
COURT OF APPEAL—5TH, 6TH AND 27TH MARCH, 1962

HOUSE OF LORDS—6TH, 7TH AND 8TH MAY, AND 20TH JUNE, 1963

Jamieson

v.

Commissioners of Inland Revenue⁽¹⁾⁽²⁾

Wills

v.

Commissioners of Inland Revenue (1)

Surtax—Settlement—Settlement on settlor's infant children—Power to appoint fund absolutely to spouses of grandchildren—Whether settlement "revocable"—Income Tax Act, 1952 (15 & 16 Geo. VI & 1 Eliz. II, c. 10), Sections 397 to 399.

The Appellant in the first case settled a fund in trust for all or such one or more of his children and remoter issue and their wives, husbands, widowers and widows, in such shares, and either absolutely or with such trusts, as the trustees should appoint. At the material times, in default of such appointment, the fund was held in trust for the Appellant's three children, who were infants and unmarried, at 25. All the income was accumulated.

Assessments to Surtax for the years 1955–56 to 1957–58 were made on the Appellant in respect of the income arising under the settlement on the footing that it was a revocable settlement for the purposes of Sections 397 to 399, Income Tax Act, 1952 (as in force for those years). On appeal the Appellant contended, inter alia, (1) that any exercise of the power of appointment would constitute the effectuation of the settlement and not the determination thereof within Section 399(b); alternatively, (2) that, having regard to the facts at the material times, only the children of the settlor could benefit from such determination within proviso (ii) to Section 399. For the Crown it was contended that the terms of the settlement provided for the determination thereof by appointment of the fund absolutely, and in such manner that the determination could benefit persons not mentioned in proviso (ii), viz., spouses of the settlor's remoter issue. The Special Commissioners upheld the Crown's contentions.

(1) Reported (C.A.) [1962] Ch. 748; [1962] 2 W.L.R. 1075; 106 S.J. 283; [1962] 2 All E.R. 321; 233 L.T. Jo. 260.

(2) Reported (H.L.) [1963] 3 W.L.R. 156; 107 S.J. 570; [1963] 2 All E.R. 1030; 234 L.T. Jo. 431.

The facts and contentions in the second case were similar to those in the first case, except that the settled fund could be appointed to existing beneficiaries outside proviso (ii) to Section 399, and the Special Commissioners' decision was the same.

Held, that the Commissioners' decision was correct.

CASES

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

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 High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 13th April, 1960, Major David A. Jamieson, V.C. (hereinafter called "the Appellant") appealed against the following assessments to Surtax which had been made upon him:—for the year 1955–56, an additional assessment in the sum of £1,519; for the year 1956–57, an assessment in the sum of £5,100; for the year 1957–58, an assessment in the sum of £6,300.

2. The sole question in dispute was whether certain income (which is more particularly described in paragraph 4(4) of this Case) should be treated as the income of the Appellant for the years in question by virtue of Sections 397, 398 and 399 of the Income Tax Act, 1952. It was common ground between the parties:

- (a) that if the Appellant's contentions succeeded, the 1955–56 assessment should be discharged and the assessments for 1956–57 and 1957–58 should be reduced to £2,541 and £3,968 respectively; and
- (b) that if the Crown's contentions should succeed, the 1955–56 assessment should be confirmed and the assessments for 1956–57 and 1957–58 should be reduced to £4,234 and £5,664 respectively.

3. There is annexed thereto, marked "A" and forming part of this Case⁽¹⁾, a copy of a deed of settlement (hereinafter called "the settlement") made on 9th August, 1950, between the Appellant (who is therein called the settlor) and a body of trustees.

Clause 3 of the settlement provides that the trustees shall hold the trust fund therein described on the following trusts:

"(1) In trust for all or such one or more exclusively of the others or other of the following class of persons (that is to say) the issue (including children hereafter to be born and issue more remote than children) of the Settlor and the wives husbands widows or widowers (whether or not remarried) of such issue in such shares if more than one and either absolutely or for such successive or other interests or with such trusts and provisions for their respective benefit at the discretion of the Trustees or any other persons and generally in such manner for the benefit of the said class or any of them as the Trustees shall from time to time or at any time by any deed or deeds revocable or irrevocable (with due regard to the rule against perpetuities) appoint Provided that no such appointment may be made or revoked whether wholly or in part after

(¹) Not included in the present print.

the perpetuity date and Provided Further that the Trustees may at any time or times by deed wholly or partially release or restrict the foregoing power of appointment

(2) In default of and until and subject to any such appointment as aforesaid in trust for all or any the children or child of the Settlor born before the Twentieth day of February One thousand nine hundred and seventy-five who shall either attain the age of twenty-five years or being a daughter shall marry under that age or be living on the perpetuity date and attain the age of twenty-one years or being a daughter shall marry under that age and if more than one in equal shares

(3) The foregoing trust in default of appointment shall carry the intermediate income so long as any member of the said class of children shall be in existence but not otherwise and the statutory powers of maintenance and advancement shall apply”.

4. (1) It was not disputed that the Appellant was the “settlor” in relation to the settlement for the purposes of Sections 397, 398 and 399 of the Income Tax Act, 1952.

(2) The trustees have not exercised the power of appointment given to them by clause 3(1) of the settlement, nor have they released or restricted such power.

(3) At all material times there have been three children only of the Appellant, who were born on 20th February, 1950, 28th May, 1951, and 4th July, 1956, respectively. There are no issue of the Appellant more remote than children.

(4) The income arising under the settlement and forming the subject matter of this appeal is : for the year 1955-56, £1,519 ; for the year 1956-57, £1,693 10s. ; for the year 1957-58, £1,696.

(5) At all material times the trustees have accumulated all the net income of the trust fund under, or by virtue of, clause 3(2) and (3) of the settlement and Section 31 of the Trustee Act, 1925.

5. It was contended for the Commissioners of Inland Revenue :

(1) that clause 3(1) of the settlement provided for “the determination of the settlement by the act . . . of any person” (i.e., the trustees) within Section 399(b) of the Income Tax Act, 1952 ;

(2) that clause 3(1) of the settlement provided for the determination of the settlement in such manner that the determination could benefit persons other than those described in proviso (ii) to the said Section 399, inasmuch as the trustees could make an appointment in favour of the wives, husbands, widows or widowers of issue of the settlor more remote than children ;

(3) that, by virtue of the said Section 399, the settlement could not be deemed to be irrevocable ;

(4) that the settlement was not an irrevocable settlement for the purpose of Section 398 of the Income Tax Act, 1952 ;

(5) that the provisions of Section 398(1) had effect in relation to the income of the trust fund ;

(6) that the said income must be treated as the income of the Appellant by virtue of Section 397 of the Income Tax Act, 1952, and that the amounts of the assessments under appeal should be determined accordingly.

6. It was contended on behalf of the Appellant :

(1) that the settlement was by its terms irrevocable, and accordingly the prohibition in Section 399 against deeming certain settlements to be irrevocable had no application ;

(2) in the alternative, that clause 3(1) did not provide for the determination of the settlement by the act of any person, in that any exercise of the power of appointment contained therein would constitute the effectuation of the settlement, and the condition expressed in Section 399(b) should not, in the context, be construed as satisfied by the existence of such a power ;

(3) as a further alternative, that if clause 3(1) should be held to provide for the determination of the settlement by virtue of section 399(b), then, having regard to the facts which existed at the material times, the only beneficiaries who could have benefited within the meaning of proviso (ii) were the children of the settlor ;

(4) that the settlement was an irrevocable settlement to which Section 398(2)(a) applied and Section 398(1) did not apply ;

(5) that Section 397 did not apply to the income in question ;

(6) that the amounts of the assessments should be adjusted accordingly.

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

The central question in this appeal is whether the settlement was at the material times an irrevocable settlement to which Section 398(2)(a) of the Income Tax Act, 1952, applies. The contentions and arguments fell into three parts.

I. For the Crown it was contended that the settlement could not be deemed to be irrevocable in view of the provisions of Section 399. The Appellant's first contention was that, as the settlement contained no power of revocation, it was in truth irrevocable ; there was no question of "deeming" it to be irrevocable, and therefore Section 399 (which provides that certain settlements "shall not be deemed to be irrevocable") was irrelevant. It seems to us that this contention involves giving the word "deemed" a meaning equivalent to "pretended" or "treated as something other than what it is". We can find no justification for this. We note that in certain places in the Income Tax Act the word "deem" is used in contexts where it gives rise (for certain particular purposes) to fictions ; in other places where the word appears it is clearly used in its ordinary meaning of "consider" or "judge" (e.g., Section 6(2)). In the present context we have no doubt that this is its meaning. Reading this settlement (without Section 399 in front of us) we judge, consider or deem it to be irrevocable ; Section 399 prevents us from doing so if its terms provide for certain things.

II. It was contended for the Crown that the terms of the settlement provide for its determination by the act of the trustees, in that the trustees might, under clause 3(1), appoint the whole trust fund absolutely to one

or more of a class. For the Appellant it was contended that the existence of such power does not satisfy the condition expressed by the words

“if the terms thereof provide . . . for the determination of the settlement by the act . . . of any person”.

Although we have not found this question at all easy, we have come to the conclusion that the Crown's contention is right. We regard the word “determination” as ordinarily meaning a bringing or coming to an end; in the context of Section 399(b), in our opinion, it means “bringing to an end”. The settlement can terminate in one of two ways:

- (a) it can come to an end if beneficiaries obtain vested interests under clause 3(2); or
- (b) it can be brought to an end if the trustees make an absolute appointment of the whole fund under clause 3(1).

Accordingly, we hold that the settlement does (in clause 3(1)) provide for its determination by the act of the trustees.

III. The Appellant's third contention related to proviso (ii) to Section 399: it was contended that at the material time (i.e., “the time when the income is so dealt with” *vide* Section 398(2)) a determination of the Settlement by the act of the trustees would not benefit any person other than children of the settlor; there was no justification for making hypotheses about the future and envisaging an appointment to the spouse of the issue of one of the children. If this were wrong, it was said, the Section could have unfortunate and anomalous results, of which this very case afforded an example. We have some sympathy with this approach, but we think the language of the Sections prevents us adopting it. We have to inquire whether “at the time when the income is so dealt with” the settlement is irrevocable: for this purpose we must inquire whether the terms of the settlement provide (again, we think, “at the time when the income is so dealt with”) for its determination by the act of any person; having found that the terms do so provide, we must further inquire whether the settlement so provides (again “at the time when the income is so dealt with”) in such manner that the determination will not benefit any person other than a particular class. We think we must answer this in the negative: we cannot say that the determination will not benefit any other person because the determination, whenever effected, could benefit any member (even those today unborn) of the wider class described in clause 3(1). In this connexion we note that the class detailed in proviso (ii) to Section 399 includes “the wife, husband or issue of such a child”. “Such a child” refers back to Section 399(a). We think we should not construe the proviso in such a way as to exclude from the class the wife, husband or issue of the particular child under consideration for the purposes of Sections 397 and 398; that child, “at the time when the income is so dealt with”, is *ex hypothesi* an infant and unmarried.

For the above reasons we hold that the appeal fails.

We confirm the assessment for 1955-56; we reduce the assessment for 1956-57 to £4,234, and we reduce the assessment for 1957-58 to £5,664.

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

9. The question of law for the opinion of the Court is whether our decision is correct.

R. A. Furtado }
N. S. Spendlow } Commissioners for the
Special purposes of the
Income Tax Acts.

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

25th July, 1960.

(2) *Wills v. Commissioners of Inland Revenue*

The facts and contentions in this case were similar to those in the foregoing case, except that there were existing beneficiaries outside proviso (ii) to Section 399, Income Tax Act, 1952, in whose favour the settled fund could be appointed; the Special Commissioners' decision was the same as in the foregoing case.

The cases came before Plowman, J., in the Chancery Division on 12th and 13th July, 1961, when judgment was given in favour of the Crown, with costs.

Mr. F. Heyworth Talbot, Q.C., Mr. W. A. Bagnall, Q.C., and Mr. Philip Shelbourne appeared as Counsel for Major Jamieson; Mr. F. Heyworth Talbot, Q.C., and Mr. E. I. Goulding, Q.C., for the Hon. Victor Wills, and Sir Milner Holland, Q.C., Mr. E. B. Stamp and Mr. Alan Orr for the Crown.

Plowman, J.—I will deal with the *Jamieson* case first. Major Jamieson appealed to the Special Commissioners against certain assessments to Surtax for the years 1955-56, 1956-57 and 1957-58. The sole question for the Special Commissioners, and for me, is whether certain accumulated income arising under a settlement which I will mention in a moment falls to be treated as the income of the Appellant by virtue of the provisions of the Income Tax Act, 1952. The Special Commissioners held that it did, and Major Jamieson appeals.

The settlement in question was dated 9th August, 1950, and was made between Major Jamieson, of the one part, and the Southern Investment Trust, Ltd., of the other part. It recites that the settlor has one child—namely, Fiona Mary Jamieson—who was born on 20th February, 1950,

“and is desirous of making such Settlement as hereinafter appears for the benefit of his said child and future born children of the Settlor and otherwise as hereinafter mentioned”.

Then it recites that he paid to the trustees a certain sum of money. Then clause 1 is in these terms:

“In this Deed the expression ‘the perpetuity date’ means the date of expiration of a period of twenty-one years from the death of the survivor of the said Fiona Mary Jamieson and the Settlor’s wife”.

(Plowman, J.)

Then there is a provision for investment, and then clause 3 of the settlement provides :

“The Trustees shall stand possessed of the said sum of Ten thousand pounds and of the investments and property for the time being representing the same (hereinafter called ‘the Trust Fund’) and of the income thereof upon the following trusts:—(1) In trust for all or such one or more exclusively of the others or other of the following class of persons (that is to say) the issue (including children hereafter to be born and issue more remote than children) of the Settlor and the wives husbands widows or widowers (whether or not remarried) of such issue in such shares if more than one and either absolutely or for such successive or other interests or with such trusts and provisions for their respective benefit at the discretion of the Trustees or any other persons and generally in such manner for the benefit of the said class or any of them as the Trustees shall from time to time or at any time by any deed or deeds revocable or irrevocable (with due regard to the rule against perpetuities) appoint Provided that no such appointment may be made or revoked whether wholly or in part after the perpetuity date and Provided Further that the Trustees may at any time or times by deed wholly or partially release or restrict the foregoing power of appointment”.

Then there is a trust in default of appointment, and various other provisions in the settlement to which I need not refer.

The only relevant facts of the case, I think, are these : first, the trustees have not exercised either the power of appointment or the power wholly or partially to release or restrict the power of appointment ; secondly, the trustees have accumulated all the income arising under the settlement in the relevant years ; and, thirdly, the settlor has three children, all of whom are infants.

Now, the question which I have to decide turns primarily on the question whether or not that settlement is “irrevocable”. If it is “irrevocable”, then it is common ground that this appeal must succeed, and the reason for this appears from an examination of certain provisions in Sections 397, 398 and 399 of the Income Tax Act, 1952. Section 397 (1) is in these terms :

“Where, by virtue or in consequence of any settlement to which this Chapter applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person.”

Then, Section 398 provides :

“(1) Subject to the provisions of this section, for the purposes of this Chapter—(a) income which, by virtue or in consequence of a settlement to which this Chapter applies, is so dealt with that it, or assets representing it, will or may become payable or applicable to or for the benefit of a child of the settlor in the future (whether on the fulfilment of a condition, or the happening of a contingency, or as the result of the exercise of a power or discretion conferred on any person, or otherwise) shall be deemed to be paid to or for the benefit of that child. . . . (2) Where any income is dealt with as mentioned in subsection (1) of this section by virtue or in consequence of a settlement to which this Chapter applies, being a settlement which, at the time when the income is so dealt with, is an irrevocable settlement—(a) the provisions of subsection (1) of this section shall not apply to that income”.

except in particular circumstances which I need not detail. Then, Section 399 provides :

“For the purposes of this Chapter, a settlement shall not be deemed to be irrevocable if the terms thereof provide”

(Plowman, J.)

—and the relevant matter is in paragraph (b)—

“for the determination of the settlement by the act or on the default of any person”.

Then, later on, the Section continues :

“Provided that a settlement shall not be deemed to be revocable by reason only . . . (ii) that it provides for the determination of the settlement as aforesaid in such a manner that the determination will not, during the lifetime of any such child as aforesaid, benefit any person other than such a child, or the wife, husband or issue of such a child”.

Now, Mr. Heyworth Talbot formally reserves the point that one is not concerned with Section 399 in this case at all for the reason that, since the settlement, on the face of it, is irrevocable in any ordinary sense of the word, the prohibition in Section 399 against deeming certain settlements to be irrevocable has no application. He concedes, however, that in view of the decision of the Court of Appeal in *Jenkins v. Commissioners of Inland Revenue*, 26 T.C. 265, the point is not open to him in this Court, even though it was dealt with only *sub silentio* in the *Jenkins* case.

That being so, the position is this : that if this settlement does provide for its determination by the act of any person, then, subject to another point which I will mention presently, the Appellant cannot pray in aid proviso (ii), which I read, because the persons to benefit on the determination of the settlement are not limited to the persons specified in that proviso. For example, under the terms of the settlement spouses of grandchildren of the settlor may benefit, and they are outside the terms of the second proviso—or were until it was amended by the Finance Act, 1958. It is, however, with the years before the proviso was amended that I am concerned.

The first question, then, is whether the terms of the settlement provide for the determination of the settlement by the act of any person ; and, as I see it, the real point here is whether this case is covered by the decision of the House of Lords in *Kenmare v. Commissioners of Inland Revenue*(¹), [1958] A.C. 267. That case was concerned with a settlement which contained the following provision, which I will read from the headnote as that sets it out, I think, sufficiently. The provision was(²) :

“Notwithstanding the trusts hereinbefore declared the trustees if they in their absolute discretion think fit may at any time and from time to time during the lifetime of the settlor . . . declare that any part of the trust fund not exceeding [in any one period of three consecutive years the sum of £60,000] . . . shall thenceforth be held in trust for the settlor absolutely and thereupon the trusts hereinbefore declared concerning the part of the trust fund . . . to which such declaration relates shall forthwith determine and the trustees shall thereupon transfer such part of the trust fund . . . to which such declaration relates to the settlor absolutely”.

The question was whether, in view of that clause, the settlor was liable to be assessed to Surtax on the income of the trust fund as being her income. That question depended upon Section 38 (2) of the Finance Act, 1938, which is now Section 404 (2) of the Income Tax Act, 1952. The relevant terms of Section 38 (2) of the Finance Act, 1938, are as follows:

“If . . . the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future . . . to revoke or otherwise determine the settlement or any provision thereof; and (b) 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 . . . comprised in the settlement . . . any

(¹) 37 T.C. 383. (²) *Ibid.*, at p. 407.

(Plowman, J.)

income arising under the settlement . . . shall be treated as the income of the settlor for that year”.

So that the House of Lords was concerned with the question whether the clause which I have read was a power to determine the settlement, and it was held that it was.

Now, although the decision was one on a different clause in a different settlement, and under a different Section of what is now the Income Tax Act, 1952, the reason why the House of Lords reached that decision is, in my judgment, very relevant in the present case. Lord Simonds, at page 276⁽¹⁾, said this :

“I turn to the second point. Is the power given to the trustees by clause 5 of the settlement”

—that is the one which I have read—

“a power within the meaning of section 38 (2) of the Act? In the courts below the conclusion has been unanimously reached that it is, but not always for the same reason. For the purpose of this appeal I think it necessary only to consider and, having considered, affirm the opinion of the Court of Appeal, that”

—and then I omit certain words which are not relevant—

“the power given to the trustees may enable them by successive withdrawals of the trust fund to exhaust it during the lifetime of the settlor and thus determine the settlement.”

So Lord Simonds is saying that a power to exhaust the trust fund is a power to determine the settlement: the exhaustion of the trust fund is a determination of the settlement. Then, at page 278⁽²⁾, Lord Reid said :

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

There, I think, Lord Reid is applying the same test :

“. . . if there is nothing left for the trusts of the settlement to operate on, then the settlement can properly be said to have been determined or brought to an end.”

At page 283⁽³⁾, Lord Cohen said this :

“The question is whether there is power to determine the settlement. I understand the word ‘determine’ as denoting putting an end to the settlement. I agree that there can be no certainty that an exercise of the powers given by clause 5 will ever remove all the remaining capital funds from the trust.”

That, again, I think, is the same test: will the exercise of the power in question remove the trust fund from the trust? Lord Keith of Avonholm did not, I think, say anything of relevance, and Lord Somervell of Harrow agreed that the appeal should be dismissed for the reasons which were given by Lord Simonds.

One has therefore to consider the trustees’ power of appointment in the present case in the light of those observations, and here I refer again to what Lord Reid said at page 278⁽²⁾ :

“But I am of opinion that we must look, not at the nature or the apparent object of the power, but at its possible effect if it is exercised.”

(¹) 37 T.C., at p. 409. (²) *Ibid.*, at p. 411. (³) *Ibid.*, at p. 414.

(Plowman, J.)

Pausing there, the possible effect of the power of appointment, if exercised, is that the trust fund will be appointed absolutely in favour of a beneficiary, be paid over to him and disappear from the settlement, Lord Reid continued⁽¹⁾ :

“ Then the question arises: If the exercise of the power may release the whole of the trust fund and re-vest it in the settlor, is that power a power to determine the settlement? In my opinion, it is.”

Rephrasing that question so as to make it fit the present case : if the exercise of the power may release the whole of the trust fund and vest it in an object of the power, is that a power to determine the settlement?—and it is difficult to suppose that Lord Reid would have answered that question differently.

It has been pointed out in argument in the present case that there is no provision in the settlement with which I am concerned corresponding to the provision in the *Kenmare* case that upon an exercise of the power,

“ the trusts hereinbefore declared concerning the part of the trust fund or the property to which such declaration relates shall forthwith determine and the trustees shall thereupon transfer such part of the trust fund or the property to which such declaration relates to the settlor absolutely ”.

In the first place, however, it does not appear to me that the existence of that provision formed any part of the *ratio decidendi* in the *Kenmare* case ; and, secondly, in my judgment its only function was to declare what in fact would have been the position even in its absence—namely, on an exercise of the trustees' power of appointment (because that, in effect, is what it was), the appointee should become beneficially entitled to the property appointed. In my judgment, therefore, the decision in the *Kenmare* case compels me to hold that the power of appointment in the present case is a provision for the determination of the settlement within Section 399 (b). This conclusion appears to me to fit in with the structure of Section 399 in those respects in which it differs from Section 404 (2). The second proviso to Section 399 contemplates a determination of a sort which will benefit someone ; and an appointment under a power in favour of an object of the power absolutely, so bringing the settlement to an end, appears to me to be both a determination of the settlement and a determination of the sort which is contemplated by the Section.

An alternative argument was then submitted on behalf of the Appellant, which was this : that, having regard to the facts which existed at the material time, which I agree is the time when the income was accumulated, the only beneficiaries who could have benefited by an exercise of the power of appointment were the children of the settlor, and that therefore the settlement is saved from being regarded as revocable by the second proviso to Section 399. In my judgment, however, that proviso does not enable one to escape from Section 399 (b) unless one is able to see, from looking at the settlement, that persons outside the specified class will not benefit if the power is exercised. Can one say here that the terms of the settlement provide for its determination in such a manner that a husband or wife of a grandchild of the settlor will not benefit? Since such a person is an object of the power of the appointment, the answer, in my judgment, is no. It may be true that in the prevailing circumstances the only way in which the settlement could have been determined was by an appointment in favour of the settlor's infant children, and that an appointment in favour of any other object of the power would not have determined the settlement, but in my judgment that is not the point. The question is whether the terms of the settlement provide that when the settlement is determined

(1) [1958] A.C., at p. 278 ; 37 T.C., at p. 411.

(Plowman, J.)

no-one but a member of the specified class will benefit ; and the answer is that it does not. This is not to render the words " at the time when the income is so dealt with " in Section 398 (2) of no effect, because a settlement originally revocable may become irrevocable—for example, by the release of the power of revocation or the death of the person having that power.

In these circumstances, the appeal in the *Jamieson* case must be dismissed. It is conceded that my decision on the first point concludes the case against the Appellant in the *Wills* case, where the second point does not arise. In the circumstances, I must dismiss both appeals.

Sir Milner Holland.—My Lord, I believe I have formally to ask your Lordship to confirm the assessments and the figures determined by the Special Commissioners. They are in fact agreed figures, but I think, as a matter of form, your Lordship should confirm them.

Plowman, J.—If that is the right Order, then I confirm them.

Sir Milner Holland.—Your Lordship will confirm the assessments in the figures determined by the Special Commissioners ; and I ask your Lordship to dismiss the appeals with costs.

Plowman, J.—That is the right Order, Mr. Heyworth Talbot?

Mr. F. Heyworth Talbot.—Yes, my Lord ; I entirely concur. In both cases that must follow.

Plowman, J.—So be it.

The taxpayers having appealed against the above decision, the cases came before the Court of Appeal (Sellers, Donovan and Pearson, L.JJ.) on 5th and 6th March, 1962, when judgment was reserved. On 27th March, 1962, judgment was given against the Crown, with costs (Sellers, L.J. dissenting).

Mr. F. Heyworth Talbot, Q.C., and Mr. W. A. Bagnall, Q.C., appeared as Counsel for Major Jamieson ; Mr. F. Heyworth Talbot, Q.C., and Mr. E. I. Goulding, Q.C., for the Hon. Victor Wills, and Sir Milner Holland, Q.C., Mr. E. B. Stamp and Mr. Alan Orr for the Crown.

Sellers, L.J.—Both these appeals, which were heard together, are against assessments to Surtax for specified years prior to the passing of the Finance Act, 1958, which admittedly, if it had been operative over the relevant periods, would have freed the Appellants from the present claims. The Special Commissioners found in favour of the Crown, and their findings were upheld and confirmed by Plowman, J. In each case there is a settlement under which funds have been transferred to trustees for the benefit of the children of the settlor and remoter issue, and during the relevant years the trustees have accumulated all the income arising from the funds. The question for decision is whether the settlements are " irrevocable ", as the Appellants submit, and so avoid liability to the tax claimed, or are not " irrevocable ", as the learned Judge has held, and the assessments are correct.

(Sellers, L.J.)

Part XVIII, Chapter II, of the Income Tax Act, 1952, deals with settlements on children generally, and by Sections 397 and 398 therein the income in these cases accumulated in the hands of the trustees would fall to be treated as the income of the settlors unless, as the Appellants allege, the settlements are ones to which Section 398 (2) applies. That Section provides, as far as is here material :

“Where any income is dealt with as mentioned in subsection (1) of this section by virtue of or in consequence of a settlement to which this Chapter applies, being a settlement which, at the time when the income is so dealt with, is an irrevocable settlement—(a) the provisions of subsection (1) of this section shall not apply to that income”.

The vital Section for construction and application is Section 399 :

“For the purposes of this Chapter, a settlement shall not be deemed to be irrevocable if the terms thereof provide . . . (b) for the determination of the settlement by the act or on the default of any person. . . . Provided that a settlement shall not be deemed to be revocable by reason only . . . (ii) that it provides for the determination of the settlement as aforesaid in such a manner that the determination will not, during the lifetime of any such child as aforesaid, benefit any person other than such a child, or the wife, husband or issue of such a child”.

For the purposes of our decision it is sufficient to refer to Major Jamieson's settlement alone, as was done at the trial and in argument before us. It was dated 9th August, 1950, when the settlor had one child, born on 20th February, 1950, and expresses the settlor's desire to make the settlement for the benefit

“of his said child and future born children of the Settlor and otherwise as hereinafter mentioned”.

It recites that the settlor has paid a sum of money to the trustees of the settlement, and clause 2 provides for its investment. Clause 3 is as follows :

“The Trustees shall stand possessed of the said sum of Ten thousand pounds and of the investments and property for the time being representing the same (hereinafter called ‘the Trust Fund’) and of the income thereof upon the following trusts:—(1) In trust for all or such one or more exclusively of the others or other of the following class of persons (that is to say) the issue (including children hereafter to be born and issue more remote than children) of the Settlor and the wives husbands widows or widowers (whether or not remarried) of such issue in such shares if more than one and either absolutely or for such successive or other interests or with such trusts and provisions for their respective benefit at the discretion of the Trustees or any other persons and generally in such manner for the benefit of the said class or any of them as the Trustees shall from time to time or at any time by any deed or deeds revocable or irrevocable (with due regard to the rule against perpetuities) appoint Provided that no such appointment may be made or revoked whether wholly or in part after the perpetuity date and Provided Further that the Trustees may at any time or times by deed wholly or partially release or restrict the foregoing power of appointment”.

Then there are two other sub-paragraphs to that clause, but there is no occasion for me to read them.

There is no power of revocation expressed in the settlement, and the Appellant wished to keep open the point that Section 399 could not be invoked by the Crown. It was not regarded as open in this Court because of *Jenkins v. Commissioners of Inland Revenue*, 26 T.C. 265, and the point was not argued. Plowman, J. applies to this case the decision and reasoning of *Kenmare v. Commissioners of Inland Revenue*⁽¹⁾, [1958] A.C. 267, and

(1) 37 T.C. 383.

(Sellers, L.J.)

his judgment makes the closeness of the application apparent. It is not in itself conclusive, for the *Kenmare* case⁽¹⁾ arose under the Finance Act, 1938, and involved the consideration and application of Section 38 (2) of that Act, which is now replaced in the same terms by Section 404 (2) of the Income Tax Act, 1952, in Chapter III of the same Part as Section 399, which Chapter deals with settlements generally.

Section 38 (2) is as follows:

“(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 for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person”.

The words “If and so long as the terms of any settlement are such that . . . in the event of the exercise of the power” are to be compared with the words under Section 399: “if the terms thereof provide . . . for the determination of the settlement by the act . . . of any person”.

In the *Kenmare* case the terms of the settlement were such that the settlement could, in reasonable possibility, work itself out to an end by successive withdrawals of the trust fund so as to exhaust it in the lifetime of the settlor. As in that event there would be nothing left for the trusts of the settlement to operate on, the settlement could, it was held, be determined. If a position of determination could be reached under the present settlement, is there a difference between “If . . . the terms . . . are such” and “if the terms . . . provide”, and between “in the . . . exercise of the power” and “by the act . . . of any person”, which act could, in the present case, be the exercise of a power?

Under clause 3 the trustees could in their discretion appoint absolutely to a person *sui juris* the whole of the settled funds. If that were done, the position would be brought about “by the act . . . of any person”. Would it determine the settlement? In effect, it would. The appointee would become absolutely entitled to the funds, and if he did not seek to acquire them the trustees could rid themselves of them. The settlement would be no longer effective as a settlement, and any further step which would have to be taken to transfer the funds would be merely consequential on the determination of the trust, and not in itself, or in any real sense, a determination of the settlement, which would have been already determined by the act of appointment.

In support of this view the Crown relied on *Hamilton-Russell's Executors v. Commissioners of Inland Revenue*, 25 T.C. 200. At the age of 21 the eldest son of a settlor became absolutely entitled to the trust fund. He did not avail himself of the right until some ten years later, during which period the trustees had accumulated the income. He then instructed the trustees to discontinue any further accumulation and to pay the income to him in future. It was held that the income so accumulated was taxable as

(1) 37 T.C. 383.

(Sellers, L.J.)

being the beneficiary's income throughout, Luxmoore, L.J., in the Court of Appeal saying⁽¹⁾:

"Obviously, in the present case, neither G. L. Hamilton-Russell nor the trustees of the settlement could, after G. L. Hamilton-Russell attained his majority, have insisted on the continuation of the trusts. The trustees could at any time after the happening of that event, even though G. L. Hamilton-Russell had requested them to continue the accumulations, have refused to do so, and, if he had refused to accept a transfer of the trust funds, could have paid them into Court; just in the same way as G. L. Hamilton-Russell could, contrary to the wishes of the trustees, have insisted on a transfer to himself of the whole of the trust funds. The reason why the trusts then became unenforceable and ineffective is because the funds were at home and belonged solely to the beneficiary for his own absolute use and benefit. The capital and income were his and no one else was interested in them: if the income was left in the hands of the trustees, and they invested it, they only did so by the sufferance of the beneficiary whose income it was. The trustees took the income as G. L. Hamilton-Russell's income because neither the trustees nor G. L. Hamilton-Russell could enforce the trust for accumulation."

If a determination of the settlement could be brought about by the exercise of a power under the settlement, can it be said that the terms of the settlement do not "provide" for it? If the terms permit it to be done, or are "such that" it can be done, I find it difficult to hold that they do not provide for it.

The Appellant relied strongly on Lord Greene, M.R.'s judgment in *Jenkins v. Commissioners of Inland Revenue*, 26 T.C. 265. Under the settlement the trustees were given power to borrow or raise money with the consent of the settlor with or without security, and money was borrowed without security and without interest from the settlor himself, and the loan appeared to be repayable on demand; and by the settlement the trustees were empowered to apply the income, amongst other things, in repayment of money borrowed by them under their borrowing power. Lord Greene said, at page 282:

"... in the year in question there was in fact a loan in existence which the trustees had obtained from the settlor pursuant to the powers contained in the settlement; that loan they might or might not choose to repay out of income; if they did so pay it, it would be a payment to the settlor and in fact they did pay it. That situation, it was said, arises because the terms of the settlement so provide. It was said: the loan is raised under a power in the settlement; the settlement contains power to repay it out of income if the trustees so wish; it happens that the lender is the settlor; therefore, reading the settlement in its application to the actual facts, it can truly be said that the terms of the settlement provide for repayment of that loan to the settlor out of income in the hands of the trustees. In my opinion that is a construction of the words which they will not fairly bear. As was pointed out by my brother Morton in the course of the argument, the terms of the settlement are precisely the same the moment after it is executed as they were in the year 1937-38. If you go on to find out what the terms of the settlement are you must look at the settlement and see what it says. Having looked at them, you ask yourself the question: 'Do the terms provide for payment to the settlor?' The answer is, in my opinion, that they do not, on any sensible construction of those words. What they do say and what can be extracted by implication is that if the trustees choose to exercise their power to borrow and if the person from whom they borrow happens to be the settlor then the person to whom they will have to repay the loan will be the settlor. If it was intended to cover that state of facts by this Sub-section, I say once more, nothing would have been easier than to do it. If that case has got to be squeezed into the language of this Section by means of the ingenious argument presented to us, then all I can say is that the Legislature has singularly failed in its duty to make its intentions clear. The language, 'if the terms thereof provide', seems to me to

(1) 25 T.C., at p. 208.

(Sellers, L.J.)

have a perfectly clear, simple and straightforward meaning, and I find no justification for giving to it a crabbed or highly intricate meaning such as would be necessary to enable it to cover the state of facts which I have mentioned."

There was no provision for the payment of income to the settlor. The borrowing there was an incident—no doubt an intended incident, in so far as money was borrowed from the settlor—and the power to repay was given generally; and the circumstances are, in my view, not comparable to a power in the present settlement to appoint to a beneficiary *sui juris* who does not come within proviso (ii). I feel it is difficult to give so narrow a meaning to the word "provide" that it does not embrace that which can in fact be carried out by the trustees under this settlement. I think that proviso (ii) to Section 399 also gives support to the Crown's contention and Plowman, J.'s judgment in their favour. As the learned Judge said⁽¹⁾, it

"contemplates a determination of a sort which will benefit someone; and an appointment under a power in favour of an object of the power absolutely, so bringing the settlement to an end, appears to me to be both a determination of the settlement and a determination of the sort which is contemplated by the Section."

Unfortunately for the Appellant, the class of potential beneficiaries under the power of appointment was too wide to come within proviso (ii) as it includes the spouses of grandchildren, and it was not until the 1958 Act that the class was so enlarged that the present settlement would not be deemed to be revocable by reason only of these powers.

The Appellant's argument also relied on observations of Buckley, L.J., in *In re Fane*, [1913] 1 Ch. 404, at page 413, and of Lord Macmillan in *Muir v. Muir*, [1943] A.C. 468, at pages 478–9, to the effect that the exercise of a special power of appointment is to fulfil the settlement and not to destroy it. It is a right of the settlor to have the settlement vicariously filled in, as it were, when the power of appointment is exercised. Although in this sense the provision may be said to be constructive and not destructive, it is, I think, its effect which has to be assessed; and on the whole I am in agreement with the learned Judge in holding that this settlement is "not to be deemed to be irrevocable", which I think means is not to be treated as irrevocable under Section 399.

The same considerations and conclusion apply to the *Wills* settlement.

A subsidiary argument was raised in the *Jamieson* case that at the time when the income under consideration was accumulated the only beneficiaries who could have benefited by an exercise of the power of appointment were the children of the settlor, and therefore proviso (ii) to Section 399 applied and the settlement was irrevocable. The argument was based on the words "at the time when the income is so dealt with" in Section 398 (2) of the 1952 Act. I agree with the learned Judge on this matter. I think the question is not whether a settlement is at the moment irrevocable, but whether there may be circumstances in which it could be determined.

In the result, I would uphold the judgment and dismiss the appeals; but I have formed this view with deference to both of my brethren, who take a different view, with the consequence that both appeals will be allowed.

Donovan, L.J.—The problem posed by these two appeals is whether the settlement made by each taxpayer is "irrevocable" within the meaning of Section 399, Income Tax Act, 1952. Each settlement is irrevocable within the ordinary meaning of that word, and each settlement was apparently

(1) See page 52, *ante*.

(Donovan, L.J.)

regarded for several years by the Revenue as irrevocable within the extended meaning of the word as defined by Section 399. It is now felt, however, that the decision of the House of Lords upon the meaning of Section 38 (2), Finance Act, 1938 (now Section 404 (2) of the Income Tax Act, 1952), in *Kenmare v. Commissioners of Inland Revenue*⁽¹⁾, [1958] A.C. 267, necessarily involved a different conclusion. The rival arguments on this point are the same in each of the two appeals, and I need deal, therefore, only with the case of Major Jamieson.

The facts and the material parts of the settlement in his case are fully set out in the Case Stated and in the judgment of Plowman, J., and need not be repeated. The argument for the Crown may be summarised thus. (a) If a fund is settled upon trusts, and pursuant thereto comes to be held upon trust for a person who is *sui juris* for an absolute interest, then *ipso facto* there is a determination of the settlement. (b) If under the settlement this result may be the consequence of the act or default of any person, then the settlement is not to be deemed to be irrevocable: see Section 399 (b). (c) The exercise by the trustees of the special power of appointment conferred by Major Jamieson's settlement may bring about such a result. Therefore the settlement must not be deemed to be irrevocable.

The principal support for these propositions rests, as I say, upon the aforesaid decision in the *Kenmare* case. There the question arose upon different language in a different enactment. But the House of Lords held that a power in trustees to make appointments of the trust funds to the settlor, such as might in time exhaust them, was a power to "determine the settlement" within the meaning of what is now Section 404 (2) of the 1952 Act. It follows, say the Crown, that a power in the present trustees to appoint the trust fund absolutely to a person who is *sui juris* must be regarded likewise as a power which provides "for the determination of the settlement" within the meaning of Section 399 (b) of the same Act. The argument is clearly a powerful one, and it has been upheld both by the Special Commissioners and by the learned Judge.

The contrary argument of the taxpayer has, however, shown that very anomalous results will ensue if the Crown are right, and that the matter therefore requires very careful consideration. In summary, the taxpayer's contentions are these. (1) The words of Section 399 (b), properly construed in their context, do not include the case where, under a special power of appointment, funds may be appointed absolutely to a person who is *sui juris*. In other words, such an appointment is not "the determination of the settlement" within the meaning of the Section. (2) In any event the settlement does not "provide" for any such determination. (3) The settlement is accordingly not revocable.

It is common ground that, in the ordinary meaning of the word, this settlement is irrevocable, and that if it is to be treated otherwise it must be because the language of Section 399 (b) so requires. This Section finds its place in Chapter II of Part XVIII of the consolidating Income Tax Act of 1952, the heading being "Settlements on Children Generally"; and it reproduces Section 21 (8) of the Finance Act of 1936. The purpose behind this legislation is not difficult to discern. Thus, a father having to maintain and educate his infant children, but getting no Surtax concession for the purpose, could before 1936 settle funds upon trust for the children and

(1) 37 T.C. 383.

(Donovan, L.J.)

pay for their maintenance and education out of the income. Such income was thus not only removed from his total income for Surtax purposes, but he could also reclaim for his child the Income Tax which the income had suffered at source in the hands of the settlement trustees. Section 21 of the 1936 Act, now Section 397 of the 1952 Act, put a stop to this by enacting as a general rule that any income paid during the life of a settlor to or for the benefit of his infant unmarried children should be treated as his income for tax purposes. There were to be exemptions from this general rule, for example, the case where income was accumulated for the future benefit of a child under the terms of an irrevocable settlement. Such income was not to be treated as the settlor's income. But the word "irrevocable" was given an extended meaning. For example, if the terms of the settlement provide "for the determination of the settlement by the act or on the default of any person", the settlement is not to be deemed to be irrevocable. I have quoted from the terms of what was originally Section 21 (8) of the Finance Act, 1936, and is now, as I say, Section 399 (b) of the Act of 1952. This is the provision upon which the present dispute arises. If it applies, then the accumulation of income made under the settlement must be treated as Major Jamieson's income for the years under appeal. Had the class of potential beneficiaries under the power of appointment been confined to the children of Major Jamieson, or the wife or husband or issue of such children, all would still have been well: see proviso (ii) to Section 399; but the class includes the spouses of grandchildren, and so that saving provision is inapplicable.

The prime question is whether it is true to say that this special power of appointment is a provision for the "determination of the settlement", and it is helpful in this context to consider the nature of such a power. In *Muir v. Muir*, [1943] A.C. 468, Lord Macmillan said this, at pages 478-9:

"I would further add that I agree with Lord Wark's first thoughts rather than with his second thoughts. I think that he stated a sound principle of construction when he said that 'where a testator gives a power of appointment under which the donee of the power may appoint among a limited class to a liferent of part of the testator's estate, the validity of the appointment must be judged as if the exercise of the power were read into the will of the granter of the power.': *Burn's Trustees v. McKenna*.⁽¹⁾"

Lord Romer said, at page 483⁽²⁾:

"My Lords, if a person be given a general power of appointment over certain property he is virtually the owner of that property. If and when he exercises the power the interests of his appointees come to them by virtue of and are created by the deed of appointment. In the case of a special power it is very different. If, for example, property be settled on trust for A for life and after his death on trust for such of A's children or remoter issue and in such proportions as B shall by deed appoint, B has no interest in the property whatsoever. He has merely been given the power of saying on behalf of the settlor which of the issue of A shall take the property under the settlement and in what proportions. It is as though the settlor had left a blank in the settlement which B fills up for him if and when the power of appointment is exercised. The appointees' interests come to them under the settlement alone and by virtue of that document."

This shows, therefore, that an interest acquired by the exercise of a special power of appointment is acquired under the settlement itself, so that the operation is the fulfilment of the settlement rather than the determination of it. Nevertheless, it is true that a settlement can in a sense be fulfilled and determined by one and the same act, so that it is necessary to look further to see whether the Legislature intended that a power of appointment such as the

⁽¹⁾ 1940 S.C. 489, at p. 504.

⁽²⁾ [1943] A.C.

(Donovan, L.J.)

present should be regarded as a power "for the determination of the settlement by the act or on the default of any person". What kind of "act or . . . default" is here contemplated? A father, for example, settles funds upon his infant daughter if and when she marries absolutely, but if she should die a spinster, then for a nephew absolutely. The Crown would regard this settlement as revocable on the ground that the marriage of the daughter is an act which would determine the settlement. If, however, the same father settled the fund upon trust for his daughter for life and on her death for the nephew absolutely, this would admittedly be an irrevocable settlement. Again, if the trusts of the settlement are to A for life with remainder on his death to his children absolutely, but should A be adjudicated bankrupt during his life, then to B absolutely, this would be an irrevocable settlement, assuming, as the Crown admitted, that the adjudication would not be an "act or . . . default" of any person. But if the trusts are to A for life with remainder to his children absolutely, but should A execute a deed of composition with his creditors, then to B absolutely, this settlement would not be irrevocable. Other instances were given at the Bar leading to similarly capricious results, and these at least give one pause before accepting the Crown's contention.

At this point it is instructive, I think, to consider the language employed by the Legislature when it first set out to curb the saving of tax by means of settlements. It is contained in Section 20 of the Finance Act, 1922; and Sub-section (1) (a), so far as here material, reads as follows:

"Any income—(a) of which any person is able, or has, at any time since the fifth day of April, nineteen hundred and twenty-two, been able, without the consent of any other person by means of the exercise of any power of appointment, power of revocation or otherwise howsoever by virtue or in consequence of a disposition made directly or indirectly by himself, to obtain for himself the beneficial enjoyment . . . shall . . . be deemed for the purposes of the enactments relating to income tax (including super-tax) to be the income of the person who is or was able to obtain the beneficial enjoyment thereof".

This provision is interesting as showing the Legislature specifying a power of appointment as one means of obtaining the beneficial enjoyment of the income, and not using some omnibus phrase for the purpose, such as "by the act or on the default of any person". It is also to be noted that this provision co-existed for two years with what is now Section 399 (b) of the Act of 1952, namely, Section 21 (8) of the Finance Act, 1936. It was repealed only when replaced by wider provisions in Section 38 of the Finance Act, 1938.

It was urged upon us that the true view of Section 399 (b) is this, that it is intended to preclude the settlor from getting the benefit of the trust fund by indirect means. Neither he nor his wife may be among the objects of the trust, at least during the lifetime of any beneficiary who is a child of the settlor: see Section 399 (a). Nor may he acquire a benefit by indirect means, such as arranging for the settlement to be brought to an end. If this view be right, a special power of appointment under which neither the settlor nor his wife can ever benefit is not something which the Legislature would need to combat.

I have said that it seemed to be the Departmental view that the present settlement was irrevocable until the decision in *Commissioners of Inland Revenue v. Kenmare*⁽¹⁾. The question there arose under Section 38 (2) of the Finance Act, 1938, which, so far as relevant, is in these terms:

"(2) If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether

(1) 37 T.C. 383.

(Donovan, L.J.)

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”.

Section 38 (2) is now Section 404 (2) of the consolidating Act of 1952, and appears in Chapter III of Part XVIII of the Act, the Chapter being headed “Revocable Settlements, Settlements where Settlor Retains an Interest, etc.”

In the settlement under consideration in the *Kenmare* case⁽¹⁾, the trustees in their absolute discretion could declare that any part of the trust fund up to a maximum of £60,000 in any triennial period should be held in trust for the settlor absolutely, and thereupon the trusts which had hitherto governed such part of the settled fund should forthwith determine and the trustees should transfer to the settlor that part of the fund in respect of which they had exercised their discretion. In these circumstances it was held that the trustees had such a power as was specified in Section 38 (2), since it was possible that successive exercises of it might exhaust the trust fund and so “determine the settlement”. The Crown claim that, by parity of reasoning, the exercise of the power of appointment in Major Jamieson’s case in favour of some person or persons *sui juris* for an absolute interest would similarly exhaust the trust fund and so involve “the determination of the settlement” within the meaning of Section 399 (b). The contrasting words of the two Sections may perhaps be usefully repeated. Section 399 (b):

“if the terms thereof provide . . . for the determination of the settlement by the act or on the default of any person”.

Section 38 (2) (now Section 404 (2)) :

“If and so long as the terms of any settlement are such that . . . any person has or may have power . . . to revoke or otherwise determine the settlement or any provision thereof”.

It is also to be remembered that Section 399 (b) is dealing solely with settlements upon children, whereas Section 404 is dealing with settlements generally.

The difference in language is obvious and needs no emphasis. I do not myself place any great weight on the words of the *Kenmare* settlement providing that the funds the subject of the exercise of the discretion should be transferred to the settlor. I take the same view as the learned Judge that that was no more than declaratory of the Countess’s rights in the circumstances. But it seems to me to be an important difference between the two cases that the exercise of the discretion in the *Kenmare* case took the funds affected back to the settlor from whom they had originally come, which is the very kind of mischief against which Section 38 (2) was designed to operate; whereas in the present case the exercise of the power of appointment will never bring the funds back to the settlor, but will simply fulfil his intention to benefit others. I do not say this consideration is conclusive, but when it is added to the other matters which are relevant—namely, the difference in language between the two enactments, the capricious nature of the results to which the Crown’s contention leads, and the absence of

(1) 37 T.C. 383.

(Donovan, L.J.)

any specific reference to a power of appointment such as appears in Section 20 of the 1922 Act—the final result is to make me doubt very much whether I am compelled by the House of Lords' decision in the *Kenmare* case to come to the same conclusion as was there reached. Otherwise, of course, I should loyally follow it.

Some stress was laid by the Crown on the wording of proviso (ii) to Section 399 (b). It was said that this showed that children might benefit from a determination of the settlement, and a power of appointment giving them absolute interests would obviously be one method of doing this. This is true, but it does not solve the problem we have to consider, whether such an appointment is the kind of "determination" contemplated by Section 399 (b). A settlor might well specify some act of a different kind and provide that should it happen the trusts should forthwith determine and the trust funds be divided among his children then living. Such an act might, for example, be his second marriage.

The taxpayer's other main contention is that in any event the terms of the settlement do not "provide" for its determination by the act or default of some person. If it can be determined in the way alleged by the Crown, this would happen only by reason of supervening events all of which one must assume to happen, i.e., (1) that the trustees exercise the power of appointment, (2) that they exercise it over the whole fund, and (3) that they appoint an absolute interest to a person or persons *sui juris*. Where all these contingencies must happen before the settlement, even on the Crown's view, can be "determined", it is wrong, says the taxpayer, to assert that the terms of the settlement by themselves provide for this result.

In this connection, the case of *Jenkins v. Commissioners of Inland Revenue*, 26 T.C. 265, was cited to us. There the trustees of a settlement had power to borrow money and repay the same out of the income of the settlement. In fact they borrowed from the settlor and repaid him out of income. The question then arose whether Section 21 (8) of the Finance Act, 1936, made the settlement revocable on the ground that

"the terms thereof provide . . . for the payment to the settlor . . . or for the application for the benefit of the settlor . . . of any income . . . in any circumstances whatsoever".

(See now Section 399.) It was held that the settlement did not so provide. The result came about because the trustees in the exercise of their discretion chose to borrow from the settlor and chose to repay out of income. Lord Greene, M.R., said this, at page 282:

"Having looked at them, you ask yourself the question: 'Do the terms provide for payment to the settlor?' The answer is, in my opinion, that they do not, on any sensible construction of those words. What they do say and what can be extracted by implication is that if the trustees choose to exercise their power to borrow and if the person from whom they borrow happens to be the settlor then the person to whom they will have to repay the loan will be the settlor. If it was intended to cover that state of facts by this Sub-section, I say once more, nothing would have been easier than to do it. If that case has got to be squeezed into the language of this Section by means of the ingenious argument presented to us, then all I can say is that the Legislature has singularly failed in its duty to make its intentions clear. The language, 'if the terms thereof provide', seems to me to have a perfectly clear, simple and straightforward meaning, and I find no justification for giving to it a crabbed or artificial or highly intricate meaning such as would be necessary to enable it to cover the state of facts which I have mentioned."

It is said on behalf of Major Jamieson that the like reasoning applies here to negative the proposition that the terms of the settlement "provide" for

(Donovan, L.J.)

its determination. The Crown's answer is that in the *Jenkins* case⁽¹⁾ factual decisions would have to be taken on matters "outside the settlement", and this makes the distinction. I do not find it easy to perceive. They were given power to borrow from any person. Thus they could borrow from the settlor. They were given power to repay out of income. Thus they could repay the settlor out of income. In the present case the trustees are given power to appoint. They could appoint the whole fund, and for absolute interests. In both cases the starting point is a power conferred by the settlement, the mode of its exercise to be in the trustees' discretion.

For the reasons which I have endeavoured to state, I have reached the conclusion that the exercise of the special power of appointment in the manner envisaged by the Crown in this case would not be a "determination of the settlement by the act or on the default of any person" within the meaning of those words in Section 399 (b). I think they connote something which brings death to the settlement, as contrasted with something that fulfils its purpose in life. I would also agree, following the reasoning of the judgment of Lord Greene, M.R., in *Jenkins v. Commissioners of Inland Revenue*⁽²⁾, that in any event the settlement does not, simply by its terms, "provide" for its determination. If either view be right, the Appellant is entitled to succeed. Putting the matter at its lowest, however, the Crown's contentions in favour of liability are beset by a sufficiency of doubt to make it contrary to principle to exact the tax it seeks. This makes it unnecessary to consider the taxpayer's subsidiary contentions concerning the true interpretation of the expression "shall not be deemed to be irrevocable" in Section 399, and the expression "at the time when the income is so dealt with" in Section 398 (2), of the 1952 Act. But on these matters I agree with the conclusions of the learned Judge.

I think the appeals in both cases should be allowed.

Pearson, L.J.—I will deal first with Major Jamieson's settlement, and the main question can be stated shortly. The income, which was in the years of assessment arising under the settlement and being accumulated by the trustees, has to be treated, by virtue of Sections 397 and 398 of the Income Tax Act, 1952, as taxable income of the settlor unless it can be regarded as an "irrevocable" settlement under the relevant provisions. The settlement is in fact irrevocable, but Section 399 provides, *inter alia*, that

"For the purposes of this Chapter, a settlement shall not be deemed to be irrevocable if the terms thereof provide . . . (b) for the determination of the settlement by the act or on the default of any person".

The words "if the terms thereof provide" and "by the act or on the default" favour a narrow construction of the settlement. They require determination by the act or on the default itself, rather than by some further act or on some further event which may follow it. An example of wider words will be found at the beginning of Section 404. The effect of the narrow wording in Section 399 is apparent from the decision and reasoning in *Jenkins v. Commissioners of Inland Revenue*.

Prima facie, Major Jamieson's settlement is not within Section 399 (b), because on the face of it there is no provision for its determination under that name or any similar name such as revocation, cancellation or bringing to an end. The settlement contains what appear to be usual trusts of a settlement for the benefit of the settlor's family. There is a specified class of persons, namely, the issue (including children to be born and issue more remote than

(1) 26 T.C. 265.

(2) *Ibid.*, at p. 282.

(Pearson, L.J.)

children) of the settlor, and the wives, husbands, widows or widowers (whether or not remarried) of such issue. The trust fund is to be held, under clause 3 (1),

“In trust for all or such one or more exclusively of the others or other of the [specified class] in such shares if more than one and either absolutely or for such successive or other interests or with such trusts and provisions for their respective benefit at the discretion of the Trustees or any other persons and generally in such manner for the benefit of the said class or any of them as the Trustees shall from time to time or at any time by any deed or deeds revocable or irrevocable (with due regard to the rule against perpetuities) appoint”.

There are two provisos to clause 3 (1), which I think are not important for the present purpose. Clause 3 (2) creates trusts which are to have effect in default of and until and subject to any such appointment as aforesaid.

The argument for the Crown is that, although the settlement does not provide for its own determination *eo nomine*, it does by its terms authorise, and therefore provide for, an appointment of the whole trust fund in favour of one person being *sui juris*, and that such an appointment would constitute a determination of the settlement. If the argument is right, it seems to follow that any family settlement containing a special power of appointment on the usual lines must fall within Section 399 (b). If that had been the intention, it would have been advantageous to state it, because it is far from being obvious. In my view, it is not right.

I hope it is not a too elementary approach to treat this settlement as an instrument to be construed, and to see what will happen under it if the supposed appointment in favour of a person *sui juris* is made. It has been decided, in relation to the English rule against perpetuities and in relation to a Scottish enactment operating in the same field, that when a special power of appointment is exercised,

“the limitations created under it are to be written into the instrument which created the power”: *In re Fane*, [1913] 1 Ch. 404, at page 413;

and

“It is as though the settlor had left a blank in the settlement which [the appointer] fills up for him if and when the power of appointment is exercised. The appointees' interests come to them under the settlement alone and by virtue of that document”: *Muir v. Muir*, [1943] A.C. 468, at page 483.

Be it supposed that at some future time the trustees make an appointment of the whole trust fund in favour of some member of the specified class who is *sui juris*. What then is the position? The trustees are still holding the trust fund in pursuance of clause 3 of the settlement for the benefit of a member of the specified class: they are holding on a trust which is provided for by the settlement and fulfils its object and carries out its intention and benefits a member of the class for whose benefit the settlement was made. The settlement has not been destroyed or set aside or circumvented. It is still alive and operating as it was intended to operate. It is true that there is not much remaining to be done by the trustees, the settlement being in its final stage with its last trust operating and with the prospect of early determination by a transfer of the trust fund by the trustees to the appointee. The interval of time between the making of the appointment and the transfer of the trust fund may be long or short or negligible. The point, however, is that the transfer is a separate and different act for which the settlement does not by its terms provide, and until there is a transfer there is still a trust operating under the settlement for the benefit of a member of the specified class.

(Pearson, L.J.)

The argument for the Crown against the view which I have been indicating is that it is too narrow, because the making of the supposed appointment will virtually determine the settlement. In *Hamilton-Russell's Executors v. Commissioners of Inland Revenue*, 25 T.C. 200, Mr. G. L. Hamilton-Russell had become absolutely entitled to the trust fund when he attained his majority in October, 1928, but the trustees continued to hold the trust fund and accumulate the income until January, 1939, when he instructed them to discontinue the accumulation and transfer the investments. It was held that the income so accumulated had been his income and taxable as such. The relevant passage in the judgment of Luxmoore, L.J., has been read by my Lord⁽¹⁾, and I need not repeat it. In view of the very clear statement in that passage, I think it can rightly be said in the present case that, after the supposed appointment has been made, not only the appointee but also the trustees will be entitled to demand that the trust fund be transferred, and the continued holding of it by them for him on a trust provided for by the settlement will be by the sufferance of both parties and may last only for a very short period. It can be said that the making of the appointment virtually determines the settlement, because the transfer must follow sooner or later. But that seems to me insufficient to establish the Crown's contention under Section 399 (b) of the Act. The act which effects the determination is the transfer, and it is a separate and distinct act, and it is not provided for by the settlement. The question is by no means an easy one, but in my judgment the right conclusion is that Section 399 (b) does not apply.

The learned Judge based his decision on the ground that the present case is governed by *Kenmare v. Commissioners of Inland Revenue*, [1958] A.C. 267; 37 T.C. 383. In my view, however, the *Kenmare* case is distinguishable, partly perhaps because it was decided under a different Section of the Act (Section 404), but mainly because clause 5 of the *Kenmare* settlement was materially different from clause 3 of the *Jamieson* settlement.

Clause 5 (a) of the *Kenmare* settlement, set out in [1958] A.C., at page 269⁽²⁾, provided that:

“Notwithstanding the trusts hereinbefore declared the trustees if they in their absolute discretion think fit may at any time and from time to time during the lifetime of the settlor by writing under their hands declare that any part of the trust fund not exceeding the amount hereinafter mentioned shall thenceforth be held in trust for the settlor absolutely and thereupon the trusts hereinbefore declared concerning the part of the trust fund or the property to which such declaration relates shall forthwith determine and the trustees shall thereupon transfer such part of the trust fund or the property to which such declaration relates to the settlor absolutely”.

And then there is a proviso limiting the amount in respect of which the power may be so exercised at any one time. Under that clause each exercise of the power with respect to a part of the trust fund would withdraw that part from what may be called the primary trusts of the settlement (i.e., the trusts in favour of persons other than the settlor) and would restore it to the beneficial ownership of the settlor, and would cause it to be transferred to the settlor, as expressly provided in the clause. Clearly, if the power were sufficiently exercised the whole trust fund would be withdrawn from the primary trusts and vested in and transferred to the settlor. Once it was decided that the power could be sufficiently exercised to produce those effects, it followed that the settlement could be determined.

(¹) See page 56, *ante*. (²) See 37 T.C., at pp. 387-8.

(Pearson, L.J.)

The *ratio* of the learned Judge was that, just as in the *Kenmare* case⁽¹⁾ the exercise of the power might release the whole of the trust fund and vest it in the settlor, whereby the settlement would be determined, so in the present case the exercise of the power might release the whole of the trust fund and vest it in an object of the power, whereby the settlement would be determined. I think the objection is that the exercise of the power would not release the trust fund, but would leave it still held by the trustees in pursuance of a provision of the settlement and on a trust in favour of one of the family, a member of the specified class. The learned Judge said⁽²⁾ :

“The second proviso to Section 399 contemplates a determination of a sort which will benefit someone; and an appointment under a power in favour of an object of the power absolutely, so bringing the settlement to an end, appears to me to be both a determination of the settlement and a determination of the sort which is contemplated by the Section.”

As Mr. Heyworth Talbot said, when questioned about the second proviso, this is a good point in favour of the Crown, but by no means conclusive. In my view, it does not outweigh the considerations which have been mentioned.

On the view which I take, there is no material distinction between Major Jamieson's settlement and Mr. Wills's settlement. I would allow the appeals in both cases.

Mr. F. Heyworth Talbot.—I think your Lordship said both appeals would be allowed. I ask that in each case the appeal be allowed with costs here and below.

Sellers, L.J.—Yes, that is right.

Mr. Heyworth Talbot.—I think that must follow. Now, to avoid the requirement of any remission to the Commissioners, perhaps your Lordships would think fit to embody in the Order figures that are expressed in the Case Stated as agreed in the *Jamieson* case, and figures that my learned friend Mr. Orr and I are in agreement about in the *Wills* case.

Sellers, L.J.—That is right, Mr. Orr?

Mr. Alan Orr.—My Lord, the figures are agreed.

Sellers, L.J.—Then they will be embodied in the Order. That is the custom, is it not?

Mr. Heyworth Talbot.—Yes, my Lord, it is the custom.

Donovan, L.J.—Have you paid the disputed tax?

Mr. Heyworth Talbot.—Yes, my Lord, I am told we have.

Donovan, L.J.—Don't you want it back?

Mr. Heyworth Talbot.—Very much, my Lord; we do want it back.

Donovan, L.J.—Then you need an Order for that.

Mr. Orr.—I am instructed that it has not been paid.

Sellers, L.J.—Then an Order for its return would not be reasonable.

Mr. Heyworth Talbot.—I do not think it is necessary to have an Order for return of the tax.

(1) [1958] A.C. 267; 37 T.C. 383. (2) See page 52, *ante*.

Donovan, L.J.—You want some interest on it?

Mr. Heyworth Talbot.—There will have to be an Order as to the rate of interest.

Donovan, L.J.—If you have not paid it, it will not arise.

Mr. Heyworth Talbot.—It is paid, I am told, in *Wills*.

Sellers, L.J.—You can consider this and agree an Order about it.

Mr. Orr.—My Lord, we will do what is right: the tax will be refunded.

Sellers, L.J.—If interest is due, what is the rate? 4 per cent?—5 per cent?

Mr. Heyworth Talbot.—I should have thought in these days one might go as far as 5 per cent.

Sellers, L.J.—See if you can agree an Order, and mention it again if you cannot, and hand it in.

Mr. Orr.—I am instructed to ask your Lordships for leave to appeal to the House of Lords.

Sellers, L.J.—Yes.

Mr. Heyworth Talbot.—I wonder if on that point I might say this? I imagine my friend will have anticipated that I might make a submission on these lines. I wonder whether, in the circumstances, your Lordships might think fit to put the Crown on some terms here, that is to say—

Sellers, L.J.—See what they offer first. Mr. Orr, what terms do you offer?

Mr. Orr.—I am not instructed in this case to offer any terms. I am, of course, in your Lordships' hands if your Lordships thought it right to impose any terms. I am not instructed to offer any. This is a case in which there has been a dissenting judgment, and the Crown succeeded in the Court below. The cases were taken as test cases.

Sellers, L.J.—All the more reason why you should give some sort of consideration to the other side.

Mr. Orr.—I am in your Lordships' hands.

Sellers, L.J.—Can you take instructions now and tell us what you will offer? In the meantime, Mr. Talbot, we might hear what you are asking for.

Mr. Heyworth Talbot.—I am asking that the Crown should undertake not to disturb your Lordships' Order as to costs. Your Lordships could not, of course, impose anything on the House of Lords.

Sellers, L.J.—Oh no.

Mr. Heyworth Talbot.—But I should be very content indeed if your Lordships would—

Sellers, L.J.—It would limit your risk?

Mr. Heyworth Talbot.—It would limit my risk.

Sellers, L.J.—What about that, Mr. Orr? That is not unusual, is it?

Mr. Orr.—No, my Lord. On the basis that we will not seek to disturb the Order as to costs in this Court or in the Court below?

Sellers, L.J.—We give you leave on that basis.

Mr. Orr.—Yes.

Sellers, L.J.—On that basis.

Mr. Orr.—Yes, my Lord.

Donovan, L.J.—You are accepting it on that basis?

Mr. Orr.—Yes.

Sellers, L.J.—Yes, I think that is very fair.

The Crown having appealed against the above decision, the case before the House of Lords (Lords Reid, Guest, Pearce, Jenkins and Hodson) on 6th, 7th and 8th May, 1963, when judgment was reserved. On 20th June, 1963, judgment was given unanimously in favour of the Crown.

Sir Milner Holland, Q.C., Mr. Alan Orr, Q.C., Mr. E. B. Stamp and Mr. J. Raymond Phillips appeared as Counsel for the Crown, and Mr. F. Heyworth Talbot, Q.C., and Mr. W. A. Bagnall, Q.C., for the taxpayer.

Lord Reid.—My Lords, this appeal relates to three assessments to Sur-tax made on the Respondent for the years 1955–56, 1956–57 and 1957–58. The assessments are in respect of the income of funds settled by him in 1950. Under the settlement the Respondent had no interest in the settled funds and could never take any interest in them. But elaborate provisions were enacted in 1936 laying down the conditions in which income from settled funds must be treated as income of the settlor for tax purposes. Those provisions now form Sections 397 to 399 of the Income Tax Act, 1952, and the question is whether those provisions apply to this case. The Special Commissioners and Plowman, J., held that they do, but the Court of Appeal has held that they do not.

The relevant part of the settlement is clause 3, which is in these terms:

“3. The Trustees shall stand possessed of the said sum of Ten thousand pounds and of the investments and property for the time being representing the same (hereinafter called ‘the Trust Fund’) and of the income thereof upon the following trusts:—(1) In trust for all or such one or more exclusively of the others or other of the following class of persons (that is to say) the issue (including children hereafter to be born and issue more remote than children) of the Settlor and the wives husbands widows or widowers (whether or not remarried) of such issue in such shares if more than one and either absolutely or for such successive or other interests or with such trusts and provisions for their respective benefit at the discretion of the Trustees or any other persons and generally in such manner for the benefit of the said class or any of them as the Trustees shall from time to time or at any time by any deed or deeds revocable or irrevocable (with due regard to the rule against perpetuities) appoint Provided that no such appointment may be made or revoked whether wholly or in part after the perpetuity date and Provided Further that the Trustees may at any time or times by deed wholly or partially release or restrict the foregoing power of appointment (2) In default of and until and subject to any such appointment as aforesaid in trust for all or any of the children or child of the Settlor born before the Twentieth day of February One thousand nine hundred and seventy-five who shall either attain the age of twenty-five years or being a daughter shall marry under that age or be living on the perpetuity date and attain the age of twenty-one years or being a daughter shall marry under that age and if more than one in equal shares”.

(Lord Reid)

The case turns on the proper interpretation of Section 399(b), but before coming to that provision I must state in outline the general scheme of this part of the Act. Section 397 provides that, where any income of a settlement is paid to or for the benefit of infant children of the settlor, that income shall be treated as income of the settlor. During the relevant period the settlor had three infant children, but the income was accumulated by the trustees, so that that Section does not apply to this case. Then, Section 398 deals with income which will or may become payable for the benefit of a child, but such income is not to be deemed to be income of the settlor if the settlement is an irrevocable settlement. This settlement is in fact irrevocable, but Section 399 deems an irrevocable settlement not to be irrevocable in certain cases. So, if this settlement falls within the scope of this Section, the exception in Section 398 does not apply. Section 399 is as follows:

“ 399. For the purposes of this Chapter, a settlement shall not be deemed to be irrevocable if the terms thereof provide—(a) for the payment to the settlor or, during the life of the settlor, to the wife or husband of the settlor for his or her benefit, or for the application for the benefit of the settlor or, during the life of the settlor, of the wife or husband of the settlor, of any income or assets in any circumstances whatsoever during the life of any child of the settlor to or for the benefit of whom any income, or assets representing it, is or are or may be payable or applicable by virtue or in consequence of the settlement; or (b) for the determination of the settlement by the act or on the default of any person; or (c) for the payment of any penalty by the settlor in the event of his failing to comply with the provisions of the settlement: Provided that a settlement shall not be deemed to be revocable by reason only— . . . (ii) that it provides for the determination of the settlement as aforesaid in such a manner that the determination will not, during the lifetime of any such child as aforesaid, benefit any person other than such a child, or the wife, husband or issue of such a child . . . ”.

Before coming to the question which your Lordships have to determine, I should note that proviso (ii) was amended by Section 20(5) of the Finance Act, 1958, by deleting “ any person other than such a child, or the wife, husband or issue of such a child ” and substituting “ the settlor or the wife or husband of the settlor ”. Apparently it was recognised that the original form was unnecessarily wide and that the new form was adequate to deal with the mischief at which these provisions were aimed. But the amendment was not made retrospective. The original form of the proviso did not exclude this settlement from the scope of Section 399 because the trustees can use their powers to benefit the husbands or wives of grandchildren as well as those who are mentioned in the proviso in its original form. But the new form of the proviso does cover the present case because the trustees cannot use their powers to benefit the settlor or the wife of the settlor. It is apparently for that reason that this case is only concerned with the years before the passing of the 1958 Act.

The trustees could use their power of appointment so as to appoint the whole fund absolutely to a beneficiary who had attained majority, and such beneficiary might be the husband or wife of a grandchild of the settlor. The Crown say that therefore the settlement provides for the determination of the settlement by the act of the trustees. If that is right then admittedly this appeal succeeds. But the Respondent argues, first, that the appointment of the whole trust fund is not a “ determination ” of the settlement within the meaning of Section 399(b), and, secondly, that even if it is, the settlement does not “ provide ” for its determination—it merely confers power to do something which will in fact bring about its determination.

(Lord Reid)

What then is meant by the "determination" of a settlement by the act or default of a person? It appears to me that, unless the context indicates a more limited meaning, it must include every case where the act of a person brings the settlement to an end. The trustees are persons, and therefore it must include every case where the trustees do an act authorised by the settlement which brings it to an end. Exercising a power of appointment is the doing of an act, and if the exercise of such power vests the whole trust fund absolutely in a major beneficiary that appears to me to bring the settlement to an end. If authority be needed for that I find it in the decision of this House in *Kenmare v. Commissioners of Inland Revenue*(¹), [1958] A.C. 267. But it is said that an absolute appointment of the whole fund does not bring the settlement to an end because after making the appointment the trustees have to wind up the trust estate by paying debts, etc., and then to convey the net estate to the appointee, and the settlement must survive until that is done. But they would have to do that in every case where the act or default of any person, whether the settlor or a third person, is such that it makes it the duty of the trustees under the settlement to divest themselves of the whole trust property. And where the act is an act of some person other than the trustees it might be quite unexpected and it might take some time before the trustees could wind up the estate. But it would surely be impossible to hold that for that reason the settlement was not determined by that act. And I can see no difference in this respect between determination by an act of the trustees and determination by the act of some other person.

Then it was said that the word "determination" must be given a narrow meaning because to give it this wide meaning would make the Section apply to cases to which it cannot have been intended to apply. That may be true. The draftsman of provisions for the prevention of tax evasion is often faced with this difficulty: if he uses narrow language the ingenuity of taxpayers' advisers will find a way to circumvent it, while if he uses wider language it will catch cases which do not really involve any element of evasion. The intervention of Parliament in 1958 shows that in 1936 the draftsman had used unnecessarily wide language, but unfortunately for the Respondent the amendment made in 1958 does not cover this case. In such a situation I would be very willing to adopt a restricted meaning if I could find any secure basis for it by ordinary methods of construction, but I cannot.

The argument is that the operation of a special power of appointment is a fulfilment of the settlement and therefore should not be regarded as a determination of it. But I cannot find any clear distinction between different kinds of acts which by reason of the provisions of the settlement in fact bring it to an end when they are done. I cannot find any satisfactory test so that some such acts can be said to be in fulfilment of the settlement and some not. A special power of appointment is in effect an authority to the trustees to write something into the settlement: see *Muir v. Muir*, [1943] A.C. 468. The settlor may himself write in to the settlement a provision which will in a certain event determine the settlement—e.g., if X does a certain act—or he may authorise his trustees to write in something which will determine the settlement—e.g., to appoint the whole trust fund to A absolutely. I do not see why one should be said to terminate the settlement prematurely, "to bring death to the settlement", while the other does not. I can see no escape from the conclusion that any act which results in the settlement being brought to an end is an act by which the settlement is determined.

(1) 37 T.C. 383.

(Lord Reid)

The other main argument for the Respondent turned on the meaning of the word "provide". In this case the settlement provides means whereby the trustees can do an act which in fact determines the settlement. But it is said that that is not providing for the determination of the settlement by that act: the settlement must expressly provide that it shall come to an end if a certain act is done. There is some support for that argument in the decision of the Court of Appeal in *Jenkins v. Commissioners of Inland Revenue*, 26 T.C. 265. There the taxpayer's scheme was to lend money to the settlement trustees and then have them use the income of the trust fund to repay his loan. He would then say that what he received was not income but a repayment of his loan. Of course he did not baldly put his scheme on paper. He gave the trustees a general power to borrow and authorised them to repay any loan out of income. So they need not have borrowed from him or anyone else, and if they did borrow they need not have repaid the loan out of income. It just so happened that they did borrow from the settlor and they did use the trust income to repay him. Then the taxpayer succeeded in his contention that the settlement did not "provide" that all this should be done—it merely authorised it. In my opinion, that decision was wrong. Lord Greene, M.R., said⁽¹⁾ that he found no justification for giving to the word "provide"

"a crabbed or artificial or highly intricate meaning such as would be necessary to enable it to cover the state of facts which I have mentioned".

No doubt the ordinary meaning of a word is something which each of us must decide according to our experience of the ordinary use of the English language. I can only say that to my mind a person who contemplates or desires a certain result and gives powers to trustees which enable that result to be achieved could properly be said in ordinary parlance to provide for that result by giving those powers. In the present case the settlor must be taken to have known that the terms of his settlement would enable the trustees to appoint the whole fund absolutely to any person who might in future come within the class of beneficiaries set out in clause 3. If such an appointment would in law determine the settlement, then the settlor made provision for its being determined in that way and the settlement so provided. Any other view would simply open the door wide for evasion. All that would have to be done would be to confer powers in terms sufficiently wide to enable them to be used in several different ways and then to say that the settlement does not "provide" for the use of those powers in any particular way.

Finally, an argument was founded on the reference in Section 398(2) to "a settlement which, at the time when the income is so dealt with, is an irrevocable settlement".

It was said that this shows that one must look at the facts at the relevant time to see whether the settlement was then irrevocable. That is quite true: a settlement may be revocable today but irrevocable tomorrow because the only person with power to revoke has died. But that appears to me to have no application to Section 399. The question there is not whether the terms of the settlement provide for its determination during the relevant period but whether they provide for its determination at any time by the act of any person. One must therefore look not only at the position today but at what the position will be if the settlor's children have children who grow up and marry. It is true that today the trustees could only appoint the trust fund to persons within the scope of proviso (ii), but some day they may be able to appoint to persons not within the scope of that proviso. And the terms

(1) 26 T.C., at p. 282.

(Lord Reid)

of Section 399 are, I am afraid, so wide that that is enough to bring that Section into operation immediately.

With some regret I feel bound to hold that this appeal must be allowed and the judgment of Plowman, J., restored. In consequence of an undertaking as to costs the Order of the Court of Appeal as to costs will not be altered, and I think that in the circumstances there should be no Order as to costs in this House.

My Lords, my noble and learned friends **Lord Guest** and **Lord Pearce** are unable to be present this morning, and they have asked me to say that they both concur.

Lord Jenkins.—My Lords, in this case the Respondent, Major D. A. Jamieson, was assessed to Surtax for the years of assessment 1955–56, 1956–57 and 1957–58 under the provisions of the Income Tax Act, 1952, relating to settlements on children. Against these assessments the Respondent appealed by way of Case Stated to the High Court (Plowman, J.), who by an Order dated 13th July, 1961, dismissed the appeal. From that Order the Respondent appealed to the Court of Appeal (Sellers, Donovan and Pearson, L.JJ.), who by a majority (Donovan and Pearson, L.JJ.—Sellers, L.J., dissenting) reversed the Order of Plowman, J., and (by an Order dated 27th March, 1962) allowed the appeal, giving leave to the Crown to appeal to your Lordships' House.

The question at issue in the appeal now brought before your Lordships in pursuance of such leave is whether a settlement made by the Respondent on 9th August, 1950, is an "irrevocable" settlement for the purposes of Sections 397, 398 and 399 of the Income Tax Act, 1952. It is common ground that if the settlement is not irrevocable the Respondent is assessable to Surtax in the figures determined by the Special Commissioners, but that if the settlement is irrevocable the proper assessments are those set out in the Order of the Court of Appeal.

The Crown have conveniently set out in their Case the relevant provisions of the Act of 1952, and I take the liberty of reproducing them here:

' 3. The relevant provisions (contained in Chapter II of Part XVIII) of the Income Tax Act, 1952, were at the material times as follows:—

' 397.—(1) Where, by virtue or in consequence of any settlement to which this Chapter applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person.'

' 398.—(1) Subject to the provisions of this section, for the purposes of this Chapter—(a) income which, by virtue or in consequence of a settlement to which this Chapter applies, is so dealt with that it, or assets representing it, will or may become payable or applicable to or for the benefit of a child of the settlor in the future (whether on the fulfilment of a condition, or on the happening of a contingency, or as a result of the exercise of a power of discretion conferred on any person, or otherwise) shall be deemed to be paid to or for the benefit of that child; and . . . (2) Where any income is dealt with as mentioned in subsection (1) of this section by virtue or in consequence of a settlement to which this Chapter applies, being a settlement which, at the time when the income is so dealt with, is an irrevocable settlement—(a) the provisions of subsection (1) of this section shall not apply to that income . . .'

' 399. For the purposes of this Chapter, a settlement shall not be deemed to be irrevocable if the terms thereof provide—(a) . . . (b) for the determination of the settlement by the act or on the default of any person; or . . . : Provided that a settlement shall not be deemed to be revocable by reason only—(i) . . . (ii) that it provides for the determination of the settlement as aforesaid in such a

(Lord Jenkins)

manner that the determination will not, during the lifetime of any such child as aforesaid, benefit any person other than such a child, or the wife, husband or issue of such a child; or’

‘400.—(1) Where, by virtue of this Chapter, any income tax becomes chargeable on and is paid by the person by whom a settlement was made or entered into, that person shall be entitled—(a) to recover from any trustee or other person to whom the income is payable by virtue or in consequence of the settlement the amount of the tax so paid; and’

The settlement of 9th August, 1950 (“the settlement”), was made between the Respondent of the one part and the Southern Investment Trust, Ltd. (“the trustees”), of the other part, and after reciting that the settlor had one daughter, Fiona Mary (born on 20th February, 1950), and with a view to the settlement had paid to the trustees a sum of £10,000, the Case went on to state the following provisions of the settlement relevant to the present appeal:

“4. The said settlement dated the 9th August, 1950 (hereinafter called ‘the Settlement’ and of which a copy is exhibited to the Case Stated) was made between the Respondent (therein called ‘the Settlor’) of the one part and The Southern Investment Trust Limited (therein called ‘the Trustees’) of the other part, and after reciting, *inter alia*, that the Settlor had one daughter, Fiona Mary Jamieson (born on the 20th February, 1950) and with a view to the Settlement had paid to the Trustees a sum of £10,000, contained the following provisions relevant to the appeal:—

‘1. In this Deed the expression “the perpetuity date” means the date of expiration of a period of twenty-one years from the death of the survivor of the said Fiona Mary Jamieson and the Settlor’s wife Nancy Cecil Jamieson. . . .

3. The Trustees shall stand possessed of the said sum of Ten thousand pounds and of the investments and property for the time being representing the same (hereinafter called “the Trust Fund”) and of the income thereof upon the following trusts:—(1) In trust for all or such one or more exclusively of the others or other of the following class of persons (that is to say) the issue (including children hereafter to be born and issue more remote than children) of the Settlor and the wives husbands widows or widowers (whether or not remarried) of such issue in such shares if more than one and either absolutely or for such successive or other interests or with such trusts and provisions for their respective benefit at the discretion of the Trustees or any other persons and generally in such manner for the benefit of the said class or any of them as the Trustees shall from time to time or at any time by any deed or deeds revocable or irrevocable (with due regard to the rule against perpetuities) appoint Provided that no such appointment may be made or revoked whether wholly or in part after the perpetuity date and Provided Further that the Trustees may at any time or times by deed wholly or partially release or restrict the foregoing power of appointment. (2) In default of and until and subject to any such appointment as aforesaid in trust for all or any the children or child of the Settlor born before the Twentieth day of February One thousand nine hundred and seventy-five who shall either attain the age of twenty-five years or being a daughter shall marry under that age or be living on the perpetuity date and attain the age of twenty-one years or being the daughter shall marry under that age and if more than one in equal shares.’

5. The Special Commissioners on the hearing of the Respondent’s appeal against the said assessments found the following facts:

‘(1) It was not disputed that the Respondent was the “settlor” in relation to the settlement for the purposes of the said Sections 397, 398 and 399. (2) The trustees of the settlement had not exercised the power of appointment given to them by the said clause 3 (1) of the settlement, nor had they released or restricted such power. (3) At all material times there had been three children only of the Respondent, who were born on 20th February, 1950, 28th May, 1951, and 4th July, 1956, respectively, and there are no issue of the Respondent more remote than children. (4) The income arising under the settlement and forming the subject matter of this appeal was:

for the year 1955–56: £1,519 0s.

for the year 1956–57: £1,693 10s.

for the year 1957–58: £1,696 0s.

(Lord Jenkins)

(5) At all material times the trustees had accumulated all the net income of the trust fund under or by virtue of clause 3 (2) and (3) of the settlement and Section 31 of the Trustee Act, 1925.’”

It has been contended for the Respondent that on the true construction of Section 399 the expression “determination of the settlement” connotes the destruction, setting aside, or circumvention of the settlement as distinct from the fulfilment of the purposes of the settlement; and an appointment of the trust fund upon trust absolutely for an appointee who is *sui juris* in exercise of the special power of appointment conferred by the settlement forms part of the fulfilment of the purposes, and the operation of the trusts of the settlement, and is not a determination of the settlement. I find this line of argument impossible to accept. I see no sufficient justification for the assertion that a settlement is not determined, e.g., by an exercise of a power therein contained of appointing absolutely to some beneficiary or beneficiaries the entirety of the trust funds.

Then it was said on the Respondent’s side that the settlement was by its terms irrevocable, and accordingly the prohibition in Section 399 against the deeming of certain settlements to be irrevocable had no application. I see no sufficient justification for construing Section 399 (b) in this way, or for denying the Legislature power to say that this or that irrevocable settlement (i.e., irrevocable according to its own tenor) should or must, in order to be irrevocable for the purposes of the enactment, be provided with some additional qualification. It appears to me to be reasonably plain that what is meant by Section 399 (b) is simply that the settlement concerned is not to count as, or be regarded or treated as (to take three obvious alternatives out of the many that might be chosen) an irrevocable settlement.

There was a good deal more discussion about the meaning of “determination”, but it did not, I think, carry the matter any further. In this connection reference was made to the important case in your Lordships’ House of *Kenmare v. Commissioners of Inland Revenue*⁽¹⁾, [1958] A.C. 267, where the trustees of the settlement were by its terms allowed (subject to certain limitations) to make periodic withdrawals from the trust fund; and it was held in your Lordships’ House that, inasmuch as the withdrawals might in given circumstances exhaust the entire fund, the exhaustion of the fund in this way would operate to “determine” the settlement within the meaning of Section 38 (2) of the Finance Act, 1938. The effect of the *Kenmare* principle, if accepted in the present case, would apparently be to make the trustees’ power of appointment a provision “for the determination of the settlement by the act . . . of any person” within the meaning of Section 399 (b), and Plowman, J., regarded himself as bound so to hold. The Lords Justices for one reason or another declined to regard themselves as bound by the *Kenmare* case, and of course were well entitled to take that view inasmuch as that case related to a different settlement, different legislation, and different circumstances generally. I think, therefore, that the *Kenmare* case, so far as it is sought to be applied in the case now before your Lordships, should be accorded strong persuasive force not amounting to binding authority.

I find it unnecessary to do more than notice the cases of *Jenkins v. Commissioners of Inland Revenue*, 26 T.C. 265, and *Hamilton-Russell’s Executors v. Commissioners of Inland Revenue*, 25 T.C. 200, to which we were referred by Counsel in the course of their full and able arguments, but which did not, I think, in the end materially advance the discussion.

(1) 37 T.C. 383.

(Lord Jenkins)

The Crown's contention before the Special Commissioners is shortly stated in their Case as being to the effect that

"Clause 3 (1) of the settlement provided for 'the determination of the settlement by the act . . . of any person' (that is to say, the trustees) within the meaning of the said Section 399 (b) of the Income Tax Act, 1952; and so provided in such manner that the determination could benefit persons other than those described in proviso (ii) to the said Section, inasmuch as the trustees could make an appointment in favour of the wives, husbands, widows or widowers of issue of the Respondent more remote than children, and that accordingly the settlement was not an irrevocable settlement for the purposes of Section 398 of the Act with the result that the said income fell to be treated as income of the Respondent."

It appears to me that these words, unfortunately for the Respondent, exactly fit his case, though it would seem that they only do so through a mistake which brought about the inclusion in the trusts of the settlement of too wide a class of beneficiaries.

The Sections upon which this case turns may be thought unnecessarily obscure, and in the circumstances to bear somewhat heavily on the Respondent. But your Lordships' task, as in any other revenue case, is to construe the provisions of the taxing enactment according to the ordinary and natural meaning of the language used and then to apply that meaning to the facts of the case. If by the application of this process the taxpayer is brought fairly within the net, he is caught. Otherwise he goes free, but there must be no straining of language either way.

I confess to some sympathy with Major Jamieson, but having applied to this case the principles above indicated to the best of my ability I have come to a clear conclusion to the effect that the Crown are entitled to succeed in this case and I would accordingly allow the appeal.

Lord Hodson.—My Lords, I agree that the appeal succeeds for the reasons given by Plowman, J., and for those given by Sellers, L.J., in the Court of Appeal.

The reasoning of this House in *Kenmare v. Commissioners of Inland Revenue*⁽¹⁾, [1958] A.C. 267, leads to the conclusion that the power to appoint absolutely which is contained in the settlement is a power to determine the settlement by the act of any person within the language of Section 399 (b) of the Income Tax Act, 1952. True that the *Kenmare* case was concerned with the wording of Section 38 (2) of the Finance Act, 1938, now Section 404 of the Income Tax Act, 1952, which is not the same *totidem verbis* as Section 399 (b); yet the wording is to the same effect, and each Section involves consideration of what is meant by "determination of the settlement". In the *Kenmare* case the words were

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

In this case the words are

"if the terms thereof provide . . . for the determination of the settlement by the act . . . of any person".

In the former case the terms of the settlement enabled the trust fund to be exhausted by successive withdrawals during the lifetime of the settlor, so that there would be nothing left for the trusts to operate upon, and the settlement, it was held, could be determined. Similarly, in this case the exercise of the power could bring about a determination.

(1) 37 T.C. 383.

(Lord Hodson)

A subsidiary argument was addressed to your Lordships to the effect that the settlement did not provide in terms for its determination and that if the Statute had intended determination to be brought about by the exercise of a power of appointment it could have easily said so. This view appealed to Donovan, L.J., and is supported by the judgment of Lord Greene, M.R., in *Jenkins v. Commissioners of Inland Revenue*, 26 T.C. 265, a case which I find difficult to distinguish on the ground suggested, namely, that it involved proof of extraneous facts. In that case the settlor was able to get into his hands the whole of the trust funds, but that was said to have occurred, not by reason of any terms contained in the settlement, but rather because of the extraneous fact that the settlor had lent money to the trustees which they repaid to him out of the income of the settlement. Like Donovan, L.J., I find the distinction difficult to perceive, and I do not think that the decision in the *Jenkins* case can be supported.

The third point raised by the Respondent settlor was to the effect that the exercise of a power of appointment cannot have the effect of determining a settlement, for it is said that the settlement is not determined until the transfer of the funds, which is not provided for by the settlement. This argument, I think, is fallacious. The settlement is in truth determined by the execution of the power in favour of a person *sui juris*, and this is no less true because the trustees may have further duties and rights under the settlement before their accounts are finally passed. This is clear, and is illustrated by the decision of the Court of Appeal in *Hamilton-Russell's Executors v. Commissioners of Inland Revenue*, 25 T.C. 200. Luxmoore, L.J., there pointed out that, once funds are at home and belong solely to the beneficiary for his own absolute use and benefit, the trusts of a settlement become unenforceable and ineffective.

Lastly, it was argued that the settlement was saved by the second proviso to Section 399 of the Act of 1952, which reads:

“Provided that a settlement shall not be deemed to be revocable by reason only . . . (ii) that it provides for the determination of the settlement as aforesaid in such a manner that the determination will not, during the lifetime of any such child as aforesaid, benefit any person other than such a child or the wife, husband or issue of such a child”.

It was argued that, having regard to the facts existing at the material time, that is to say, when the income of the settlement is being accumulated, the only persons who could have benefited were the children of the settlor. The answer is, as Plowman, J., said, that one must look at the settlement. One then sees from the language of the power that persons outside the class can benefit when the settlement is determined.

I would allow the appeal and restore the judgment of Plowman, J.

Question put :

That the Order appealed from be reversed except as to costs, and that the Order of Plowman, J., be restored except as to costs.

The Contents have it.

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