
 - (iv) alternatively, the making of the will of Mrs. Kipling was not an associated operation within the meaning of Section 18 ;
- (4) that the assessments appealed against ought to be discharged or (in the alternative) reduced.

5. It was contended on behalf of the Respondents that

(1) as regards that part of the income of Kamouraska appropriate to the shares and debentures settled by Mr. Kipling on 12th January, 1934:—

- (i) the sale of assets to Sussex by Mr. Kipling in February, 1915, was a transfer of assets within the meaning of Section 18 of the Finance Act, 1936 ;
- (ii) the subsequent transactions set out herein culminating in Mr. Kipling's settlement of 12th January, 1934, were associated operations within the meaning of the said Section ;
- (iii) by means of the said transfer in conjunction with the said associated operations the Appellant acquired rights by virtue of which she had during the relevant years power to enjoy the said part of the income of Kamouraska within the meaning of the said Section ;

alternatively:—

- (iv) the sale of assets to Kamouraska by Mr. Kipling on 14th December, 1933, was a transfer of assets within the meaning of Section 18 of the Finance Act, 1936 ;
 - (v) Mr. Kipling's settlement of 12th January, 1934, was an associated operation within the meaning of the said Section ;
 - (vi) by means of the said transfer in conjunction with the said associated operation the Appellant acquired rights by virtue of which she had during the relevant years power to enjoy the said part of the income of Kamouraska within the meaning of the said Section ;
- (2) as regards that part of the income of Kamouraska appropriate to the shares and debentures settled by Mrs. Kipling on 12th January, 1934:—

- (i) the sale of assets to Sussex by Mrs. Kipling in February, 1915, was a transfer of assets within the meaning of Section 18 of the Finance Act, 1936 ;
- (ii) all the subsequent transactions set out herein were associated operations within the meaning of the said Section ;
- (iii) by means of the said transfer in conjunction with the said associated operations the Appellant acquired rights by virtue of which she had during the relevant years power to enjoy the said part of the income of Kamouraska within the meaning of the said Section ;

alternatively:—

- (iv) the sale of assets to Kamouraska by Mrs. Kipling on 14th December, 1933, was a transfer of assets within the meaning of Section 18 of the Finance Act, 1936;
- (v) all the subsequent transactions set out herein were associated operations within the meaning of the said Section;
- (vi) by means of the said transfer in conjunction with the said associated operations the Appellant acquired rights by virtue of which she had during the relevant years power to enjoy the said part of the income of Kamouraska within the meaning of the said Section;

(3) the assessments under appeal were correctly made in principle.

6. We, the Commissioners who heard the appeal, gave our decision in principle in writing on 30th December, 1952, in the following terms:—

(1) This is an appeal by Mrs. Elsie Bambridge against assessments to Income Tax under Schedule D for 1948-49 and 1949-50 in the sum of £8,681 and £10,783, respectively, and assessments to Surtax for the same years in the sum of £26,018 and £40,000, respectively, on the grounds that the said assessments incorrectly include the income of a Canadian company, Kamouraska Investments, Ltd. (hereinafter called "Kamouraska"). It is not denied that the Appellant had power to enjoy the income of Kamouraska during the financial years in question, and the sole question for our decision is whether such power of enjoyment devolved upon her in such manner as to come within the provisions of the Finance Act, 1936, Section 18, and so to constitute the said income of Kamouraska her income for all purposes of the Income Tax Acts.

(2) The Appellant acquired her interest in Kamouraska from two sources; first, by virtue of a settlement dated 12th January, 1934, made by her father, Rudyard Kipling, who died on 18th January, 1936, which it is admitted was an associated operation within the meaning of Section 18 (2), following the previous transfer of certain assets by him to Kamouraska (hereinafter referred to as "source A"); secondly, under the will of her mother, Mrs. Caroline Kipling, who died on 19th January, 1939, under which she acquired a life interest in the residuary estate, which included certain shares in Kamouraska. These shares had been acquired by Mrs. Kipling following the transfer of certain assets by her to Kamouraska, and it is admitted that this transfer was a transaction within Section 18 (hereinafter referred to as "source B").

(3) It is said on behalf of the Appellant that in the case of both source A and source B, even if it is admitted that the transactions carried out by Mr. Rudyard Kipling and Mrs. Caroline Kipling constituted transfers of assets and associated operations within the meaning of the said Section 18, there yet remained an essential preliminary to the ability of the Appellant to enjoy the income of the assets in question, namely, in the case of source A, the death of Mr. Rudyard Kipling and Mrs. Kipling during the lifetime of the Appellant, and in the case of source B, the death of Mrs. Kipling during the Appellant's lifetime. It is then said that death is not an associated operation within the meaning of Section 18 (2) (and this is admitted by the Crown), and

that therefore the chain of events is broken and the said Section 18 no longer applies to the assets in question. In the alternative, it is said that, in the case of source B, the will of Mrs. Caroline Kipling was not an associated operation and, therefore, even if source A is within the Section, source B is not. The Crown, whilst admitting that the death of a person is not an associated operation, contends that the deaths of Mr. Rudyard Kipling and Mrs. Kipling were merely points in time at which previously associated operations affected the Appellant and brought her within the Section in place of the deceased. In our opinion this view is correct, and accordingly the appeal fails with regard to the income arising from source A.

There remains the alternative contention of the Appellant, namely, that the will of Mrs. Caroline Kipling was not an associated operation within the meaning of the said Section 18. The definition of an associated operation for the purposes of Section 18 is contained in Section 18 (2). It is, in relation to any transfer,

“an operation of any kind effected by any person in relation to any of the assets transferred”.

In our opinion this definition is wide enough to include, *prima facie*, the making of a will. On this view, for the Appellant to avoid liability in respect of source B, it must be shown that the making of the will comes within Section 18 (1B) (a), i.e., that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the will was made. We have therefore to consider the evidence as to the purpose of Mrs. Caroline Kipling in making her will. This consists solely of the will itself, and in our opinion the purpose or one of the purposes of making the will was to put into effect at some future date the provisions of the will itself. This provides, *inter alia*, for payment to the Appellant of the income of the residuary estate, which, of course, includes the income from the testator's shares in Kamouraska. In our opinion, therefore, the making of the will was an associated operation within the meaning of the Finance Act, 1936, Section 18, and the alternative contention of the Appellant fails.

(4) We leave the amounts of the assessments to be agreed between the parties on the basis of this our decision in principle.

7. On 20th February, 1953, the figures having been agreed between the parties on the basis of our decision in principle, we determined the assessments, as under:—

Income Tax 1948-49: assessment increased to £9,197.

Income Tax 1949-50: assessment increased to £11,522.

Surtax 1948-49: assessment increased to £27,751.

Surtax 1949-50: assessment reduced to £38,436.

8. The Appellant, immediately after the communication to her of our determination of the appeal, expressed to us her 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 64 and 229 (4), which Case we have stated and do sign accordingly.

9. The point of law for the opinion of the High Court is whether on the facts found by us there was evidence upon which we could properly

arrive at our decision and whether on the facts so found our decision was correct in law.

Norman F. Rowe, } Commissioners for the Special Purposes
A. W. Baldwin, } of the Income Tax Acts.

Turnstile House,
94-99, High Holborn,
London, W.C.1.
30th December, 1953.

The case came before Harman, J., in the Chancery Division on 21st and 24th May, 1954, when judgment was reserved. On 16th June, 1954, judgment was given in favour of the Crown in respect of the proportion of the income of the Canadian company appropriate to the taxpayer's rights under her father's settlement, and against the Crown in respect of the proportion appropriate to her rights under the residuary bequest in her mother's will.

Mr. Roy Borneman, Q.C., and Mr. Roderick Watson appeared as Counsel for the taxpayer, and Mr. John Pennycuik, Q.C., Mr. J. H. Stamp and Sir Reginald Hills for the Crown.

Harman, J.—This is an appeal by the taxpayer against a decision of the Special Commissioners assessing her to tax on the income of a company resident abroad under Section 18 of the Finance Act, 1936. The facts of the case are set out at some length in the Case Stated and I need only refer to them shortly. They begin in 1915 but so far as I can tell the first material transaction was the sale on 14th December, 1933, by the Appellant's father and mother of certain shares to a company called Kamouraska Investments, Ltd., a company incorporated in the Province of Prince Edward Island, Canada. It appears that each of the Appellant's parents was the beneficial owner of a number of Canadian and United States investments all of which were prior to the sale held by the Royal Trust Company of Montreal, Canada, as bare trustee for him or her, and the sales comprised the whole of the investments so held.

In the case of the Appellant's father a settlement dated 12th January, 1934, and expressed to be made under the law of Prince Edward Island transferred to Canadian trustees the shares and debentures in Kamouraska allotted to him in consideration of the sale. The settlement provided that the trustees should pay the income of the investments to the settlor for his life with remainder to his widow for her life with remainder to the Appellant for her life with remainder to such persons as she might by deed appoint with remainder to her next-of-kin according to the law of Prince Edward Island. The settlement contained a power of advancement and a power for the settlor with the consent of the trustees to revoke it. That settlement is still in force and the Appellant is now entitled to the income. Her father enjoyed that income till his death in January, 1936, and his widow took the income till her death in December, 1939.

In the case of the Appellant's mother she made a similar settlement in January, 1934, but revoked it under her power in the year 1937. In December, 1938, she made a will containing a general residuary bequest in favour of the Appellant and she died in December, 1939, without having revoked her

(Harman, J.)

will and being still the owner of the Kamouraska shares and debentures sold to her in 1933 or the bulk of them. The result was that since her mother's death the Appellant has been entitled to the income of her mother's Kamouraska shares and debentures.

The Appellant's father died before the passing of the Finance Act, 1936, but nevertheless his estate became liable to Surtax under Section 18 of that Statute for the last year of his life. The Section is a long one and I shall treat myself here as having read in full Sub-sections (1) and (2) of it. The Appellant's father for the last year of his life and the Appellant's mother during her lifetime were admittedly charged to tax under Section 18 (1) as having acquired rights by means of a transfer of assets within the mischief of the Section.

On her mother's death the Appellant became entitled to the income from both sources but it never occurred to her or to the Crown apparently that she came within the mischief of the Section until after the decision in the House of Lords in *Congreve v. Commissioners of Inland Revenue*⁽¹⁾ in the year 1948. This case decided in circumstances very different from the present that a person may acquire rights "by means of" a transfer within the meaning of the Section although the transfer was not made by himself or his agent or anyone whom he can influence to make it. It is argued by the Crown therefore that the Appellant has acquired rights by means of transfers made by each of her parents; and as those rights admittedly confer on her the power to enjoy the income or part of the income of Kamouraska the Crown maintains that she can properly be charged as being entitled to the appropriate portions of the income of that company. This contention has been upheld by the Commissioners. Having regard to the decision in the House of Lords to which I have referred it is not open to the Appellant to argue that she may not be liable by reason of the transfers made by her parents. Moreover she does not deny that the settlement made by her father was an associated operation within the meaning of the Section. The only point is whether she can be said to have acquired rights "by means of" the sale and the settlement. The Appellant argues that these are not the only events but that to them must be added the death of her father without revoking the settlement and the death of her mother and that these events are not associated operations. Death, as we know, is an awfully big adventure, but even the Crown admits that it is not an associated operation. The Crown however contends that the two deaths are merely events which happened bringing the interest into possession and that it was not by means of them that the Appellant acquired the rights. In my judgment this is right. The Appellant acquired her rights in the assets in question immediately the settlement of 1934 was made. It is true that she did not enjoy them in possession till the death of the survivor of her parents and that during her father's life she might have lost them by the exercise of his power of revocation, but these were not means by which she acquired the rights. Indeed the Section seems to go further, speaking as it does of rights to enjoy "whether forthwith or in the future." What these words mean I have been unable to understand, but the Sub-section in my judgment avails to catch the Appellant's interest under her father's disposition.

As to the mother's securities the position seems to me quite different. The settlement she made was no doubt an associated operation but as that was revoked it is out of the picture altogether. The only means by which

(1) 30 T.C. 163.

(Harman, J.)

the Appellant acquired rights to her mother's securities was by her mother's will. Now no doubt the will may be an associated operation having regard to the definition in Sub-section (2), but it will be observed that to be effective the associated operation must be

"an operation of any kind effected by any person in relation to any of the assets transferred".

Now can this will be said to have been made "in relation to any of the assets transferred"? I think not. If it had contained a specific bequest of these securities that would no doubt have been in relation to them, but a mere general bequest does not seem to me properly to be described as made "in relation to" any assets that happen to fall within it because they belong to the testator at his death. If the Crown were right a will made before the date of the original transfer would needs be classed as an associated operation, which seems to me to be absurd. In my judgment therefore so far as the enjoyment by the Appellant of these securities is derived through her mother's will she is not taxable on the income of them by virtue of the provisions of Section 18 of the 1936 Act.

I therefore dismiss the appeal so far as the property emanating from the father is concerned and allow it so far as the mother's securities are concerned.

Now, Mr. Stamp, what ought I to do as a result of that?

Mr. J. H. Stamp.—Costs on neither side, my Lord, because each side has half won and half lost.

Harman, J.—No costs, in other words.

Mr. Stamp.—I should have thought that that would be right.

Harman, J.—Yes. It will be simple to frame a declaration to distinguish the two, will it?

Mr. Stamp.—There will be no difficulty about that. Will it go back to the Special Commissioners to assess the amount?

Harman, J.—Yes, perhaps that will be right; very good.

Both parties having appealed against the above decision, the case came before the Court of Appeal (Sir Raymond Evershed, M.R., and Jenkins and Birkett, L.JJ.), on 17th and 18th November, 1954, when judgment was given in favour of the Crown, with costs.

Mr. R. E. Borneman, Q.C., and Mr. Roderick Watson appeared as Counsel for the taxpayer, and Mr. John Pennycuik, Q.C., Sir Reginald Hills and Mr. J. H. Stamp for the Crown.

Sir Raymond Evershed, M.R.—I will ask Jenkins, L.J., to deliver the first judgment.

Jenkins, L.J.—These are an appeal by the Crown and a cross-appeal by Mrs. Elsie Bambridge from a judgment of Harman, J., dated 16th June, 1954, allowing in part an appeal by Mrs. Bambridge from a decision of the Special Commissioners to the effect that she was liable to Income Tax and Surtax on the income of Kamouraska Investments, Ltd., a company incorporated in

(Jenkins, L.J.)

Prince Edward Island in the Dominion of Canada, under the provisions of Section 18 of the Finance Act, 1936.

It will be convenient if I next refer to the provisions of that Section, so far as they are relevant for the purposes of these appeals. Section 18 begins with this preamble:

"For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue of or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows",

and proceeds:—

"(1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts".

Then by Sub-section (1B)⁽¹⁾:

"The last two foregoing subsections shall not apply if the individual shows in writing or otherwise to the satisfaction of the Special Commissioners either—
(a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected";

sub-paragraph (b) of the same Sub-section adds an alternative which is not of any materiality here. Then by Sub-section (2):

"For the purposes of this section an associated operation means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets."

The circumstances in which these claims for Income Tax and Surtax were raised against Mrs. Bambridge were briefly these. On 14th December, 1933, the parents of Mrs. Bambridge, Mr. and Mrs. Rudyard Kipling, made transfers of assets to Kamouraska Investments, Ltd. They had already in the year 1915 transferred certain investments to another Canadian company, but that company was later put into liquidation and all its assets were acquired by Kamouraska Investments, Ltd. It is agreed, for the purposes of the present case, that the matter can be regarded as if all the assets acquired by Kamouraska Investments, Ltd., had been directly transferred to it by Mr. and Mrs. Kipling on 14th December, 1933.

On 12th January, 1934, Mr. Kipling settled the shares and debentures in Kamouraska Investments, Ltd., which he had received as consideration for the assets transferred by him upon trusts whereunder, so far as material, Mr. Kipling received a first life interest with remainder to Mrs. Kipling for life, with remainder to Mrs. Bambridge for life. That settlement contained a power of revocation reserved to Mr. Kipling which was never, in fact, exercised.

On the same date Mrs. Kipling made a settlement in similar terms of the shares and debentures in Kamouraska Investments, Ltd., which she had received as consideration for the assets transferred by her to that company.

(¹) Inserted by the Finance Act, 1938, Section 28.

(Jenkins, L.J.)

The trusts of that settlement closely resembled those of the settlement made by Mr. Kipling, the only difference being that the first life interest was taken by Mrs. Kipling with remainder to Mr. Kipling for life, followed by a remainder to Mrs. Bambridge for life, as in Mr. Kipling's settlement. There was also in this settlement a similar power of revocation exercisable by Mrs. Kipling which, as will appear in a moment, was in fact exercised.

On 18th January, 1936, Mr. Kipling died; on 19th December, 1939, Mrs. Kipling died, and on the death of both her parents Mrs. Bambridge became entitled in possession to the life interest given to her under Mr. Kipling's settlement. Mrs. Kipling, after Mr. Kipling's death, wholly revoked the trusts of her settlement, that revocation being dated 16th June, 1937. On 6th December, 1938, Mrs. Kipling made a will containing a residuary gift under which her residuary estate was to be held on trusts which included a first life interest to Mrs. Bambridge. That will contained no specific reference at all to Mrs. Kipling's shares and debentures in Kamouraska Investments, Ltd.

Mrs. Kipling, as I have said, died on 19th December, 1939. She never revoked or altered her will, which was duly proved on 19th February, 1940. As a result Mrs. Bambridge became entitled to the whole, or virtually the whole, of the share and loan capital of Kamouraska Investments, Ltd., and in those circumstances it was claimed by the Crown that, under the provisions of Section 18 of the Act of 1936 to which I have referred, she had acquired the rights by virtue of which she had power to enjoy the income of Kamouraska Investments, Ltd., with the result that the whole of the income should be treated as hers for the purposes of Income Tax and Surtax.

The Special Commissioners upheld the assessments. On appeal Harman, J., held that the assessments should stand so far as they related to the proportion of the income of Kamouraska Investments, Ltd., attributable to the shares and debentures comprised in Mr. Kipling's settlement; but he held that the assessments should be discharged so far as they related to the proportion of the income of Kamouraska Investments, Ltd., attributable to the shares and debentures taken by Mrs. Bambridge under her mother's will. The learned Judge's reason for that view was that, in as much as the will did not dispose specifically of Mrs. Kipling's shares and debentures, the making of it could not be said to be an operation effected "in relation to" any relevant assets within the meaning of Sub-section (2) of Section 18, and therefore could not be regarded as an "associated operation" for the purposes of the Section.

As regards Mrs. Bambridge's interest under Mr. Kipling's settlement the learned Judge held that the settlement was an associated operation within the meaning of the Section, and consequently that the claim to tax was made out as regards the corresponding part of the income of the Canadian company.

From the decision of Harman, J., both parties now appeal to this Court, the Crown contending that the Special Commissioners' decision should be restored, and Mrs. Bambridge contending that the assessments should be wholly discharged, as neither Mr. Kipling's settlement nor Mrs. Kipling's will could rightly be regarded as associated operations within the meaning of the Section.

The Case was stated by the Special Commissioners with great amplitude and elaboration but, in truth, the matters debated before us fall within a narrow compass. There is no doubt that Mr. and Mrs. Kipling did, within the meaning of Section 18 of the 1936 Act, make transfers of assets by

(Jenkins, L.J.)

virtue or in consequence whereof, either alone or in conjunction with associated operations, income became payable to a person resident or domiciled outside the United Kingdom, namely, Kamouraska Investments, Ltd.

There is further no doubt that Mrs. Bambridge did, within the meaning of the Section, acquire rights by virtue of which she had power to enjoy the income of Kamouraska Investments, Ltd., partly under the provisions of her father's settlement and partly under the provisions of her mother's will. But it is contended on the part of Mrs. Bambridge that she did not acquire those rights by means of the transfers, either alone or in conjunction with associated operations, within the meaning of the Section.

The argument for the Crown as regards Mrs. Bambridge's interest under her father's settlement is to the effect that she acquired the rights in question by means of the transfer to Kamouraska Investments, Ltd., made by her father, in conjunction with an associated operation in the shape of his settlement of his shares and debentures in Kamouraska Investments, Ltd.; and this argument was accepted by the learned Judge.

The argument for Mrs. Bambridge as regards this same interest is to the effect that she acquired the rights in question not by means simply of the transfer and the settlement, but by means of those two transactions together with the deaths of her father and mother. It is said that such deaths constituted essential links in Mrs. Bambridge's title to the rights in question, which links were not associated operations within the meaning of the Section; and that, in order to bring the rights in question within the mischief of the Section, it must be shown that Mrs. Bambridge acquired them strictly in the way postulated by the Section, that is to say, by means either of the transfer alone or of the transfer in conjunction with associated operations, and by no other alternative or ancillary means.

I agree with the submission that the deaths of Mr. and Mrs. Kipling were not associated operations within the meaning of the Section, but I cannot accept the conclusion sought to be adduced from that submission. In my opinion Mrs. Bambridge did acquire the rights in question by means of the transfer and settlement within the meaning of the Section, and the deaths of Mr. and Mrs. Kipling were merely events upon the happening of which the rights acquired by Mrs. Bambridge by means of the transfer and settlement, or, in other words, her interest under the settlement, fell into possession by virtue of the terms and provisions of the settlement itself.

It would, to my mind, be an abuse of language to say that Mrs. Bambridge acquired her interest under the settlement by means of the deaths of her father and mother. An interest in remainder, or, for that matter, a contingent interest, given by settlement is given by means of the settlement and not by means of the happening of the event which brings the interest into possession or, as the case may be, fulfils the contingency. The prior interest or, as the case may be, the contingency, is in the nature of a qualification upon the interest given, and forms no part of the means or instrumentality whereby the interest is given by the settlor or acquired by the beneficiary, which consist in the settlement and nothing but the settlement.

The point is not one which can be usefully further elaborated, and on this part of the case I am content to accept the learned Judge's conclusion and the reasons upon which it is based.

As regards Mrs. Bambridge's interest under her mother's will, the argument on her side was to the effect that, while the making of the will

(Jenkins, L.J.)

might have been an associated operation if it had referred specifically to Mrs. Kipling's shares and debentures in Kamouraska Investments, Ltd., the mere making of the will effected nothing, as it was also necessary, before Mrs. Bambridge could acquire any interest under it, that Mrs. Kipling should die in the lifetime of Mrs. Bambridge, leaving her will unrevoked; and it was further argued that as the will only disposed of Mrs. Kipling's shares and debentures in Kamouraska Investments, Ltd., by means of the general residuary gift contained in it, the making of the will was not an operation "in relation to the assets transferred" within the meaning of Sub-section (2) of Section 18. The learned Judge rejected the former branch of this argument but accepted the latter. In my opinion he should have rejected both.

I agree with the submission made on Mrs. Bambridge's side that the compound event in which alone the provision made for Mrs. Bambridge in the residuary gift could become effective, namely, the death of Mrs. Kipling in Mrs. Bambridge's lifetime leaving the will unrevoked, was not an associated operation within the meaning of the Section; but I think the happening of this compound event amounted to no more than the fulfilment of the conditions essential to the efficacy of any testamentary disposition. In the events which happened, the testamentary disposition in this case did become effective, and accordingly Mrs. Bambridge acquired the relevant interest under and by virtue of, or in other words by means of, her mother's will. Certain events might have happened which would have prevented her from so taking, but none of them did happen. One event had to happen before she could take anything under the will, namely, the death of her mother, the testatrix, and that event did, of course, happen. But it does not follow that she acquired her interest otherwise than by means of the will, which, by its very nature, could only take effect on the death of the testatrix. I would say that Mrs. Bambridge took by means of the will upon the happening of the event in which alone it could take effect as a will.

As to the second branch of the argument on this part of the case, which the learned Judge accepted, namely, the argument to the effect that the residuary gift, although it undoubtedly disposed of the shares and debentures in question, did not suffice to make the will an operation "in relation to" such shares and debentures, I confess I find myself wholly unable to follow it. I fail to see how a will which disposes of property can reasonably be said not to have been made in relation to the property of which it disposes; nor can I see any justification for distinguishing between property specifically disposed of and property comprised in a residuary gift, and holding that the will relates to the former but not to the latter. It seems to me abundantly plain that where a testator has made a will containing a residuary gift he has made a will in relation to every item of property comprised in that gift, just as much as he would have done if he had disposed specifically of each item comprised in the residuary gift.

I am not impressed by the argument, by way of *reductio ad absurdum*, which the learned Judge seems to have found conclusive, to the effect that if a will containing a residuary gift under which relevant assets passed amounted to an associated operation, any will containing a residuary gift would amount to an associated operation, even though made before the date of any transfer, provided only that a transfer was made between the date of the will and the date of the testator's death, and that on the happening of the latter event relevant assets passed under the residuary gift. It is not necessary for the purposes of the present case to decide whether this would be so or not, but if the supposition is well founded I cannot see anything manifestly absurd in it. If a testator makes a will containing a general

(Jenkins, L.J.)

residuary bequest, then embarks on what I may call a Section 18 transaction, as a result of which he receives shares and debentures in a foreign company, and leaves his will unrevoked, he must be taken to know that if he retains the shares and debentures until his death they will pass under the residuary gift, and must be taken to intend that result, just as much as if, after acquiring the shares and debentures, he had made a fresh will in identical terms.

Mr. Borneman and Mr. Watson for Mrs. Bambridge urged upon us as a reason for rejecting the Crown's arguments the extension of liability to an indefinite succession of persons which acceptance of those arguments would entail. The answer to this submission *in terrorem*—if I may so describe it—seems to me to be that once it is recognised, as in view of the decision of the House of Lords in the *Congreve* case, 30 T.C. 163, it must be recognised, that liability under the Section extends to persons who are in no way parties to the offending transfer, the result must be that the liability attaches to every person who, for the time being, has power to enjoy the income in question, and has acquired the right giving rise to such power by means which bring him within the mischief of the Section, and continues so long as there is any person who fulfils these conditions.

A further point was taken that if the making of a will was to be considered as an associated operation, a capricious result would ensue inasmuch as a case in which shares or debentures of a foreign company devolved under a will would, or might, fix the legatee with liability, whereas a devolution of similar property on an intestacy could have no such result. I agree that it is indeed difficult to see how mere inactivity resulting in intestate succession could be held to amount to an associated operation, and it may well be, therefore, that in such a case the person taking under the intestacy would escape liability under the Section. But the mere fact that such a case may be outside the net is no ground for excluding from the net cases which appear to fall fairly within the terms of the Section.

Paying the best attention I can to its terms, I am of opinion that Mrs. Bambridge acquired the rights which gave her power to enjoy the income of Kamouraska Investments, Ltd., wholly by means of transfers and associated operations within the meaning of Section 18. For these reasons I would allow the appeal of the Crown and dismiss the cross-appeal of Mrs. Bambridge, and direct that the assessments should be restored.

Sir Raymond Evershed, M.R.—I am of the same opinion.

Upon the cross-appeal our view is coincident with that of Harman, J., and the Special Commissioners, and I say but little upon it. I can appreciate the point of view which underlay Mr. Borneman's argument, that until the House of Lords in the *Congreve* case had pointed out the true scope of the language used by Parliament in Section 18 of the Finance Act, 1936, it was not, perhaps, generally realised how far-reaching that Section might be. Mr. Borneman therefore sought, on *a priori* grounds, to give a construction to the Act which would exclude its operation upon a person like the Appellant, not herself a transferor or a party to the transfers or any of the operations associated therewith, but a daughter of the transferors, taking as a beneficiary under their dispositions, testamentary or *inter vivos*, as the case might be. But having regard to the decision of *Congreve*, and upon a fair construction of the language of the Section, it seems to me that the limitation Mr. Borneman seeks to put upon the Section is not open to him.

(Sir Raymond Evershed, M.R.)

Upon the appeal we have taken a different view from that which commended itself to Harman, J. I shall not, I hope, be thought disrespectful to him if I content myself again with but very few observations on this part of the case, for, in truth, the argument is, as my brother has observed, within a narrow compass and is not capable of long reasoning or, indeed, of much analysis. In the language of the learned Judge⁽¹⁾:

" . . . can this will be said to have been made 'in relation to any of the assets transferred'? . . . If it had contained a specific bequest of these securities that would no doubt have been in relation to them, but a mere general bequest does not seem to me properly to be described as made 'in relation to' any assets that happen to fall within it because they belong to the testator at his death."

I confess that upon my first approach to the case I was inclined to be sympathetic to that view; but I have since been persuaded by the argument that it cannot be sustained.

Mr. Stamp posed this question: To what property does a will relate? The answer must, I think, be as Mr. Stamp submitted: To all the property that is comprised in it when it takes effect, whether the property is the subject of a specific devise or bequest, or is comprised within a residuary gift. In the light of that question and answer it seems to me that this will was made "in relation to" the assets here in question. For that reason and for those which my brother has already expressed I think that the appeal should be allowed. The cross-appeal, as I have already indicated, will be dismissed.

Birkett, L.J.—I agree with the two judgments which have just been delivered, and do not desire to add a judgment of my own.

Mr. John Pennycuik.—Your Lordship will affirm the determination of the Commissioners, and I would ask for the costs here and below?

Sir Raymond Evershed, M.R.—Mr. Borneman, unless there is something special about this the costs should follow the event, should they not?

Mr. Roy E. Borneman.—I cannot resist my friend's application. My Lord, might I ask your Lordship for leave for Mrs. Bambridge to appeal to the House of Lords if she should be so advised? The amount at stake on these two assessments before your Lordship is, of course, very substantial, and it goes on year after year. The assessments before your Lordships are for 1948-49 and 1949-50.

Sir Raymond Evershed, M.R.—Two years, yes.

Mr. Borneman.—My Lord, there have been four years since then and there are the years going on. I thought perhaps your Lordship might feel that Section 18 was not clear, and that in these circumstances she should be given the opportunity.

Sir Raymond Evershed, M.R.—Mr. Pennycuik, does the Crown take any particular view about this?

Mr. Pennycuik.—My Lord, I think it is not the practice of the Crown to oppose these applications.

Sir Raymond Evershed, M.R.—Yes, very well then.

Mr. Borneman.—If your Lordship pleases.

(¹) See page 323 *ante*.

The taxpayer having appealed against the above decision, the case came before the House of Lords (Lords Morton of Henryton, Tucker, Cohen and MacDermott) on 7th and 8th November, 1955, when judgment was reserved. On 8th December, 1955, judgment was given unanimously in favour of the Crown, with costs.

Sir Andrew Clark, Q.C., Mr. Roy Borneman, Q.C., and Mr. Roderick Watson appeared as Counsel for the taxpayer, and Mr. John Pennycuik, Q.C., Sir Reginald Hills and Mr. E. B. Stamp for the Crown.

Lord Morton of Henryton.—My Lords, I am entirely in agreement with the speech which is about to be delivered by my noble and learned friend, Lord Cohen, and I do not desire to add anything to it.

Lord Tucker.—My Lords, I have had the advantage of reading in print the speech which is about to be delivered by my noble and learned friend, Lord Cohen. I agree with it and have nothing which I wish to add.

Lord Cohen.—My Lords, the Appellant, who is the daughter of the late Mr. and Mrs. Rudyard Kipling, appeals against assessments to Income Tax and Surtax made on her in respect of the Income Tax years 1948-49 and 1949-50, pursuant to Section 18 of the Finance Act, 1936, as amended by Section 28 of the Finance Act, 1938. That Section, the sidenote of which is

“Provisions for preventing avoidance of income tax by transactions resulting in the transfer of income to persons abroad”,

is, so far as material to the question at issue on this appeal, in the following terms:—

“18. For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows:—
(1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts: . . .
(2) For the purposes of this section an associated operation means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets.”

Sub-section (3) lays down rules for the determination of the question whether an individual has, for the purposes of the Section, power to enjoy income of a person resident or domiciled out of the United Kingdom, but, as the Appellant admits that she has that power, it is unnecessary to set out the terms of that Sub-section, or of Sub-section (4), which contains further directions as to how that question is to be determined.

The facts which gave rise to the assessments in the present case can be shortly stated as follows. On 14th December, 1933, Mr. and Mrs. Kipling respectively sold to a Canadian company called Kamouraska Investments, Ltd. (hereinafter called “Kamouraska”), all their Canadian and United States investments, receiving as consideration therefor capital stock and

(Lord Cohen.)

debentures of Kamouraska. On 12th January, 1934, Mr. Kipling settled his shares and debentures in Kamouraska upon trusts whereunder, so far as material, Mr. Kipling received a first life interest with remainder to Mrs. Kipling for life with remainder to the Appellant for life. The settlement contained a power of revocation reserved to Mr. Kipling which was never exercised. On the same date Mrs. Kipling made a similar settlement of her holding of shares and debentures in Kamouraska, but it is unnecessary to set out the effect of that settlement since it was revoked by Mrs. Kipling on 16th June, 1937. Mr. Kipling died on 18th January, 1936. On 6th December, 1938, Mrs. Kipling made a will containing a residuary gift under which her residuary estate was to be held on trusts which included a first life interest to the Appellant. The said will contained no specific reference to Mrs. Kipling's shares and debentures in Kamouraska. She died on 19th December, 1939, without having revoked or altered her will, which was duly proved in the Principal Probate Registry on 19th February, 1940.

No claim under Section 18 was made by the Inland Revenue authorities in respect of any year prior to the financial year 1948-49, but in respect of that year the assessment which I have mentioned was made. This was no doubt the result of the decision of this House in *Congreve v. Commissioners of Inland Revenue*, 30 T.C. 163, which decided that Section 18 applied notwithstanding that the taxpayer whom it was sought to charge was not a party to the transfer. The Appellant appealed against the assessments for this and the next following year, and on 30th December, 1953, the Commissioners dismissed her appeal, but at the request of the Appellant stated a Case for the opinion of the High Court pursuant to the Income Tax Act, 1952. The matter came before Harman, J., on 16th June, 1954. He dismissed the appeal so far as it related to the securities formerly the property of Mr. Kipling, but allowed it so far as Mrs. Kipling's securities were concerned because there was no specific reference to the securities in the will and, in his view, therefore, the will could not be said to have been made *in relation to* any of the assets transferred. From this decision so far as it affected the property derived by the Appellant from her mother the Respondents appealed, and the Appellant lodged a cross-appeal so far as the property derived by her from her father was concerned. The matter came before the Court of Appeal on 18th November, 1954. That Court allowed the Respondents' appeal and dismissed the Appellant's appeal. It is from this decision that the Appellant now appeals.

It is common ground between the parties that the sales to Kamouraska by Mr. and Mrs. Kipling on 14th December, 1933, were transfers to which Section 18 of the Finance Act, 1936, applied. It is also common ground that the settlements of 12th January, 1934, by Mr. and Mrs. Kipling were "associated operations" within the meaning of Section 18. But the Appellant alleges that to make her liable under Section 18 the Respondents must establish that her power to enjoy the income of Kamouraska was wholly the result of the transfer either alone or in conjunction with associated operations. She claims that the Respondents have failed to establish that this was the position in her case.

So far as Mr. Kipling's holdings in Kamouraska are concerned, she says that her power to enjoy the income of Kamouraska was not wholly derived from the transfer of 14th December, 1933, and the settlement of 12th January, 1934, but was attributable also to the death of Mr. Kipling in her lifetime without having revoked the settlement. It being admitted that Mr. Kipling's death could not be said to be an associated operation, she says that it follows

(Lord Cohen.)

that her power to receive the income was not derived wholly from the transfer and associated operation.

As regards Mrs. Kipling's holdings in Kamouraska, she says that her title depends on the will of Mrs. Kipling and that the making of that will is not an associated operation within the meaning of Section 18, (a) because her power to enjoy the income was dependent on Mrs. Kipling dying in her lifetime without having revoked her will, and (b) because the will contained no specific reference to Mrs. Kipling's holdings in Kamouraska, and, accordingly, the will could not be said to be, in the words of Sub-section (2), "effected . . . in relation to any of the assets transferred". The Appellant adds that, even if your Lordships are against her on this point, still she should succeed in her appeal because the Appellant's power to enjoy the income of Kamouraska was derived not only from the will but also from the probate thereof.

My Lords, the leading judgment in the Court of Appeal was given by Jenkins, L.J. On the points with which he deals I find myself in such complete agreement with his reasons for rejecting the Appellant's submissions that I am content to adopt his reasoning as my own and to say only that it seems to me as clear as it did to him that, (1),

"An interest in remainder, or, for that matter, a contingent interest, given by settlement is given by means of the settlement and not by means of the happening of the event which brings the interest into possession or, as the case may be, fulfils the contingency"⁽¹⁾;

and (2),

"I fail to see how a will which disposes of property can reasonably be said not to have been made in relation to the property of which it disposes; nor can I see any justification for distinguishing between property specifically disposed of and property comprised in a residuary gift, and holding that the will relates to the former but not to the latter."⁽²⁾

The first of these citations is sufficient to dispose of the Appellant's argument so far as her interest under her father's settlement is concerned. The combined effect of the two citations would suffice to dispose of her arguments as regards her interest under her mother's will but for two points apparently not taken in the Court of Appeal to which I must refer shortly, (1) that the will was not and could not be an associated operation because it could be revoked, and even while unrevoked had no operative effect during the lifetime of the testatrix, and (2) that the Appellant's power to enjoy the income of Kamouraska was derived not only from the will but also from the probate thereof.

As regards the first point, I am unable to accept the view that pending the death of a testator a will is not an operation of any kind effected by a person in relation to any of the assets comprised therein. No further action by the testator is required to make it effective after his death in relation to the assets comprised in his estate, and the fact that it is impossible in his lifetime to be sure what assets will be affected by its provisions seems to me immaterial. On his death the assets affected are identified and the will is an operation effected by the testator in relation to the assets so ascertained: see in this connection Section 24 of the Wills Act, 1837. If, as in this case, those assets included assets transferred or assets representing assets transferred, it necessarily follows that the will is an associated operation within the meaning of Section 18 (2).

⁽¹⁾ See page 326 *ante*.

⁽²⁾ See page 327 *ante*.

(Lord Cohen.)

I turn now to the second point. Sir Andrew Clark said that probate is not an associated operation because it is done by the High Court and not by any person and under the Section an operation cannot be an associated operation unless it is effected by some person. I do not think this argument helps him since, as Mr. Pennycuick said, the probate was no part of the Appellant's title to enjoy the income of Kamouraska. He called our attention to a passage in Williams on Executors, 13th edn., vol. I, page 57, and to a decision of the Privy Council in *Meyappa Chetty v. Supramanian Chetty*, [1916] 1 A.C. 603, at page 608, where the judgment was given by Lord Parker of Waddington, which clearly established that an executor derives his title and authority from the will of a testator and not from any grant of probate. He also referred us to the decision of this House in *Cooper v. Cooper*, L.R. 7 H.L. 53, which shows that the interest of beneficiaries under a will and the interest of next-of-kin in an intestacy both vest at death subject only to the payment of the debts and the administration expenses of the testator or intestate. We are not concerned here with the title of the executor, but the case last mentioned, in my opinion, establishes that the Appellant's power to enjoy the income depends on the will of the testatrix and not on the probate of that will. She might have difficulty without production of probate in proving her right if it was disputed, but, as was said in the passage I have cited from Williams on Executors, though an executor cannot rely on his title in any Court without production of the probate, probate is merely operative as the authenticated evidence of the executor's title. So, too, if a beneficiary has to prove her title, it seems to me that probate is merely a question of evidence and not of title.

My Lords, for the reasons given by Jenkins, L.J., and for those I have added above on the points which were not taken in the Court of Appeal, I would dismiss this appeal with costs.

I am asked by the noble and learned Lord, Lord MacDermott, to say that he agrees with the conclusion I have reached and the reasons I have given therefor.

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:—Field, Roscoe & Co.; Solicitor of Inland Revenue.]