

G-14 G-2

Judgment
13/1964

IN THE PRIVY COUNCIL

No. 47 of 1962

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
22 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.

O N A P P E A L
FROM THE COURT OF APPEAL FOR EASTERN
AFRICA AT DAR ES SALAAM

BETWEEN

78559

KANJEE NARANJEE

Appellant

- and -

THE COMMISSIONER OF INCOME TAX Respondent

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CASE FOR THE RESPONDENT

Record

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1. This is an appeal from a judgment of the Court of Appeal for Eastern Africa at Dar es Salaam (Sinclair P. Gould J.A. and Mayers Ag. J.A.) dated the 30th November, 1962 upon an appeal by the Appellant from a Judgment and Decree of the High Court of Tanganyika at Dar es Salaam (Weston J.) dated 9th June, 1962 which save as it discharged the Appellant from liability to tax on the sum of £45,777 being portion of the sum contained in the amended assessment which the Appellant disputes, affirmed the assessment and dismissed the Appeal. By the judgment of the Court of Appeal for Eastern Africa, the Judgment of the High Court dismissing the appeal against assessment of income tax on income in the sum of £56,420 was affirmed, and the cross appeal which had been lodged by the Respondent in respect of the amount of £45,777 having been withdrawn was formally dismissed.

p.40
p.15
p.34

2. The matter arises upon an amended assessment to income tax made upon the Appellant, under the East African Income Tax (Management) Act 1958, by the Respondent, relating to the Year of Income 1958. The point in issue relates to the inclusion as chargeable income in such assessment of an amount of £54,085 which may be described as the 1958 income of the Kanjee Naranjee Settlement Trust and an amount of £2,335 which may be described as the 1958 income of the Ujambhai

p.5

Naranjee Settlement Trust. The point in issue is the same in respect of each of these two amounts, and it is whether by reason of the provisions of Section 25 of the East African Income Tax (Management) Act 1958, the two settlement trusts hereinbefore referred to should be deemed to be revocable and in consequence the income arising thereunder should be deemed for income tax purposes to be that of the settlor of the trusts.

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3. The facts of the Case are set out in detail in the Record and may be summarised as follows :-

(i) The Appellant is the settlor, and together with his wife Ujambhai Kanjee Naranjee was at all material times a trustee of a settlement created by Deed dated the 5th day of June 1955 which established a trust for the benefit of the then existing and any future sons of his three sons and in default for certain other persons. This settlement is hereinafter called "the husband's settlement".

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(ii) The Appellant's wife Ujambhai Kanjee Naranjee is the settlor, and together with her husband, the Appellant, was at all material times a trustee of a settlement created by Deed dated the 5th day of June 1955, which established a trust for the benefit of the then existing and future sons of her three sons and in default for certain other persons. This settlement is hereinafter called "the wife's settlement".

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p.69 ll 33-43

(iii) In each settlement there is a clause, number 10 in each - in the following terms :-

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"The Trustees may invest any money
"for the time being subject to the
"trusts of this settlement in any
"investments authorised by law or in
"or upon ordinary preference
"preferred deferred or other stock or

10 "shares of any public or private
"company wherever incorporated or
"carrying on business or in making
"loans secured or unsecured or fixed
"deposits to or with any person firm
"company or bank and they may so
"invest notwithstanding that the
"Trustees or any of them may have an
"interest in such public or private
"company or such firm company or bank".

20 (iv) In respect of the Year of Income 1958
each of the trusts produced income,
and that income has been treated by
the Respondent as income chargeable
to tax of the Appellant. The income
of the husband's settlement for 1958
having been grossed up amounts to
£54,085 and the income of the wife's
settlement, having been grossed up,
amounts to £2335.

4. The relevant provisions of the East
African Income Tax (Management) Act 1958
(hereinafter called "the Act") are as follows:-

30 "25.(1) All income which in any year of
"income accrued to or was received by any
"person under a settlement, which
"revocable or not and whether made or
"entered into before or after the
"commencement of this Act, from assets
"remaining the property of the settlor
"shall be deemed to be income of the
"settlor for such year of income and not
"income of any other person.

"(2) All income which in any year of
"income accrued to or was received by any
"person under a revocable settlement shall
"be deemed to be income of the settlor for
"such year of income and not income of any
"other person.

40 "(3) Where in any year of income the
"settlor, or any relative of the settlor,
"or any person under the direct or
"indirect control of the settlor or of
"any of his relatives, by agreement with
"the trustees of a settlement in any way,
"whether by borrowing or otherwise, makes

"use of any income arising, or of any
"accumulated income which has arisen,
"under such settlement to which he is not
"entitled thereunder, then the amount of
"such income or accumulated income so
"made use of shall be deemed to be
"income of such settlor for such year of
"income and not income of any other
"person.

"(4) For the purposes of this Section, 10
"a settlement shall be deemed to be
"revocable if under its terms the settlor -

"(a) has a right to reassume control,
"directly or indirectly, over the
"whole or any part of the income
"arising under the settlement or of
"the assets comprised therein; or

"(b) is able to have access, by
"borrowing or otherwise to the whole 20
"or any part of the income arising
"under the settlement or of the assets
"comprised therein; or

"(c) has 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
"and, in the event of the exercise of
"such power, the settlor or the wife 30
"or husband of the settlor will or
"may become beneficially entitled to
"the whole or any part of the
"property comprised in the settlement
"or to the income from the whole or
"any part of such property:

"Provided that a settlement shall not be
"deemed to be revocable by reason only
"that under its terms the settlor has a
"right to reassume control, directly or 40
"indirectly, over any income or assets
"relating to the interest of any
"beneficiary under the settlement in the
"event that such beneficiary should
"predecease him.

"(5) In this section -

"settlement" includes any disposition,
"trust covenant, agreement,
"arrangement, or transfer of assets,
"other than -

"(i) a settlement made for valuable
"and sufficient consideration;

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"(ii) any agreement made by an
"employer to confer a pension upon an
"employee in respect of any period
"after the cessation of employment
"with employer, or to provide an
"annual payment for the benefit of
"the widow or any relative or
"dependent of such employee after his
"death, or to provide a lump sum to
"an employee on the cessation of such
"employment;

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"Settlor" in relation to a settlement,
"includes any person by whom the
"settlement was made;

"Relative" has the same meaning as in
"section 37".

¶ ¶ ¶ ¶

"2(3) Reference in this Act to -

"(a).....

"(b).....

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"(c) "under", in relation to any
"enactment, rule, schedule, part,
"section, subsection, paragraph,
"sub-paragraph, will, settlement or
"other document, include references
"to, in accordance with, by virtue
"of, and in consequence of, such
"enactment, rule, schedule, part,
"section, sub-section, paragraph,
"sub-paragraph, will, settlement or
"other document, as the case may be".

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"74 (1) The income of a married
"woman living with her husband shall
"be deemed to be the income of the
"husband for the purpose of
"ascertaining his total income, and
"shall be assessed on, and the tax

"thereon charged on, the husband:

"Provided that such part of the
"total amount of tax charged on the
"husband as bears the same
"proportion to such total amount as
"the amount of the income of the wife
"bears to the amount of the total
"income of the husband may, if due and
"not paid, be collected from the wife
"or, if she is dead, from her
"executors or administrators, 10
"notwithstanding that no assessment
"has been made upon her; and the
"provisions of this Act relating to
"the collection and recovery of tax
"shall apply to such part of such
"tax as if it were tax the due date
"for payment of which is a date 30
"days after the date of a notice
"served on such wife, or her 20
"executors or administrators, as the
"case may be, requiring payment of
"such part of such tax."

5. The question of law raised in this appeal, shortly stated is whether the husband's settlement is deemed to be revocable by virtue of the provisions of paragraph (b) of subsection (4) of section 25 of the Act. As the husband's settlement and the wife's settlement are in identical terms it is conceded by the Appellant that if the Appellant is liable to income tax in respect of the income from his, the husband's settlement, he is also liable to tax in respect of the income from his wife's settlement. 30

6. The Appellant objected to the amended assessment made by the Respondent for the year of Income 1958, in so far (inter alia) as it charged the Appellant with tax on the income arising under the husband's trust and the wife's trust. 40

p.1

By Memorandum of Appeal dated the 10th day of November 1961, the Appellant appealed to the High Court of Tanganyika against the said amended assessment.

7. The grounds of the Appeal to the High

Court, so far as they are relevant to the present issue, were that -

"(i) In the said Assessment (as amended)
"the Appellant is wrongly assessed to tax
"in respect of a sum of £103,855 which
"with a sum of £2,673 is included in the
"aggregate sum of £106,528 shown therein
"and is described as being dividends
"received by him;

p.2 l.9 -
p.3 l.4

10 "(ii) Neither the said sum of £103,855
"nor any part thereof was paid to or
"received by either the Appellant or by
"his wife Ujambhai Kanjee (herein
"referred to as "the wife");

"(iii) Neither the said sum of £103,855
"nor any part thereof constitutes
"income of the Appellant or of the wife
"for any of the purposes of the said
"Act;

20 "(iv) Neither the Settlement dated 5th
"June, 1955 which was created by the
"Appellant as settlor (herein referred
"to as "the Husband's Settlement") nor
"the Settlement of the like date which
"was created by the Wife as settlor
"(herein referred to as "the Wife's
"Settlement") constitutes a revocable
"settlement for the purposes of section
"25 of the said Act;

30 "(v) Neither the Appellant under the
"terms of the Husband's Settlement nor
"the Wife under the terms of the Wife's
"Settlement has a right to reassume
"control directly or indirectly over
"the whole or any part of the income
"arising under the relative Settlement
"or of the assets comprised therein
"within meaning of section 25 (4) of the
"said Act;

40 "(vi) The Appellant was not under the
"terms of the Husband's Settlement able
"at any material time to have access by
"borrowing or otherwise to the whole or
"any part of the income arising under
"that Settlement or of the assets

"comprised therein nor was the Wife under
"the terms of the Wife's Settlement able
"at any material time to have access by
"borrowing or otherwise to the whole or
"any part of the income arising under
"the Wife's Settlement or of the assets
"comprised therein within the meaning
"of section 25 (4) of the said Act;

.....

.....

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p.4 11.17-23

"(xiv) The Respondent in making the said
"Amended Assessment erred in fact and in
"law in treating the said sum of
"£103,855 or any part thereof as having
"been received by the Appellant or as
"forming portion of the income of the
"Appellant for the purposes of the said
"Act."

p.15

8. The High Court of Tanganyika (Weston J.)
dismissed the appeal in part (the part
wherein it was allowed is not material to
this appeal) on the 9th June 1962 and a
decree to that effect was given on the same
date.

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p.34

p.29 11.3-5

In the course of his judgment, Weston J.
pointed out that both the settlements are
declared "absolutely irrevocable in all
"circumstances" but that it was contended
by the Respondent before him that the
settlements were revocable settlements
having regard to Clause 10 of each and the
provisions of S.25(4)(b) of the Act.

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p.29 11.16-19

p.29 11.30-33

The learned judge stated that the
Appellant's liability to tax depended
solely on the answer to the question: Are
the settlements revocable or irrevocable
within the meaning of the Act?

p.29 1.40 -
p.30 1.2

Weston J. then referred to the
argument for the Appellant, that the
intention of S.25(4)(b) is that a settle-
ment is to be regarded as revocable which
by its terms (a) enables the settlor to
have access to the income arising out of it,
and (b) enjoins the trustees to pass such

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income to him so that they must do so on demand.

10 The learned judge considered the intention of the Legislature to be plain, and to be that a settlement should be deemed to be revocable where its terms are found to be such that there is no lawful bar to the passing of any income arising out of it into the hands of the settlor. He considered that "if one looks fairly at the language used" (See Cape Brandy Syndicate -v- I.R.C. (1921) 1 K.B. 64 per Rowlatt J. at p.71) the words of the paragraph are apt to give effect to that intention.

p.31 11.
42-49

20 It seemed to the learned judge that to construe the paragraph restrictively in particular to read the word "under" as meaning "in accordance with" or "by virtue of" rather than as meaning "in consequence of" which s.2(3)(c) also makes permissible would be arbitrarily to frustrate the achievement of the end which the legislature had in mind.

p.32 11.1-8

30 Weston J. also was unable to agree "that the words "is able to have access" mean anything more or less than "has the legal competence to have access", or that that competence is in any way diminished or impaired by reason of the fact that in any bilateral transaction involved any concurrence has to be obtained, or act done by the party of the other part to such transaction."

p.32 11.8-17

40 The learned Judge referred to the general rule of equity which make the settlor who is also a trustee, to use the words of the Lord Chancellor King in Keech -v- Sandford (2 Eq.Cas.Abr.741) "the only person of all mankind" other than the co-trustees to whom the trustees could not properly lend the settlement income. He then referred to clause 10 of the settlements and considered that there was no bar to the settlor as partner in a firm borrowing from the trustees and that in such a case this would be receipt of such income by the settlor.

p.33 11.1-7

p.33 11.8-25

p.33 11.36-40

Accordingly he dismissed that part of the appeal which related to the issue now in dispute.

p.35

9. The Appellant appealed to the Court of Appeal for Eastern Africa against that part of the decision of the High Court of Tanganyika and by a Memorandum of Appeal dated the 31st July 1962 the grounds of appeal were set out as follows :-

p.38 11.1-40

"1. That the learned Judge erred in holding that the said settlements are or that either of them is "revocable" within the meaning of the said section.

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"2. That the learned Judge erred in holding that under the terms of either of the said settlements the settlor named therein was at any material time "able to have access by borrowing or otherwise to the whole or any part of the income arising under such settlement or of the assets comprised therein" within the meaning of sub-section (4)(b) of the said section.

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"3. That the learned Judge erred in failing to hold that in the case of each of the said settlements access by the settlor to the income arising thereunder or the assets comprised therein could be enjoyed only if and insofar as the trustees for the time being of such settlement in the proper exercise of their discretion as trustees and in the due administration of the trusts of the settlement might from time to time see fit to permit and enable such access so to be enjoyed and that accordingly such settlor was not "able to have access" to such income or assets within the meaning of the said sub-section.

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"4. That the learned Judge erred in holding that in the case of each settlement there was no bar to the settlor as a partner in a firm borrowing or taking on fixed deposit from the trustees of such settlement income arising out of such settlement notwithstanding that such settlor was a trustee thereof.

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"5. That the learned Judge erred in holding
"that the Appellant had been correctly
"assessed to tax in the said Assessment in
"relation to the said sums of income
"amounting to £4,085 and £2,335 respectively
"and in failing to discharge the said
"Assessment in that regard.

10 "6. That in regard to the construction of the
"said sub-section and its application to the
"facts and to the inferences of fact to be
"drawn in the case the decision of the
"learned Judge was wrong in law."

10. The case came on for hearing in the Court
of Appeal at Dar es Salaam on the 6th
November 1962 (Sinclair P., Gould J.A. and
Mayers Ag. J.A.) and on the 30th November
1962 the Court of Appeal dismissed the
Appellant's appeal.

pp.40-64

20 11. The first judgment was given by Mayers
Ag. J.A., who first reviewed the facts,
referring to the settlements and also to
section 25 of the Act.

He then referred to the general rule
which was not disputed, that in the absence
of an express provision to the contrary a
trustee cannot lend to himself. He
regarded this rule as an instance of the
wider proposition that a trustee may not
make a profit out of his office, and
referred to the dictum of Lord Herschell in
Bray -v- Ford (1896) A.C. 44 at page 51.

p.44 11.10-13

p.44 11.25-35

30 The learned Acting Justice of Appeal
then considered the submissions of Counsel.
He summarised the contentions of Counsel
thus:-

"Mr. Thornton, who appeared for the
"Respondent, conceded that there was no
"express power in the settlement
"enabling a loan to be made to a trustee,
"but he contended that as by virtue of
"the provisions of Clause 10, already
"referred to, loans can be made inter alia
"to a firm in which a trustee is
"interested, it was possible under the

p.44 1.45 -
p.45 1.20

"terms of the settlement for the
"Appellant to become a member of a firm
"and for that firm to obtain a loan from
"the trustees, a course of conduct which
"he maintains would bring the Appellant
"within the provisions of paragraph (b)
"of Sub-section (4), that is to say,
"would constitute him a person who is
"able under the terms of the settlement
"to have access by borrowing or otherwise 10
"to the whole or any part of the income
"arising under the settlement. The
"Appellant's contention, put equally
"shortly, is that "under the terms of the
"settlement" must mean in accordance with
"or by virtue of the provisions of the
"settlement and that the phrase "able to
"have access by borrowing or otherwise"
"means has a right to obtain and not
"merely a capacity to apply for a loan." 20

p.45 l.49 -
p.46 l.3

He then dealt in some detail with the
submissions made for the Appellant. With
reference to the argument that if the
Respondent's submissions as to paragraph (b)
of subsection (4) of section 25 of the Act
were correct then paragraphs (a) and (c)
became unnecessary, Mayers Ag. J.A. expressed
the view that it might equally well be said
that on any construction of paragraph (a)
paragraphs (b) and (c) are unnecessary. 30

p.46 ll.12-24

He then considered the submission on
behalf of the Appellant on three matters on
which paragraph (b) of sub-section (4) was
silent -

- (a) that it makes no reference to the
settlor having joint access;
- (b) that it makes no reference to the
settlor having access with or
without the consent of any other
person; 40
- (c) that it does not say "is able to
have access directly or indirectly"
which was apposite to the
partnership point in that incidents
attaching to a loan to a partnership
differ from those of a loan to an
individual;

The learned Acting Justice of Appeal considered that it by no means followed that the failure of the draftsmen to use some phrase which might have expressed the intention of the statute with greater precision than that achieved by the words actually used necessarily implies that the words actually used are not sufficient to attain the desired end. The question always to be determined in construing a statute is ultimately what is the natural meaning in their context of the words used and if the words used are sufficiently clear to achieve a particular object it matters not that some other words might have attained that object with greater precision.

p.47 11.25-37

Referring particularly to the submission in paragraph (a) above, he did not derive any assistance from the decision in Lord Vestey's Executors -v- C.I.R. 31 T.C.I. because he considered that Lord Morton's remarks at page 110 which had been referred to by Counsel for the Appellant were based upon the wording of the particular section which he was in that case constrained to construe and are not to be regarded as necessarily applying to quite other words in some other statute.

p.47 1.38 -
p.48 1.40

He considered the case of Wolfson -v- C.I.R. but considered there was a clear distinction between that case and the instant case. The distinction was that the words construed in the Wolfson case "if and so long as the terms of any settlement are such" appeared to him to mean if it is specially provided by the terms of the settlement. He considered such a phrase very different from the phrase "under the terms of a settlement" inasmuch as the "under" might bear the meaning "in consequence of" under paragraph (c) of subsection (3) of section 2 of the Act and those words appeared to the learned acting Justice of Appeal to be wide enough to cover much that is not specifically provided for by the settlement so long as it is not prohibited by the settlement.

p.48 1.40 -
p.51 1.45

Mayers Ag. J.A. also dealt with Jenkins

p.53 1.44 -
p.57 1.24

-v- C.I.R. 26 T.C. 265 and Jamieson -v-
I.R.C. 1962 W.L.R. 1075 but found them
distinguishable on the facts.

- p.58 11.4-9 He then turned to the arguments which had been adduced by Counsel for the Respondent. Counsel had emphasised the distinction between the words of subparagraph (a) which refers to a right to resume control and those of subparagraph (c) which refers to a power to determine the settlement on the one hand and on the other the words of paragraph (b) "is able to have access". Mayers Ag. J.A. said on this point that he found it difficult to believe that the draftsman of section 25 would have used such different words as "right" in paragraph (a) and "power" in paragraph (c) and "is able to" in paragraph (b) if he had intended in each case to express the same idea. The learned Acting Justice of Appeal concluded his judgment by saying that the ability to do something seemed to him not necessarily to extend to a power to do that thing, but merely to imply a capacity to do it. In his view therefore the phrase "if under the terms of the settlement is able to have access" means if the settlor is a person who can otherwise than in contravention of the terms of the settlement have access to its funds and in the event of his doing whatever acts and things may be necessary for him to obtain such access. 10
- p.58 11.31-35
- p.58 11.36-45 20
- p.59 11.44-47 Sinclair P. said he derived little assistance from the authorities referred to by Counsel for the Appellant in which different words in a different context were being construed. He referred to Clause 10 of the settlement which empowered the trustees to make loans to a firm in which one of them might be interested and said that this was not a circumstance extraneous to the settlement but one expressly provided for by it. He considered therefore that under the terms of settlement the Appellant is within the category of persons who could legally be competent to borrow trust funds. 30
- p.60 11.2-13 40
- p.60 11.13-16
- p.60 11.17-33 The learned President did not think the words "is able to have access" are synonymous

10 with "has a right to have access" and drew attention to the use of the word "right" in paragraph (a). He considered the expression "is able to have access" not a term of art, but one must be given its ordinary or natural meaning of competence to have access rather than a right to have access. He considered therefore that if the Appellant is not legally competent, he could at any time make himself so and that therefore he is a person able to have access to the trust funds by borrowing within the meaning of section 25 (4)(b) of the Act.

20 The final judgment was delivered by Gould J.A. who agreed with Sinclair P. and Mayers Ag. J.A. that the appeal should be dismissed. Gould J.A. referred to the use of the words "right" and "power" in the other paragraphs of the subsection and said that as the draftsman had these words present to his mind, the change to the concept of ability in paragraph (b) was so marked that he was satisfied that the intention must be to convey something less than a right or power. He thought also that it was within the scheme and comprehensive scope of this part of the Act that the legislature would intend to include within it a settlement under which the settlor may be able to borrow as well as one which gives him a right to do so. 30 He found that the word "able" in this context meant ability in the sense of being one of the category of persons to whom the trustees may lawfully lend money under the terms of the settlement. He considered that the settlor's ability to borrow arose under the terms of the settlement because apart from clause 10 he would not be able to borrow.

p.61 1.4

p.61 11.15-29

p.61 11.38-44

p.62 11.1-5

40 12. An order granting Final Leave to Appeal to the Appellant to appeal to Her Majesty in Council was made on the 4th December 1962.

pp.64-65

13. The Respondent humbly submits that the decision of the Court of Appeal is right and should be affirmed and that this Appeal should be dismissed with costs for the

following amongst other

R E A S O N S

1. Because by reason of the provisions of paragraph (b) of subsection (4) of section 25 of the Act, the husband's and the wife's settlements are deemed to be revocable, and that in consequence the income arising therefrom was properly included in the chargeable income of the appellant for the year of income 1958. 10
2. Because Clause 10 of each settlement permits the trustees to lend trust funds to a firm in which a trustee may have an interest, and therefore the settlor, although a trustee, is able to have access to trust funds under the terms of the settlement.
3. Because section 2(3)(c) of the Act ascribes the meaning "in consequence of" as one of meanings which may be given to the word "under" and there is no justification for construing this term restrictively. 20
4. Because the words "able to have access" in paragraph (b) of subsection (4) of Section 25 of the Act bear their ordinary meaning of competence to have access rather than right to have access.
5. Because the context of the words "able to have access" in paragraph (b) of subsection (4) of Section 25 of the Act, particularly when contrasted with the words used in paragraphs (a) and (c) makes it clear that something less than a right or power is sufficient to satisfy the relevant statutory test as to whether a settlement is to be deemed to be revocable. 30
6. Because by reason of Clause 10 of the trusts, the settlor is a person who is legally competent to have access to the trust funds, and accordingly the trusts are deemed to be revocable. 40
7. For the reasons given in the judgment

of the High Court.

8. For the reasons given in the judgment of the Court of Appeal.

G.C. THORNTON.

No. 47 of 1962

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN
AFRICA AT DAR ES SALAAM

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- and -

THE COMMISSIONER OF INCOME TAX
Respondent

CASE FOR THE RESPONDENT

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