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(13), 1964

IN THE PRIVY COUNCIL

No. 47 of 1962

ON APPEAL  
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

KANJEE NARANJEE

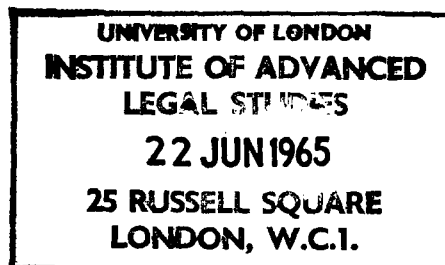
Appellant

- and -

THE COMMISSIONER OF INCOME TAX

Respondent

R E C O R D    O F    P R O C E E D I N G S



- 78557

LINKLATERS & PAINES,  
Barrington House,  
59-67, Gresham Street,  
London, E.C.2.  
Solicitors for the Appellant.

CHARLES RUSSELL & CO.,  
37, Norfolk Street,  
London, W.C.2.  
Solicitors for the Respondent.

IN THE PRIVY COUNCILNo. 47 of 1962

ON APPEAL  
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

KANJEE NARANJEE

Appellant

- and -

THE COMMISSIONER OF INCOME TAXRespondentRECORD OF PROCEEDINGSINDEX OF REFERENCE

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IN THE PRIVY COUNCIL

No. 47 of 1962

ON APPEAL  
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

KANJEE NARANJEE

Appellant

- and -

THE COMMISSIONER OF INCOME TAX

Respondent

RECORD OF PROCEEDINGS

No. 1

In the  
High Court of  
Tanganyika

No. 1

10

MEMORANDUM OF APPEAL AGAINST ASSESSMENT  
No. 21/7543 WITH ANNEXURES.

IN THE HIGH COURT OF TANGANYIKA

MISCELLANEOUS CIVIL APPEAL (DAR ES SALAAM) No. 5 of  
1961

IN THE MATTER of ASSESSMENT NO.21/7543 YEAR OF  
INCOME 1958

AND IN THE MATTER of THE EAST AFRICAN INCOME TAX  
(MANAGEMENT) ACT 1958

KANJEE NARANJEE

Appellant

20

- versus -

THE COMMISSIONER OF INCOME TAX Respondent

MEMORANDUM OF APPEAL

1. The Appellant above-named (whose address for service for the purpose of this Appeal is care of Gerald Harris, Advocate, c/o Messrs. Atkinsons, Walker and Company, P.O. Box 176, Kelvin House, Acacia Avenue, Dar es Salaam) being aggrieved by the above Assessment and having given to the

Memorandum of  
Appeal against  
Assessment  
No. 21/7543  
with Annexures.  
10th November,  
1961.

In the  
High Court of  
Tanganyika

No. 1

Memorandum of  
Appeal against  
Assessment  
No. 21/7543  
with Annexures.

10th November,  
1961

- continued.

Respondent a valid Notice of Objection thereto and having been served with an Amending Notice of Assessment under Sect. 110(3)(a) of the above-named Act and having given Notice of Appeal in writing to the Respondent under section 111 of the said Act, appeals to this Honourable Court against the said Assessment (as amended) on the following amongst other grounds:-

- (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; 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 Ujambai Kanjee Naranjee (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 the meaning of section 25(4) of the said Act;
- (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 40

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;

In the  
High Court of  
Tanganyika

No. 1

Memorandum of  
Appeal against  
Assessment  
No. 21/7543  
with Annexures.

10th November,  
1961

- continued.

- 10 (vii) So much (if any) of the said sum of £103,855 as comprised or represented dividends declared in the years 1956, 1957 and 1958 by Kanjee Naranjee Finance Corporation Limited (herein called "the Corporation") or Kanjee Naranjee Limited (herein called "the Company") in respect of shares held either by the Appellant and the Wife as trustees of the Husband's Settlement or by the Wife and the Appellant as trustees of the Wife's Settlement constituted "income arising" under the relative Settlement within the meaning of section 25(3) of the said Act only as from the time of actual payment;
- 20 (viii) No part of the said sum of £103,855 consisted of or represented "accumulated income which had arisen" under either of the said Settlements within the meaning of section 25(3) of the said Act;
- (ix) Neither the Appellant nor any relative of his nor any person under his control or the control of any of his relatives within the meaning of section 25(3) of the said Act made use of any income arising under the Husband's Settlement;
- 30 (x) Neither the Wife nor any relative of hers nor any person under her control or the control of any of her relatives within the meaning of section 25 (3) of the said Act made use of any income arising under the Wife's Settlement;
- 40 (xi) The entire share capital of the Company was at all material times held by the trustees of the Husband's Settlement and accordingly if that company by borrowing or otherwise made use of any income arising or of any accumulated income which had arisen under such Settlement (which is not admitted) the benefit derived thereby accrued to the advantage of the Settlement and did not constitute the making use of such income or accumulated income by a person not entitled thereto within the true intend and purpose of section 25 (3) of the said Act;
- (xii) So much of the dividends declared by the



In the  
High Court of  
Tanganyika

No. 1

Memorandum of  
Appeal against  
Assessment  
No. 21/7543  
with Annexures.  
10th November,  
1961  
- continued.

Corporation in respect of shares held by the trustees of the Wife's Settlement or of the Husband's Settlement which after being so declared were for a period not paid out to the shareholders but retained by the Corporation did not during that period constitute income of either the Appellant or the Wife as settlor for the purpose of section 25 of the said Act;

- (xiii) So much of the dividends declared by the Company in respect of shares held by the trustees of the Husband's Settlement which after being so declared were for a period not paid out to the shareholders but retained by the Company did not during that period constitute income of the Appellant as settlor for the purpose of section 25 of the said Act; 10
- (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. 20

2. Pursuant to Rule 5 of the Income Tax (Appeal to the High Court) Rules, 1959, the Appellant attaches hereto:-

- (a) a copy of the said Amending Notice of Assessment (marked "Annexure A").
- (b) a copy of the said Notice of Appeal (marked "Annexure B"), and 30
- (c) a Statement of Facts (marked "Annexure C").

3. The Appellant therefore prays:

- (a) that the said Amended Assessment be annulled or reduced as may be just and reasonable;
- (b) for such further or other relief as this Honourable Court may see fit to grant;
- (c) for the costs of this Appeal.

DATED this 10th day of November, 1961. 40

(Sgd.) "Kanjee Naranjee"  
Kanjee Naranjee  
Appellant.

5.

No. 2

ANNEXURE "A" - AMENDING NOTICE OF ASSESSMENT

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In the  
High Court of  
Tanganyika

---

No. 2

Annexure "A" -  
Amending  
Notice of  
Assessment.

31st August,  
1961.

EAST AFRICAN INCOME TAX DEPARTMENT  
INCOME TAX—YEAR OF INCOME, 1958<sup>A</sup>

FILE No. 213333/101

ASSESSMENT No. 21/ 7543

Additional to ASSESSMENT No. 216074

### ADDITIONAL ASSESSMENT

KANJEE NARANJEE

P.O. Box 2  
NGERENGE

Take notice that you have been assessed under the East African Income Tax (Management) Act 1958, on additional income as shown hereon.

If you dispute this Additional Assessment you must give me notice of objection in writing, stating precisely the grounds of objection, within 30 days from the date of service of this Notice of Assessment.

P.O. Box 9131, Dar es Salaam,  
Tanzania.

R. F. JOHNSON,  
Regional Commissioner of Income Tax  
(Dar es Salaam District)

Date Assessment TERRY AMENDELMAN Income

Source										Revised		Totally Assessed		AMENDED Income	
Agriculture															
Trade, Profession, etc.										10		10			
Pension															
Employment, Salary, Self									3060			3060			
Wife										3060		3060			
Quarters															
Rents, etc.															
Annual Value Property										106 528		2673		103 855	
Dividends										7		7			
Interest															
Other Income															
income from outside East Africa															
TOTAL															
Less Interest Paid															
Losses															
Passage Deduction															
Retirement benefit payments															
Alimony															
TOTAL INCOME										109 605		5750		103 855	
Single	Married	Child	Edu- cation	Depen- dent	Age	Life As- surance	Prov. Fund								
	700	120		60						880		880			
CHARGEABLE INCOME										108 725		4870		103 855	
Income Tax on Chargeable Income										Sh. 1,580 375		Sh. 33 200		Sh. 1,507 175	
Less Life Assurance £ @ Sh.															
£ @ Sh.															
Double Taxation Relief															
NET TAX PAYABLE										1,580 375		33 200		1,507 175	
Tax paid at source on Additional Income												571 220			
Tax payable on Additional Income												975 955			
Tax Section 101															
Tax Now Payable												975 955			

YEAR OF INCOME, 1958 <sup>AMENDED</sup> ASSESSMENT NO. 21/ 7543

FILE NO. 21/3233/101

C.F. NO.

Additional to Assessment No. 2116074

Additional Tax	Payable
----------------	---------

Tax Section 101

Less Overpaid on Asst.

19

TOTAL	PAYABLE	975955
-------	---------	--------

Payable Sh. 975955 on 1 - 11. 61

Sh. on

Address PO Box 2 NGERENGERE

Name KANJEE NARANJEE

## NOTES

Please make payment to me either by post to Regional Commissioner of Income Tax, P.O. Box 9131, Dar es Salaam, Tanganyika, or personally at Tancot House, Main Avenue, Dar es Salaam, Tanganyika.

Cheques, Money Orders and Postal Orders should be crossed and made payable to "East African Income Tax Department."

**Your attention is drawn to the provisions of the East African Income Tax (Management) Act, 1958, which imposes a penalty of 20% of the total tax if payment of any instalment is not made by the appropriate due date (see opposite).**

**No further reminder will be issued.**

**Please produce this slip when making payment.**

In the  
High Court of  
Tanganyika

No. 3

Annexure "B" -  
Notice of  
Appeal against  
Amended Assess-  
ment.

11th October,  
1961.

No. 3

ANNEXURE "B" - NOTICE OF APPEAL AGAINST  
AMENDED ASSESSMENT

Annexure "B"

NOTICE OF APPEAL

To: The Regional Commissioner of Income Tax,  
Dar es Salaam District,  
P.O. Box 9131,  
DAR ES SALAAM

I, KANJEE NARANJEE of P.O. Box 2, Ngerenge  
Tanganyika Territory having been served with Notice  
of Amended Assessment No. 21/7543 (year of income  
1958) (additional to Assessment No. 21/6074) (your  
file No. 21/3333/101) under Section 110 (3) of the  
East African Income Tax (Management) Act, 1958, and  
having previously given a valid notice of objection  
to the original Assessment hereby give you notice  
in writing that it is my intention to appeal to a  
Judge of the High Court of Tanganyika against the  
said Amended Assessment.

10

Dated this 11th day of October, 1961.

20

KANJEE NARANJEE.

No. 4

## ANNEXURE "C" - APPELLANT'S STATEMENT OF FACTS

In the  
High Court of  
Tanganyika

No. 4

Annexure "C"Annexure "C" -  
Appellant's  
Statement of  
Facts.10th November,  
1961.IN THE HIGH COURT OF TANGANYIKAMISCELLANEOUS CIVIL APPEAL (DAR ES SALAAM) No.5 of  
1961IN THE MATTER of ASSESSMENT NO. 21/7543 YEAR OF  
INCOME 195810 AND IN THE MATTER of THE EAST AFRICAN INCOME TAX  
(MANAGEMENT) ACT, 1958

KANJEE NARANJEE

Appellant

- versus -

THE COMMISSIONER OF INCOME TAX RespondentAPPELLANT'S STATEMENT OF FACTS

1. The Appellant resides with his wife Mrs. Ujambai Kanjee Naranjee (herein called "the Wife") in Tanganyika Territory and there are three sons of their marriage and no more namely Dwarkadas Kanjee, Mangaldas Kanjee and Devendra Kanjee.

20

2. By an Indenture of Settlement (herein called "the Husband's Settlement") dated 5th June, 1955 the Appellant created a trust fund for the benefit of the then existing and any future sons of his said three sons and in default thereof for certain other persons and declared the said Settlement to be irrevocable. The sole trustees of the Husband's Settlement are and have always been the Appellant and the Wife.

30 3. By an Indenture of Settlement (herein called "the Wife's Settlement") also dated 5th June, 1955 the Wife created a trust fund for the benefit of the then existing and any future sons of her said three sons and in default thereof for certain other persons and declared the said Settlement to be irrevocable. The sole trustees of the Wife's Settlement are and have always been the Wife and the Appellant.

In the  
High Court of  
Tanganyika

No. 4

Annexure "C" -  
Appellant's  
Statement of  
Facts.

10th November,  
1961

- continued.

4. The subject matter of the Husband's Settlement at the date of its inception was 6,487 Ordinary shares of Shs.20/- each in Kanjee Naranjee Finance Corporation Limited (hereinafter referred to as "the Corporation") and 4,500 shares of Shs.1,000/- each in Kanjee Naranjee Limited (hereinafter referred to as "the Company").

5. The subject matter of the Wife's Settlement at the date of its inception was 6,487 Ordinary shares of Shs. 20/- each in the Corporation.

10

6. The Corporation is a public limited liability company which was incorporated in Tanganyika Territory on 8th June, 1953 but it does not constitute a "public company" for the purpose of the above named Act.

7. The issued share capital of the Corporation as it was on 1st January, 1958 and is now consists of 149,700 Ordinary shares of Shs. 20/- each and 300 Management shares of Shs. 20/- each which are held as follows:-

20

<u>Holder</u>	<u>Ordinary</u>	<u>Management</u>	
The Appellant	-	66	
Pandya Kameshwar Juthalal	-	30	
Dhrona Devohand Jinabhai	-	6	
The Wife	-	30	
Mangaldas Kanjee (son of the Appellant and the Wife)	23952	30	
Devendra Kanjee (son of the Appellant and the Wife)	23952	6	30
Dwarkadas Kanjee (son of the Appellant and the Wife)	11976	30	
Mrs. Shardaben Dwarkadas	11976	6	
The Appellant and the Wife (as Trustees of the Husband's Settlement)	38922	-	
The Wife and the Appellant (as Trustees of the Wife's Settlement)	38922	-	
Kirpal Singh Sagoo	-	36	40
Lakhani Girdharlal Vithaldas	-	24	
Jani Pranalal Kalyanji	-	12	
Pandya Amratlal Kameshwar	-	24	
	<u>149,700</u>	<u>300</u>	

8. The increase in the shareholding in the Corporation of the Appellant and the Wife as trustees of the Husband's Settlement and the Wife's Settlement respectively between the time of the inception of the said two Settlements and the 1st January 1958 was the result of an issue of bonus shares in 1957 by the Corporation by way of capitalization of undistributed profits.

In the  
High Court of  
Tanganyika

No. 4

Annexure "C" -  
Appellant's  
Statement of  
Facts.

10th November,  
1961

- continued.

10 9. The Directors of the Corporation are and at all material times have been the Appellant and his sons Dwarkadas Kanjee and Mangeldas Kanjee.

20 10. The Company is a private company limited by shares and was incorporated in Tanganyika Territory on 8th February, 1955. The authorised share capital was originally Shs. 5,000,000/- made up of 5,000 shares of Shs. 1,000/- each, but was increased to Shs. 7,500,000/- made up of 7,500 Ordinary shares of Shs. 1,000/- each on 16th September, 1958. Of these 7,500 shares 6,852 only have been issued, the present shareholders being the Appellant and the Wife as to one share each in addition to which as trustees of the Husband's Settlement they are joint holders of the entire of the remaining 6,850 shares.

11. The Appellant and the Wife are the sole directors of the Company, the former being under the Articles of Association the Governing Director for life.

30 12. The position at paragraph 10 above also obtained on 1st January, 1958 except that the total number of shares issued at that date was 4,502 of which one share was held by the Appellant, one share by the Wife and 4,500 shares by the Appellant and the Wife jointly as trustees of the Husband's Settlement. On 31st December, 1958 the issued share capital had increased to 6,002 shares of which one share was held by the Appellant one share by the Wife and 6,000 shares by the Appellant and the Wife jointly as trustees of the Husband's Settlement.

40 13. On 20th November 1956 the Company declared a dividend of Shs.66/- per share free of income tax payable on or after 31st December, 1956 for the year ending 31st December 1955 by virtue of which the trustees of the Husband's Settlement became entitled to receive by way of dividend a net sum of Shs. 297,000/- from the Company. This sum was not then paid over to the trustees of the Husband's Settlement but remained to the credit of the

In the  
High Court of  
Tanganyika

No. 4  
Annexure "C" -  
Appellant's  
Statement of  
Facts.

10th November,  
1961  
- continued.

Husband's Settlement in the books of the Company.

14. On 11th July 1957 the Company declared a dividend of Shs. 99/- per share free of income tax payable on or before 31st December 1957 for the year ending 31st December 1956 by virtue of which the trustees of the Husband's Settlement became entitled to receive by way of dividend a net sum of Shs. 445,500/- from the Company. This sum was not then paid over to the trustees of the Husband's Settlement but remained to the credit of the Husband's Settlement in the books of the Company.

10

15. On 16th September 1958 the Company declared a gross dividend of Shs. 230/- per share payable on or before 31st December 1958 for the year ending 31st December 1957 by virtue of which the trustees of the Husband's Settlement became entitled to receive by way of dividend (after deduction of tax) a net sum of Shs. 762,750/-. This sum was not then paid over to the trustees of the Husband's Settlement but remained to the credit of the Husband's Settlement in the books of the Company. At this stage (i.e. on 16th September 1958) the Company had in its books to the credit of the Husband's Settlement an accumulated sum of Shs. 1,505,250/- in respect of the dividends so declared and not yet paid to the trustees of the Husband's Settlement. The sum of £75,000 referred to in the Regional Commissioner's letter of 16th September 1960 as Accumulated Trust Income represented unpaid dividends of the Company.

20

30

16. On each of the three dates 7th November, 1958 11th November 1958 and 10th December, 1958 the Company paid to the trustees of the Husband's Settlement out of the said accumulated dividends the sum of Shs. 500,000/- making in all a total payment of Shs. 1,500,000/- which was paid by the trustees into the trust bank account and subsequently invested by the trustees of the Husband's Settlement towards the end of 1958 in the acquisition by allotment as fully paid of a further 1,500 Ordinary shares in the Company of Shs. 1,000/- each as a result of which the shareholding in the name of the Husband's Settlement was increased accordingly.

40

17. On 28th November, 1956 the Corporation declared a dividend in respect of the period ending 30th June, 1955 of Shs. 3/- per Ordinary Share (free of tax) (payable on or before 31st December, 1956) by



virtue of which the trustees of the Husband's Settlement and the trustees of the Wife's Settlement respectively become entitled to be paid by way of dividend net sums of Shs.19,461/- and Shs. 19,461/- respectively.

In the  
High Court of  
Tanganyika

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No. 4  
Annexure "C"  
Appellant's  
Statement of  
Facts.

10th November,  
1961  
- continued.

10 18. On 28th December, 1956 the Corporation in its accounts credited a company known as "Kiwege and Mgude Sisal Estates Limited" (hereinafter called "Kiwege" in which the Corporation at that time held the entire of the Ordinary share capital) with the said two sums of Shs. 19,461/- (with other monies) and debited the said two sums to the Husband's and the Wife's Settlement respectively. Kiwege in its turn on 31st December, 1956 credited the Company with the said two sums of Shs. 19,461/- (with other monies) and debited the Corporation accordingly. Owing to an accounting error these transactions did not appear in the books of the Company until 31st December, 1958 when the said two sums of Shs.19,461/-  
20 was credited to the Husband's Settlement and the Wife's Settlement respectively, both sums being debited to Kiwege accordingly.

30 19. On 18th March, 1957 the Corporation declared a dividend in respect of the year ending 30th June, 1956 of Shs. 6/- per share free of income tax (payable on or before 30th June, 1957) by virtue of which the trustees of the Husband's Settlement and the trustees of the Wife's Settlement respectively became entitled to be paid by way of dividend sums of Shs. 38,922/- and Shs. 38,922/- respectively.

40 20. On 31st December, 1957 the Corporation in its accounts credited Kiwege with the said two sums of Shs. 38,922/- (with other monies) and debited the said two sums to the Husband's Settlement and the Wife's Settlement respectively. Kiwege in its turn on the same day credited the Company with the said two sums of Shs. 38,922/- (with other monies) and debited the Corporation accordingly. Owing to an accounting error these transactions did not appear in the Company's books until the following year, and on 25th April, 1958 the sum of Shs. 38,922/- was credited to the Husband's Settlement (and debited to Kiwege) and on 31st December, 1958 a like sum was credited to the Wife's Settlement (and debited to Kiwege).

21. On 17th March, 1958 the Corporation declared a dividend in respect of the year ending 30th June, 1957 of 90 cents per share (free of tax and payable

In the  
High Court of  
Tanganyika

No. 4  
Annexure "C"  
Appellant's  
Statement of  
Facts.

10th November,  
1961  
- continued.

on or before 30th June, 1958) by virtue of which the trustees of the Husband's Settlement and the trustees of the Wife's Settlement respectively became entitled to be paid by way of dividend net sums of Shs.35,029/80 and Shs.35,029/80 respectively. On 31st October, 1958 the Corporation paid the above two sums of Shs.35,029/80 direct to the said Settlements.

22. At the hearing of this Appeal oral and documentary evidence will be adduced in substantiation of the foregoing statements of fact and copies of the Husband's Settlement and the Wife's Settlement and of the relative trust accounts and copies of the balance sheets and relative accounts, books and share registers of the Corporation, the Company and Kiwege will be produced.

10

DATED this 10th day of November, 1961.

(Sgd.) "KANJEE NARANJEE"  
Kanjee Naranjee  
Appellant.

20

No. 5

No. 5

Respondent's  
Statement of  
Facts.

7th December,  
1961.

RESPONDENT'S STATEMENT OF FACTS

IN HER MAJESTY'S HIGH COURT OF TANGANYIKA

AT DAR-ES-SALAAM

Miscellaneous Civil Appeal No.5 of 1961

KANJEE NARANJEE

Appellant

- versus -

THE COMMISSIONER OF INCOME TAX Respondent

RESPONDENT'S STATEMENT OF FACTS

1. Article 23 of the Articles of Association of Kanjee Naranjee Ltd. reads:

30

"Mr. Kanjee Naranjee shall be the governing director of the company until he resigns such office and while he retains the same he shall

have authority to exercise all the powers, authorities and discretions by these presents expressed to be vested in the directors generally, and all the other directors shall be under his control and shall be bound to conform to his directions in regard to the affairs of the company".

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Statement of  
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- continued.

10 2. The only trustees of both the husband's settlement and the wife's settlement are the husband and wife. Both settlements contain a clause reading as follows:

20 "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 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".

3. The husband's and the wife's settlements contain the following clause:

30 "all questions arising in the administration or management of the Trust Fund (but not the question of exercise of any discretion) shall be decided by a majority of the Trustees and if on any such question the Trustees shall be equally divided the Senior Trustee shall have a casting vote. The expression "the Senior Trustee" means the Trustee who shall have been earliest appointed and as between Trustees appointed at the same time an earlier named Trustee shall be deemed to have been appointed earlier than a later-named Trustee".

The said Kanjee Naranjee is the senior Trustee of the husband's settlement.

40 4. The amount in dispute (£103,855) is made up as follows:

1. The amount of accumulated income of the husband's settlement which was being made use of during 1958 by Messrs. Kanjee Naranjee Ltd., a company which it is claimed is a person under

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the direct or indirect control of the settlor,  
Mr. Kanjee Naranjee (Sec.23(3) ... £34,332  
treated under section 11 (2) as a gross amount  
of credit being given in the assessment for  
the difference of £13,023 as tax paid at  
source. ... £47,355

2. The amount of income for 1958 of the  
husband's settlement, which it is  
claimed is revocable under the pro-  
visions of section 24(4)(b) £54,085 10

3. The amount of income for 1958 of  
the wife's settlement, which it is  
claimed is revocable under the pro-  
visions of section 25(4)(b) £ 2,415

£103,855

DATED at NAIROBI this 7th day of December 1961.

(Sgd.) G.C. Thornton  
Senior Assistant Legal  
Secretary,  
East Africa High Commission  
(Counsel for Respondent). 20

Served on:  
Gerald Harris Esq.,  
Advocate,  
Messrs. Atkinsons, Walker & Co.,  
Advocates,  
DAR-ES-SALAAM.

Received by me this 13th day of December, 1961

(Sgd.) "P.G. Gandhi"  
Advocate for Atkinsons, Walker & Co. 30

No. 6

J U D G M E N TIN THE HIGH COURT OF TANGANYIKAAT DAR ES SALAAMCivil Appeal No.5 of 1961

KANJEE NARANJEE

Appellant

- versus -

THE COMMISSIONER OF INCOME TAXRespondentJUDGMENT10 WESTON, J.

This is an appeal under s.111(1)(b) of the East African Income Tax (Management) Act, 1958 against an amended notice of assessment served on the appellant by the Commissioner under S.110(3)(a) of the Act, which came into operation on 1st January 1958 and applies to assessments for the year of income 1958 and to assessments for subsequent years of income (see s.1(1)). The appellant is a resident of this country and lives with his wife, Ujambai Kanjee Naranjee. There are three sons of the marriage.

The assessment relates to the year of income 1958 and assesses the appellant to tax in respect of a chargeable income of £107,067 attracting additional tax amounting to Sh.968,272/- as under:

Tax suffered

	<u>£</u>	<u>sh</u>
(a) Income per original assessment	5,750	33,200
30 (b) 1958 Income of Kanjee Naranjee Settlement Trust	54,085	297,467
(c) 1958 Income of Ujambhai Kanjee Naranjee Settlement Trust	2,335	12,842
(d) Accumulated Trust Income used in Kanjee Naranjee Limited	<u>45,777</u>	<u>243,724</u>
Total	107,947	<u>587,233</u>
Allowances	<u>880</u>	
40 Chargeable Income	<u>107,067</u>	
Income Tax		1,555,505
Less tax suffered		<u>587,233</u>
Additional tax payable		<u>968,272</u>

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In this assessment the amount of £54,085 described as the 1958 income of Kanjee Naranjee Settlement Trust, the amount of £2,335 described as the 1958 income of Ujambhai Kanjee Naranjee Settlement Trust, and the amount of £45,777 described as the accumulated trust income used in Kanjee Naranjee, Limited, are in dispute in the sense - but no other - that the appellant denies that he is liable thereon. No other figure is the subject of controversy in any sense, nor is there any difference between the parties as to the facts, though, as will appear, there is no agreement as to the interpretation of and inferences to be drawn from those facts.

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It will I think be convenient to consider first the claim raised by the Commissioner against the appellant in respect of the sum last mentioned, namely, £45,777, described, as I have said, as the accumulated trust income used in Kanjee Naranjee, Limited, and to do this it is necessary to turn to such of the facts as are relevant in this connection.

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By a settlement dated 5th June 1955 the appellant created a trust fund for the benefit of the then existing and any future sons of his three sons, and in default thereof for certain other persons. The sole trustees of this settlement at all material times were the appellant and his wife. The trust fund at the date of its inception consisted in part of 4,500 shares of sh.1000/- each in Kanjee Naranjee, Limited.

This company is a private company limited by shares and was incorporated in this country on 8th February 1955. The authorised share capital was originally sh.5,000,000/- made up of 5,000 shares of sh.1,000/- each, but this was increased on 16th September 1958 to sh.7,500,000/- made up of 7,500 ordinary shares of sh.1,000/- each. Of these 7,500 shares, 6,852 shares only have been issued, the present shareholders being the appellant and his wife as to one share each, in addition to which as trustees of the appellant's settlement they are joint holders of the remaining 6,850 shares. The position as at 1st January 1958 was that of the authorised share capital then made up of 5,000 shares of sh.1,000/- each, the total number of shares issued was, 4,502, of which one share was held by the appellant, one share by the wife, and 4,500 shares by the appellant and his wife jointly as trustees of the appellant's settlement. In

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November and December 1958 the appellant and his wife as trustees of the Appellant's settlement increased their shareholding in the company by the acquisition of a further 1,500 fully paid shares in the company, in circumstances to which reference will be made in its proper place.

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The appellant and his wife are and at all material times were the only directors of the company, article 23 of the articles of association of which reads as follows:

" Mr. Kanjee Naranjee shall be the governing director of the company until he resigns such office and while he retains the same he shall have authority to exercise all the powers, authorities and discretions by these presents expressed to be vested in the directors generally, and all the other directors shall be under his control and shall be bound to conform to his directions in regard to the affairs of the company."

On 20th November 1956 the company declared a dividend for the year ending 31st December 1955 of sh.66/- per share free of tax payable on or after 31st December 1956, as a result of which the trustees of the appellant's settlement became entitled to receive by way of dividend a net sum of £12,057 from the company. This sum, according to the appellant's statement of facts, "was not then paid over to the trustees of the husband's settlement but remained to the credit of the husband's settlement in the books of the company".

On 11th July 1957 the company declared a dividend for the year ending 31st December 1956 of sh.99/- per share free of tax payable on or before 31st December, 1957, as a result of which the trustees of the appellant's settlement became entitled to receive by way of dividend a net sum of £22,275 from the company. Again according to the appellant's statement of facts "this sum was not then paid over to the trustees of the husband's settlement but remained to the credit of the husband's settlement in the books of the company".

In November and December 1958 these two sums, that is to say £34,332 in all, together with other monies paid by the company to the trustees of the appellant's settlement in respect of further dividend for the year ending 31st December 1957 and

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payable on or before 31st December 1958, were invested by the trustees of the appellant's settlement in the acquisition of the 1,500 fully paid up shares in the company already mentioned.

I have, in referring to the disposition of the sum of £12,057 on and after 31st December 1956 and of the sum of £22,275 on and after 31st December 1957, used the terminology employed by the appellant in his statement of facts. Mr. Monroe, who appeared for him, amplified the appellant's words and clarified the appellant's contention in this connection. Learned Counsel argued that from the moment when each of these sums respectively became due from the company to the trustees of the appellant's settlement until November and December 1958 when the company paid these amounts to the trustees who thereupon invested them in the purchase of further shares in the Company as stated, the sums were merely debts owing by the company to the trustees; so that the dividends in question were not, until the moment they were so invested or at least until shortly before, when they were in fact transferred to the trustees account - nothing turns on the very short space of time between the two dates - the dividends I say were not income arising out of the settlement. The relevance of this argument, however, will only become apparent when the grounds are stated upon which the Commissioner seeks to charge the appellant to tax in respect of the sum of £45,777, that is to say, £34,332 grossed up at the appropriate rate. And to these grounds attention must now be directed.

The appellant, it is said, is chargeable to tax on the sum of £45,777 under and by virtue of s.25(3) of the East African Income Tax (Management) Act, which reads - it has been amended since - as follows:

" 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

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"year of income and not income of any other person."

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10 Applying this provision to the facts as he  
sees them, the Commissioner contends that the com-  
pany, Kanjee Naranjee, Limited, being a person  
under the control of the appellant, the settlor, by  
agreement with the trustees of the appellant's  
settlement, in the year of income 1958 and more  
specifically for the period from 1st January 1958  
until November or December 1958, made use of  
£45,777, being income which had arisen under that  
settlement to which the appellant was not entitled  
by its terms. I must observe that as originally  
put forward by the Commissioner, the claim was in  
respect of income accumulated as at 31st December  
1957, but in course of argument, as will appear,  
Mr. Thornton abandoned this position and founded  
the claim on a user of income running from 1956 and  
1957 to November or December 1958, that part of  
20 this period falling in 1958 only attracting tax.

It would I think be well to mention here, in  
order to dismiss them from the field of argument,  
those elements in the Commissioner's contention  
which the appellant is prepared to concede. First,  
and this I have before mentioned, there is no dis-  
pute about the arithmetic of the matter. Then, the  
appellant does not pretend he is entitled to any  
income under the settlement. And lastly, Mr. Monroe,  
if I understood him rightly, would not deny that  
30 monies as he puts it "in the company's coffers"  
could properly be said to be monies which were  
being used by the Company. This being said, it is  
time to move to disputed ground.

The appellant's objections are put thus: (a)  
no income within the meaning of the Act arose under  
the appellant's settlement before the year of  
income 1958 when it was immediately properly appro-  
priated to the purposes of the settlement. I have  
already set out the basis of Mr. Monroe's argument  
40 on this point and will return to it in a moment;  
or alternatively (b) if income did arise under the  
settlement in 1956 and 1957 it was used by the  
company in those years and could not therefore,  
despite the fact that there was a sense in which  
it could be said that the company had used the  
monies in 1958, be taxed in the year of income  
1958; and in any event, (c) the company was not a  
person under the control of the appellant.

With regard to (a), Mr. Monroe's contention is

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based on the simple proposition of law that nothing which does not come in is to be regarded as income within the meaning of the statute, and it seems to me that this proposition is sound in principle and has the support of authority. In Lambe v. The Commissioners of Inland Revenue (1934) 1 K.B. 178 Finlay, J., at p.182, said:

" Now the point which in these circumstances is raised for my decision is whether, where there is a sum due to the tax-payer by way of interest, which by reason of the default of the debtor is not paid, that sum can come in as a part of the income. Looking at the matter quite generally, one would suppose that income means that which comes in, and that it refers to what is actually received. Income may be of various sorts, income under Schedule A and various schedules, but none the less the tax is a tax on income. It is a tax on what in one form or another goes into a man's pocket. That is the general principle. I may refer to, without reading it, a passage in Lord Finlay's speech in the leading case of Inland Revenue Commissioners v. Blott (1) in the House of Lords, quoting from the judgment of Pitney J. in Eisner v. Macomber (2) in the Supreme Court of the United States, where he lays down the general principle as to income and what is income. My attention was called to a number of authorities in which matters somewhat like this have been considered. With the single exception of Inland Revenue Commissioners v. Earl of Haddington (3) - a decision of the Court of Session where this point was not argued, though I think implicit in the decision - the cases are all one way on the actual point to be decided here, namely, whether in order to attract tax there must be income in the sense of something coming in. I am not going through the cases in detail, but I may refer to Leigh v. Inland Revenue Commissioners (4), Grey v. Tiley (5), Simpson v. Bonner Maurice (6), and St. Lucia Usines and Estates Co. v. St. Lucia (Treasurer) (7), all of which, if fairly looked at, are in agreement with the general principle which I have indicated."

I do not think it necessary to advert to any other of the authorities referred to by Mr. Monroe, for Mr. Thornton, for the Commissioner, does not

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|------------------------------|-----------------------|
| (1) (1921) 2 A.C. 171, 195   | (5) (1932) 16 Tax     |
| (2) (1920) 252 U.S. 189, 207 | Cases, 414            |
| (3) (1924) S.C. 456; 8 Tax   | (6) 14 Tax Cases, 580 |
| Cases, 711                   | (7) (1924) A.C. 508   |
| (4) (1928) 1 K.B. 73; 11 Tax |                       |

question that if indeed the true position here was that the dividends were at no material time anything but a debt or debts owing by the company to the trustees of the appellant's settlement then there never was any income until the year of income 1958 when, as was argued for the appellant, it was forthwith properly invested in accordance with the terms of the settlement. But, so runs the submission for the Commissioner, for two reasons this is not the true position.

First, it is said that by virtue of s.7(b) of the Act:

"... a dividend paid by a resident company shall be deemed to be income of the year of income in which it was payable".

Accordingly, when the dividends were paid on a date or dates in 1958 they became in contemplation of law income of the years of income 1956 and 1957 respectively, when they were payable. Secondly and alternatively, it is argued that on a fair reading of the agreed documents in the case, and in particular the balance sheets of the Company and the Appellant's settlement, it is clear that the trustees in 1956 and 1957 lent the company the sums representing the dividends due from the latter to the former. The realities of the transaction were to be considered.

In my judgment, learned counsel's first submission is founded on a reading of s.7(b) of the Act which is not sustainable, and I would say, with respect, this is due to a misconception as to the meaning and scope of the expression "shall be deemed to be" appearing in the subsection. As Lord Reid said in Barclays Bank v. Inland Revenue Commissioners (1961) A.C. 509 at p.528, the word "deemed" has often given trouble, but I do not think its interpretation here presents any insuperable difficulty if it is remembered that the word is not a charismatic formula endowed with power to convert anything into something which it is not. To think so is to fall into mortal semantic sin. Professor Dicey's Frenchman spoke truer than he knew when he said that Parliament could not "make a woman a man, and a man a woman". \* But if - absit omen! - Parliament were minded to enact that women should be deemed to be men and men women, Her Majesty's judges, I am in no doubt, would scrutinise such a rebarbative provision with jealous, not to say jaundiced, eye, and apply the canon of interpretation I find most clearly and succinctly

\* See Dicey's Law of the Constitution, 9th edn. at p.43.

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stated by Griffith C.J. in Muller v. Dalgety & Co. Ltd. (1909) 9 C.L.R. 693 at p.696. He said:

"The word 'deemed' .... is more commonly used for the purpose of creating .... a 'statutory fiction' .... that is, for the purpose of extending the meaning of some term to a subject-matter which it does not properly designate. When used in that sense, it becomes very important to consider the purpose for which the statutory fiction is introduced"

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This is the rule which I think is applicable here, and I hold it plain that the purpose of s.7(b) of the Act is not to convert into income that which is plainly not income, but only to provide in the circumstances which the subsection contemplates, that is to say where dividends are declared in one year of income and paid in another, the solution to the problem which then arises as to the choice of year of income by reference to which the rate of tax is to be assessed. I am fortified in my view by the words used by Finlay J. in Lambe's case op. cit., in which that learned judge was called upon to construe s.39(2) of the Finance Act, 1927, which the Crown sought to read in much the same way as it invites me to read s.7(b) of the East African Income Tax (Management) Act in this case. He said:

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" Now the general object of s.39 of the Act of 1927 is perfectly clear. It is a section inserted with reference to the substitution of sur-tax for super-tax, and there are a number of consequential provisions necessary, and this is one of them. The first part of the section gets rid of the confusion, which had caused much trouble, due to the provisions of r.19 of the General Rules applicable to Schedules A, B, C, D and E of the Income Tax Act, 1918, which in effect said that on payment of certain sums one had to deduct tax at the rate applicable to the period over which the sums had accrued due. The result was that a great number of people had to do a rather difficult and troublesome sum, because there might be one rate at one period and another rate at another period. That was got rid of by sub.s.1 of s.39 of the Act of 1927. But it is sub.s.2 upon which the Solicitor-General has placed all his reliance, and it is as follows: 'In estimating under the Income Tax

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Acts the total income of any person, any income which is chargeable with income tax by way of deduction at the standard rate in force for any year shall be deemed to be income of that year, and any deductions which are allowable on account of sums payable under deduction of income tax at the standard rate in force for any year out of the property or profits of that person shall be allowed as deductions in respect of that year, notwithstanding that the income or sums, as the case may be, accrued or will accrue in whole or in part before or after that year.'

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Now the suggestion from the Crown appears to be that that has effected a startling change in the law and that it has brought into the area of assessment sums which have not been received and which may never be or will never be received. I do not think that that is the effect of this legislation at all, and I think that it is all governed by the words 'any income'. After all, surtax is leviable upon the total income, and I think that before this sub-section operates there must be an income, and there must be deduction, and there cannot be deduction if there is nothing from which to deduct. I think that the essential condition of the application of the subsection is that there should be income, income going out from the person who pays it, and coming in to the person receiving it, and that when there should be deduction from that income. The meaning of s. 39 and the scheme now in operation is this: Supposing there is, as in this case, interest due on a loan, then if the matter goes through in the ordinary way and the interest is paid there is no difficulty at all - the tax is deducted at the appropriate rate and the income is brought in as part of the income of the recipient. But supposing a period arrives at which, by reason of the default of the debtor, interest is not paid. In that case, in my opinion, there is no income - there is nothing to assess, nothing to deduct from. If unfortunately the loan is irrecoverable so that it is a dead loss to the creditor, then the latter will not be liable to any assessment in respect of it. But now let us suppose that three years hence the debtors here happily become prosperous again and are

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in a position to pay and that they do pay, say in 1936, the interest for that year and also the interest for the five preceding years. Then it seems to me that an additional assessment can properly be made on Lieut.-Commander Lambe, and, though made in 1936, the payments will be referred to each of the years in which they were receivable and he will be liable to assessment in respect of each of those years. That, as I read it, is the result of the subsection".

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But if there is not, in my judgment, substance in Mr. Thornton's first point, his second submission is in my opinion valid.

Article 36 of the articles of association of Kanjee Naranjee, Limited, reads as follows:

" All dividends unclaimed for one year after having been declared may be invested or otherwise made use of by the Directors for the benefit of the Company until claimed and all dividends unclaimed for three years after having been declared may be forfeited by the Directors for the benefit of the Company".

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Apart, therefore, from the general duty imposed upon the trustees of the appellant's settlement as such to act in the best interests of the cestui que trusts and to this end to take steps to see that monies owing to the settlement are brought to account as speedily as may be, \* there was in addition a special duty upon them as shareholders under the article I have just read to claim any dividend declared and delay in doing so was visited by the sanctions provided for. I am bound to assume in the absence of evidence or even suggestion to the contrary that the trustees acted throughout with propriety. How then explain the undoubted fact that monies due to the settlement remained in the hands of the company so long after they could have been brought in for the benefit of the settlement on simple demand? It seems to me the irresistible inference is that the monies remained in the hands of the company by agreement between the trustees and the company, that is, as Mr. Thornton says, that they were lent by the former to the latter. The trustees had full powers to lend income arising out of the settlement to the company, as will become apparent when the terms of the trust instrument are

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\* See Maitland, "Equity" 2nd edn. Lect.VIII at p. 94.

considered as they will have to be later in this judgment, and I find that they did so. There was of course no need for the money to pass back and forth in specie, and I am not to be taken as suggesting any such thing. The Roman lawyers would have had no difficulty in naming such a transaction as I find here to have taken place, and if the language which Blackstone spoke has, so far as I know, somewhat surprisingly failed to coin a name for it, traditio brevi manu itself is not a conception alien to the common law (see e.g. Winter v. Winter (1861) 4 L.T. (N.S.) 639).

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In Dewar v. Commissioners of Inland Revenue (C.A.) (1935) 2 K.B. 351, Lord Hanworth M.R., at p.367, said:

"If the subject had in any way intervened so as to say what was to be the disposal of this sum, he would have become liable to tax. You cannot, by the use which you make of a sum which has been received or which has come into your disposal, escape tax".

I accept, therefore, the submission made by the Commissioner both as to the nature of the transactions which took place in 1956 and 1957 and the legal effect of those transactions, namely, that the monies concerned were income within the meaning of the Act before notionally they passed to the Company in those years.

But having done that, what then? The next step in the argument for the Commissioner is this. The Company, it is submitted, having borrowed income arising out of the appellant's settlement in 1956 and 1957, continued to use it from the dates respectively when it was borrowed until the latter part of the year of income 1958, and it is in respect of the user for the period from 1st January 1958 until November or December 1958 that the appellant is chargeable under s.25(3) of the Act as the settlor with control of the company. Mr. Thornton very fairly took his argument to its logical conclusion and was prepared to support the proposition that if the company had not repaid the loan to the trustees of the appellant's settlement until, say, this year, s.25(3) of the Act would have justified the appellant's assessment to tax in respect of it not only in 1958 but also and successively in 1959, 1960, 1961 and 1962.

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Hear then, if the submission is sustainable, in country which one might have supposed had been thoroughly explored, are fresh woods and pastures new, and a pleasant enough prospect no doubt for everybody except, perhaps, the taxpayer lacking something in that public-spiritedness which every State may reasonably expect of its subjects. For here, no less - I do not think I have misunderstood learned counsel for the Commissioner - is a tax still called "income tax" though it is to be levied not on income but, in certain circumstances, on monies that once were income and have been taxed as such. Presumably too, income arising out of such monies would itself attract income tax under the other, more usual provisions of the Act - compound income tax, in fact.

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I confess I would have thought that the intention to introduce a cess of such revolutionary character would have been apparent at the most cursory first reading of the relevant enactment. But all that a most careful re-reading of it does is to confirm one's first impression that it is a perfectly orthodox, reasonably straightforward provision that neither surprises by its eccentricity nor shocks by its iniquity. The general intention is plain enough in all conscience. In certain circumstances, where monies which properly belong to A and would be taxed as income in his hands find their way into B's pocket, they shall be taxed as B's income and not A's. That is all. Whence then comes the notion that the monies, having been taxed as income in B's pocket, retain indefinitely the ability to arise therefrom at the stroke of midnight on 31st December each year and proclaim themselves subject to tax anew?

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The answer I think is that the words "makes use of" appearing in s.25(3) of the Act have been given a meaning which, if I may say so, wilts under scrutiny. They do not introduce any new doctrine of continuous user, and it would require far clearer words than any that appear in the sub-section to make it incumbent on this Court so to hold. When the subsection is examined with that special care which the interpretation the Commissioner seeks to put upon it makes necessary, it will be seen that the words "whether by borrowing or otherwise" appearing therein within commas restrict, in the specific case of borrowing, the meaning of the words "makes use of any income arising" appearing immediately after them, to the very act of borrowing.

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In short, the borrowing is the use. This I would say would not have been so but for the words within commas, for where A lends money to B one would not ordinarily say that it was B who used the money but A. He that as it may, however, and whether the Legislature intended that result or had something else in mind, the use upon which the subsection bites where income has been borrowed is the borrowing, and no other. There is no nexus in fact, and I can see no link in law between that use of income arising out of the settlement and what the borrower does with what then is nothing more than money in his hands and belonging to him. There are two uses, different in mind, not one continuous use of the same kind. The first of these is a creature of statute - a use of income - the second is a use in the ordinary sense of that word as understood in common parlance - a use of money. If the money is, in the second sense, used as capital, then indeed, income arising out of it certainly is properly assessable to income tax, but that is all. And it seems to me that not only in the particular case of borrowing but in every case, the user aimed at by the subsection is the single transaction, whatever it may be, whereunder the settlor lays his hands on income arising out of the settlement to which he is not entitled.

Applying this to the facts of this case - and I think it worth mentioning that I have found the facts to be what the Commissioner contended they were - the borrowing by the company of the income arising out of the appellant's settlement in 1956 and 1957, always assuming the company was a person under the direct or indirect control of the appellant, would have rendered him chargeable had s.25(3) of the Act then been in force. But the Act did not come into operation until 1st January 1958, and what the company did in the year of income 1958 with money which it had borrowed in 1956 and 1957, the use it made of its own, is no concern whatsoever of the Commissioner except, as I have indicated, in so far as he is under a duty to assess the company to income tax in respect of any income that may have arisen as a result of the use of such money as capital.

In my judgment, Mr. Monroe's point (b) - that if income arose under the settlement in 1956 and 1957 the company made use of it in those years and not, in the sense of the statute, in the year of

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income 1958 - is good in law. Accordingly, I hold that the appellant was not lawfully assessed to tax in respect of the sum of £45,777 for the year of income 1958 and this whether the company was under his control or not, a matter which my finding now makes it unnecessary to go into.

I turn now to consider the appellant's objections to his assessment to tax in respect of the sum of £54,085 described as the 1958 income of Kanjee Naranjee Settlement Trust, and £2,335 described as the 1958 income of Ujambhai Kanjee Naranjee Settlement Trust.

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I have already given some particulars of what I have called the appellant's settlement and it is necessary at this point to examine it further and also to describe in such detail as is required the Ujambhai Kanjee Naranjee Settlement Trust, a settlement made by the appellant's wife, which I shall refer to as the wife's settlement.

The wife's settlement, like the appellant's, came into being on 5th June 1955. Like the appellant's settlement it created a trust fund for the benefit of the then existing and any future sons of her (and the appellant's) three sons, and in default thereof for certain other persons. The sole trustees of this settlement at all material times were the wife herself and her husband, the appellant. The trust fund at the date of its inception consisted of 6,487 ordinary shares of Sh.20/- each in the Kanjee Naranjee Finance Corporation Ltd., a public limited liability company which was incorporated in Tanganyika on 8th June 1953. By 1st January 1958 the wife and the appellant, as trustees of this settlement, had increased their holding in the corporation to 38,922 such ordinary shares.

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

" 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 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

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of them may have an interest in such public or private company or such firm company or bank."

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Both the appellant's settlement and the wife's settlement are declared "absolutely irrevocable in all circumstances". Nevertheless, it is contended for the Commissioner that the appellant is chargeable to tax in respect of the income arising out of both settlements in the year of income 1958 under and by virtue of s.25(2) of the Act, which reads as follows:

" 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".

The settlements, it is argued, are revocable settlements having regard to Clause 10 of each and to the provisions of s.25(4)(b) of the Act, which is in the following terms:

" For the purposes of this section, a settlement shall be deemed to be revocable if under its terms the settlor -

(a) .....

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

(c) .....

The appellant's liability to tax then depends solely on the answer to the question: Are the settlements revocable or irrevocable within the meaning of the Act? If they are revocable, then it is not disputed that he has been properly assessed to tax. If not, the charge raised against him is bad in law. We are not concerned then with what in fact happened to the income which arose out of the settlements under discussion, but only with what could or might have happened to it.

Mr. Monroe, for the appellant, argued in substance that the intention of s.25(4)(b) is that a settlement 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

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trustees to pass such income to him so that they must do so on demand. The settlor must not require to go "cap in hand", as learned counsel puts it, to the trustees for the income. More particularly, the expression "if under its terms the settlor ... "means" if in accordance with or by virtue of its terms the settlor...", and Mr. Monroe referred to s.2(3)(c) of the Act for authority so to read it. This provision reads:

"References in this Act to -

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(a) .....

(b) .....

(c) "under", in relation to any enactment, rule, schedule, part, section, sub-section, 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".

20

With regard to the words "is able to have access .... to the whole or any part of the income arising under the settlement ...." it was submitted that this meant that the settlor was entitled to go to the trustees for the money and to have it from them for the asking.

This statement of the argument does scant justice I fear to the care and skill with which it was developed, and although I think I have summarised it accurately and fairly it might perhaps be as well to quote a short extract, which clearly shows the approach which learned counsel urged I should adopt in interpreting both the expressions to which reference has been made. He said:

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"My bank has got a lot of money. I may be able to have access to that money if my bank manager will agree to give me an overdraft. If I negotiate overdraft facilities with my bank manager up to the limit of those facilities I can then state that I have access to the Bank's monies to that extent. And, of course, when I exercise those facilities I will be borrowing. So that it is perfectly possible for a person to be in a position that he can borrow because there is already an agreement that he can

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borrow either the whole or part of the trust monies, and this, of course, is, as the overdraft example shows, a common commercial arrangement and could perfectly well be a term of a transaction which was a settlement, either a formal one or a settlement of a kind that the section contemplates, some kind of disposition. A father gives to his son money and says, 'now it is to be understood that if at any time I want to borrow this money back I can'. He is able to have access by borrowing. It could be a term of the settlement, of a written settlement; admittedly an unusual term, but it could be a term that 'Notwithstanding anything hereinbefore contained, the settlor shall be entitled to borrow the trust monies at the rate of interest in force, at the bank rate in force for the time being', something of that kind, or 'some part of the money' would of course cover the point. So that in my submission it is perfectly possible for there to be an arrangement, an agreement, a contract, which gives to a man the right to borrow, so that you can say of him at any moment, "Well now, that chap, he is able to borrow money from the bank up to such-and-such a sum", so you can say of the settlor in a particular case 'He is able to borrow from the trust'; and the contrast is the man who is a very good customer of the bank, his credit is splendid, but in fact he has no overdraft facilities. The cautious man, speaking of him, will say, 'Well, he may be able to borrow, I think there is a very good chance that he will, but I cannot be certain, and I cannot say of him that he is able to have access to unlimited funds at the bank. But now this other man, now I know of him, I can tell you at once he is able to have access to half a million. He has made an arrangement with the bank to that effect'."

I find I am unable to agree.

In my opinion the intention of the Legislature is plain, that a settlement shall 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; and in my judgment if "one looks fairly at the language used"\* the words of the paragraph are apt to give effect to that intention.

\* See Cape Brandy Syndicate v. I.R.C. (1921) 1 K.B. 64, per Rowlatt J. at p.71.

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-- continued.

It seems to me that to construe the paragraph restrictively, and in particular to read as Mr. Monroe would have me do, the word "under" as meaning "in accordance with" or "by virtue of" rather than as meaning "in consequence of", which s.2(3)(c) of the Act also makes permissible, would be arbitrarily to frustrate the achievement of the end which it is abundantly clear the Legislature had in mind, and indeed to encourage the mischief manifestly aimed at. I cannot agree, and for the same reasons, 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.

10

A person may properly say he is able to have access to the reading room of the British Museum if there is nothing in the rules governing admission to the Museum to say a member of the class of persons to which he belongs may not enter it, and it is not to the point in my view that he must first possess himself of an admittance card, or that this might - not must - be refused. It may be he will be more successful on a renewal of his application. It is ability in posse, so to speak, that is to be regarded. It is in this sense that in England everybody is able to have access to the Courts of Justice as well as to the Ritz Hotel. And it is in a like sense that in some countries which shall be nameless, some persons are not able to have access to a bench in the park. The ability to have access of which s.25(4)(b) of the Act speaks is the capacity to have access which the settlor has in right of being himself - in other words, because he is who he is. It is not a capacity which he would not have had were it not vested in him by the terms of the settlement. In short, I am not prepared to construe the words "is able to have access" as if they read "is enabled to have access".

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I think indeed that no settlement can fail to be regarded as a revocable settlement by virtue of the provisions of s.25(4)(b) of the Act unless its terms expressly or impliedly keep the settlor effectively away from all income arising out of it. Thus, in each of the settlements with which we are concerned, although the trustees are as we have seen empowered to use income arising out of it "in making loans secured or unsecured or fixed deposits

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to or with any person .....", the general rules of equity have the effect of making the settlor who is also a trustee, to use the words of Lord Chancellor King in Keech v. Sandford,\* "the only person of all mankind" other than the co-trustee to whom the trustees could not properly lend the settlement income.

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Judgment.

9th June, 1962

- continued.

10 But under Clause 10 of each of the settlements under consideration here, the trustees "may invest any money for the time being subject to the trusts of this settlement .... in making loans secured or unsecured or fixed deposits to or with any .... firm .... and they may so invest notwithstanding that the Trustees or any of them may have an interest in such .... firm ....". It follows that in the case of each such settlement, there is no bar legal or equitable, to the settlor as partner in a firm, borrowing or taking on fixed deposit from the trustees, income arising out of the settlement,

20 notwithstanding the fact that he (or she) is also trustee; and Mr. Monroe did not, as I understood him, dispute Mr. Thornton's contention that receipt of income arising out of a settlement by the settlor as partner in a firm was receipt of that income by the settlor.

30 Accordingly, I hold that the appellant's settlement and the wife's settlement are revocable settlements within the meaning of the Act, and it follows that the appellant has been lawfully assessed in respect of the income arising out of them in the year of income 1958.

40 In the result then, this appeal succeeds in so far as it relates to the assessment of £45,777 described as accumulated trust income used in Kanjee Naranjee, Limited, and that assessment is annulled. The appeal fails and is dismissed in relation to the amount of £54,085 described as 1958 income of Kanjee Naranjee Settlement Trust and £2,335 described as 1958 income of Ujambhai Kanjee Naranjee Settlement Trust, and these assessments are confirmed.

The appellant will have half the costs of this appeal.

L. WESTON  
JUDGE.

Dar es Salaam,  
9th June, 1962.

\* See 2 Eq. Cas. Abr. 741.

In the  
High Court of  
Tanganyika

No. 7

D E C R E E

No. 7

IN THE HIGH COURT OF TANGANYIKA AT DAR ES SALAAM

Decree.

MISCELLANEOUS CIVIL APPEAL No. 5 of 1961

9th June, 1962.

KANJEE NARANJEE

Appellant

- versus -

THE COMMISSIONER OF INCOME TAXRespondentD E C R E E

This appeal coming on for hearing on the 21st, 22nd, 23rd, 24th and 25th days of May 1962 in the presence of H.H. Monroe Esquire one of Her Majesty's Counsel and Gerald Harris Esquire Counsel for the Appellant and of G.C. Thornton Esquire Counsel for the Respondent it was Ordered that the appeal do stand for judgment and upon the same coming up for judgment on the 9th day of June 1962 IT IS ORDERED AND DECREED:

10

(1) that the assessment the subject of the appeal be and the same is hereby discharged insofar as it charges the Appellant to tax on the sum of £45,777 being portion of the total sum mentioned therein and that the appeal to that extent is allowed:

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(2) that save as aforesaid the said assessment be and the same is hereby confirmed and the appeal to that extent is dismissed:

(3) that the Appellant do have one-half of the costs of the appeal to be paid to him by the Respondent when taxed on the ordinary scale together with one-half of the cost of the official shorthand note taken and supplied to the parties and the Judge doth certify that having regard to the nature, importance and difficulty of the case the employment by the Appellant of two advocates was reasonable and proper.

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GIVEN under my hand and the Seal of the Court at Dar es Salaam this 9th day of June 1962.

ISSUED this 30th day of July 1962

(Sgd.) ?

DEPUTY REGISTRAR  
HIGH COURT OF TANGANYIKA  
AT DAR ES SALAAM.

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No. 8

NOTICE OF APPEALIN THE HIGH COURT OF TANGANYIKA AT DAR ES SALAAMCivil Appeal No. 5 of 1961

KANJEE NARANJEE

Appellant

- versus -

THE COMMISSIONER OF INCOME TAX RespondentNOTICE OF APPEALIn the  
High Court of  
Tanganyika

No. 8

Notice of  
Appeal.  
19th June, 1962.

10 TAKE NOTICE that Mr. Kanjee Naranjee the  
Appellant above-named being dissatisfied with the  
decision of the Honourable Mr. Justice Weston given  
herein at Dar es Salaam on the 9th day of June 1962  
intends to appeal to Her Majesty's Court of Appeal  
for Eastern Africa against such part of the said  
decision as decides that the two respective settle-  
ments created by the Appellant and his wife respec-  
tively and more particularly referred to in the  
said decision are revocable settlements within the  
meaning of section 25 of the East African Income  
20 Tax (Management) Act, 1958, and that the Appellant  
was correctly assessed under the assessment referred  
to in the said decision to income tax for the year  
of income 1958 in respect of the income arising  
under the said settlements and amounting to the sums  
of £54,085 and £2,335 respectively.

DATED this 19th day of June 1962.

HAMILTON HARRISON & MATHEWS,  
Advocates for the Appellant.

30 To The Registrar of the High Court,  
of Tanganyika at Dar es Salaam:

And to The Legal Secretary, East African  
Common Services Organization,  
P.O. Box 30005, Nairobi.

And to The Regional Commissioner of  
Income Tax, Dar es Salaam.

The address for service of the Appellant is  
c/o Messrs. Hamilton Harrison & Mathews, c/o

In the  
High Court of  
Tanganyika

Messrs. Atkinsons, Walker & Company, Advocates  
P.O. Box 176, Standard Bank Chambers, City Drive,  
Dar es Salaam.

No. 8

Notice of  
Appeal.

19th June, 1962

- continued.

NOTE:- A respondent served with this notice is required within fourteen days after such service to file in these proceedings and serve on the appellant a notice of his address for service for the purposes of the intended appeal, and within a further fourteen days to serve a copy thereof on every respondent named in this notice who has filed notice of an address for service. In the event of non-compliance, the appellant may proceed ex parte.

10

FILED the 20th day of June 1962 at Dar es Salaam.

No. 9

No. 9

Order granting  
Leave to  
Appeal to the  
Court of  
Appeal.

23rd July, 1962.

ORDER GRANTING LEAVE TO APPEAL TO THE COURT  
OF APPEAL

IN THE HIGH COURT OF TANGANYIKA AT DAR ES SALAAM

20

Miscellaneous Civil Appeal No. 5 of 1961

KANJEE NARANJEE

Appellant

- versus -

THE COMMISSIONER OF INCOME TAX Respondent

UPON the application of Messrs. Atkinson, Walker & Company, Advocates for the Appellant, filed on the 9th day of July, 1962, and upon reading the affidavits in support thereof and upon hearing H.C. Walker Esquire, Advocate for the Appellant and W.R. Wickham, Esquire, Crown Counsel for the Respondent;

30

THE COURT DOETH HEREBY GRANT LEAVE to the Appellant to appeal to Her Majesty's Court of Appeal for Eastern Africa against that part of the judgment and decree which dismissed the Appellant's appeal.

DATED this 23rd day of July, 1962.

(Seal of the High  
Court of Tanganyika)

BY THE COURT,

B.H. RAHIM  
DEPUTY REGISTRAR.

Issued & Signed: 31/7/62.

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No. 10

MEMORANDUM OF APPEALIN THE COURT OF APPEAL FOR EASTERN AFRICA ATDAR ES SALAAMCivil Appeal Number 58 of 1962KANJEE NARANJEEAppellant

- versus -

THE COMMISSIONER OF INCOME TAX Respondent

10 (APPEAL from a Judgment and Decree of the High Court of Tanganyika at Dar es Salaam (Mr. Justice Weston) dated the 9th day of June 1962 in Civil Appeal No. 5 of 1961)

IN THE MATTER of an APPEAL against Assessment Number 21/7543 (Year of Income 1958)

- and -

IN THE MATTER of THE EAST AFRICAN INCOME TAX (MANAGEMENT) ACT 1958.

MEMORANDUM OF APPEAL

20 Kanjee Naranjee, the Appellant above named, appeals to the Court of Appeal for Eastern Africa against so much of the decision above-mentioned as decides that the settlement created by deed dated the 5th of June 1955 and made between the Appellant as settlor of the one part and the Appellant and his wife Ujambai Kanjee Naranjee as Trustees of the other part (herein referred to as "the Husband's Settlement) and the settlement created by deed dated the same day and made between the said Ujambai Kanjee Naranjee as settlor of the one part and the said Ujambai Kanjee Naranjee and the Appellant as trustees of the other part (herein referred to as "the Wife's Settlement") are revocable settlements within the meaning of Section 25 of the East African Income Tax (Management) Act, 1958, and that the Appellant was correctly assessed under the Assessment above-mentioned to income tax for the year of income 1958 in respect of the income arising under the said respective settlements and amounting to the sums of £54,085 and £2,335 respectively on the following grounds, namely:

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In the Court  
of Appeal for  
Eastern Africa

No. 10

Memorandum of  
Appeal.

31st July, 1962.

In the Court  
of Appeal for  
Eastern Africa

No. 10

Memorandum of  
Appeal.

31st July, 1962.

- continued.

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.

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.

10

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 £54,085 and £2,335 respectively and in failing to discharge the said Assessment in that regard.

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.

40

WHEREUPON the Appellant prays that the Judgment and Decree of the High Court of Tanganyika herein dated 9th June 1962 insofar as it decides that the said settlements are or that either of them is recoverable within the meaning and for the

purpose of Section 25 of the Act above-mentioned and that the above mentioned Assessment should in part be confirmed be set aside and that the said Assessment should be discharged and that the costs of the Appellant in this Court be allowed.

DATED this 31st day of July 1962.

HAMILTON HARRISON & MATHEWS,  
advocates for the Appellant.

In the Court  
of Appeal for  
Eastern Africa

No. 10

Memorandum of  
Appeal.  
31st July, 1962.  
- continued.

10 To: The Honourable The Judges of  
Her Majesty's Court of Appeal  
for Eastern Africa,  
Dar-es-Salaam.

and to: The Legal Secretary,  
East African Common Services Organization,  
East African Common Services Building,  
P.O. Box 30005, NAIROBI.  
(Advocate for the Respondent)

20 The address for service of the Appellant is:-  
c/o Hamilton Harrison & Mathews,  
c/o Messrs. Atkinsons, Walker & Co.,  
Advocates,  
P.O. Box 176  
Standard Bank Chambers,  
City Drive, Dar-es-Salaam.

FILED this 7th day of August 1962  
Filed by: Hamilton, Harrison & Mathews,  
Advocates for the Appellant.

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In the Court  
of Appeal for  
Eastern Africa

No. 11

J U D G M E N T

No. 10

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICAAT DAR ES SALAAMCivil Appeal No. 58 of 1962BETWEEN

KANJEE NARANJEE

Appellant

- and -

THE COMMISSIONER OF INCOME TAX Respondent

(Appeal from judgment and decree of the High Court  
of Tanganyika at Dar es Salaam (Weston J.) dated  
9th June, 1962 in Civil Appeal No. 5 of 1961

10

IN THE MATTER of an APPEAL against Assessment  
No. 21/7543 (year of income 1958)

- and -

IN THE MATTER of THE EAST AFRICAN INCOME TAX  
(MANAGEMENT) ACT 1958

JUDGMENT OF MAYERS Ag. J.A.

This is an appeal by a tax payer from so much  
of a judgment and decree of the High Court of  
Tanganyika as confirms an amended assessment to  
income tax raised upon him in respect of the income  
for the year 1958, of two settlements constituted by  
himself and his wife respectively in the year 1955  
and hereinafter referred to respectively as the  
"appellant's settlement" or "his settlement" and  
his "wife's settlement", in favour of their grand-  
sons whether subsisting at the date of the con-  
stitution of those settlements or born thereafter,  
and in default in favour of certain other persons.

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It is only necessary to consider the appellant's  
liability or otherwise to tax in respect of his  
settlement as, by virtue of section 74(1) of the  
East African Income Tax (Management) Act 1958, here-  
inafter referred to as the "Act", the income of a  
married woman living with her husband, as was at all

material times and no doubt still is the appellant's wife, is deemed to be her husband's income for income tax purposes; and as the appellant's settlement and his wife's settlement are in identical terms it is conceded that if the appellant is liable to income tax in respect of the income of his settlement he is also liable to tax in respect of the income from his wife's settlement.

10 It is not in dispute that the appellant's liability or otherwise to income tax in respect of his settlement depends entirely upon the true construction of section 25 of the Act. The provisions of section 25 were, at the material time, as follows:

20 "25. (1) All income which in any year of income accrued to or was received by any person under a settlement, whether 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.

30 (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  
40 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, a settlement shall be deemed to be revocable if under its terms the settlor -

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of Appeal for  
Eastern Africa

No. 10

Judgment.

(a) Mayers,  
Acting, J.A.

30th November,  
1962

- continued.

In the Court  
of Appeal for  
Eastern Africa

No. 10

Judgment.

(a) Mayers,  
Acting, J.A.

30th November,  
1962

- continued.

(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 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 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 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;

(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 such 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."

The settlement is expressed to be made between the appellant of the one part and himself and his wife as trustees of the other part. The settlement, after reciting that the settlor is desirous of constituting the trusts specified in the settlement for the benefit of his grandsons and has for that purpose transferred or caused to be allotted to the trustees certain of his investments specified in the Schedule, goes on to recite that -

"the settlor intends this settlement to be absolutely irrevocable in all circumstances."

It is not in dispute that there was an absolute and bona fide transfer of the scheduled investments from the sole ownership of the appellant in his personal capacity to himself and his wife in their capacity as trustees of the settlement.

Likewise, it is not in dispute that the appellant at no time made any use, by borrowing or otherwise, of the income or assets of the settlement. Hence it is clear that the liability, if any, of the appellant to income tax in respect of the income of his settlement did not arise under subsection (1) or subsection (3) of section 25 and those subsections are only set out herein because reference was made to them in argument for the purpose of determining the true construction of subsection (2) and subsection (4) of the section, which are the subsections relied upon by the respondent as rendering the appellant liable.

Put quite generally, the respondent's contention is that although expressed to be irrevocable, the settlement is deemed to be revocable by virtue of the provisions of paragraph (b) of subsection (4) of section 25. This contention is based upon the provisions of clause 10 of the settlement which are as follows:-

"10. 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

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deferred or other stock or 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."

It was accepted on the first appeal and not sought to be disputed by either party that in the absence of an express provision to the contrary a trustee cannot lend to himself. No authority precisely in point was cited for this proposition, but it appears to be implicit in the observations of Sir John Leach M.R. in - v. Walker 5 Russ. 6, 38 E.R. 929, where he says:

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"When a testator empowers three executors to lend money on personal security he must be taken to rely upon the united vigilance of the three with respect to the solvency of the borrower. If two of the three lend it to the third, this object is defeated, and it is a breach of trust."

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So, too, this rule must be regarded as a specific instance of the wider proposition that a trustee may not make a profit out of his office, which was stated by Lord Herschell in Bray v. Ford (1896) A.C. 44 where he says at page 51:-

"It is an inflexible rule of a court of equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict."

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Manifestly, for a trustee to lend to himself would be to put himself in a position where his duty and his interest may be in conflict inasmuch as the duty of a trustee is to ensure that the money lent is only lent to solvent persons to the best advantage, while the interest of a borrower may well be to borrow money at a time when his solvency is not beyond doubt and at a lower rate of interest than could be obtained by the trust in the open market.

40

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 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 subsection (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 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. The first contention advanced by Mr. Monroe, who appeared for the appellant, in support of this proposition was that if the mere fact that the appellant was one of a class of persons who might obtain a loan if the trustees were minded to grant it to him, rendered him a person who was able to have access paragraphs (a) and (c) of subsection (4) would be unnecessary. In elaboration of this contention he stressed that paragraph (a) dealt in terms with a right of a settlor and paragraph (c) with a power conferred by the settlement. From this he argued that paragraph (b) likewise must contemplate a positive power to have access. Mr. Monroe then illustrated the difference between the meaning "is able to have access" for which he contended and that for which the respondent contended by a simple example. He pointed out that if someone has arranged with his bank for overdraft facilities he has a right to borrow up to the amount of the agreed overdraft. On the other hand a customer of the bank who has not arranged for overdraft facilities may conceivably be granted a loan if he applies for one, but cannot be said to have a right to a loan. In the former case it might be said of the potential borrower that he is able to have access to the funds of the bank to the sum of x pounds. In the latter case no such statement could, with accuracy, be made.

So far as the contention that if the construction advanced by the respondent is correct, paragraphs (a) and (c) of the subsection become

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unnecessary is concerned it might, in my view, equally well be said that on any construction of paragraph (a) paragraphs (b) and (c) are unnecessary inasmuch as if a person has a right to resume control, directly or indirectly, of the whole or any part of the income or assets of the settlement, he would thereby be able to acquire for himself any advantage which he could derive either by borrowing the whole or any part of the income or assets of the settlement or with or without the consent of any other person revoking or otherwise determining the settlement. Mr. Monroe further pointed out three matters as to which subsection (4) was silent:- 10

- (a) it makes no reference to the settlor having joint access;
- (b) it makes no reference to the settlor having access with or without the consent of any other person;
- (c) 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; and he argued that if section 25(4)(b) meant no more than that the settlor was one of a category of persons to whom the trustees might or might not make a loan as they thought fit, paragraphs (a) and (c) of the subsection were unnecessary, a matter which has been discussed above, and by virtue of the provisions of subsection (5) of the section which define a settlement sufficiently widely to cover any absolute disposition other than for good and sufficient consideration, it would be impossible for any gift of securities to be made, e.g., from a father to his son unless there were at the time of the making of the gift an express agreement under seal that the donee should not lend to the donor at any time thereafter the whole or any part of the income from the securities donated. 20 30 40

That the silence of the subsections, as to the matters above referred to, could be regarded as a key to the true construction to be placed on the subsection he contended was supported by the authority of Lord Morton of Henryton in Lord Vestey's

Executors v. Commissioners of Inland Revenue 31 Tax Cases, 1 at page 110, where he says:-

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10 "The words 'has acquired' are not followed by any such words as 'either alone or jointly with some other person or persons' and this omission becomes very significant when one observes, by way of contrast, that the words 'either alone or in conjunction with associated operations' are inserted immediately after the words 'by means of any such transfer'. Compare also Sub-section (3)(d), 'the individual has power .... to obtain for himself, whether with or without the consent of any other person, the beneficial enjoyment of the income'. I cannot believe that Sub-section (1) would have been in its present form if the Legislature had intended to include among the 'rights' mentioned in the Sub-section any rights which the individual held jointly with another person."

20 I should not have thought that any authority was in fact necessary for the proposition that in considering the effect of any statutory provision it is permissible to contrast the words actually used with others which might have been used to attain the desired result, but it by no means follows from that that the failure of the draftsman to use some phrase which might have expressed the intention of the statute with greater precision than that achieved by the words actually used

30 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.

40 Nor, in my view, can any assistance be derived from the fact that in Lord Vestey's case it was held that the power of two persons jointly to give directions was not a power acquired by any individual, in determining whether the words "is able to have access" are sufficiently wide to cover the case in which access can only be had jointly with some other person or with the concurrence of some other person, i.e., by a partnership borrowing from two trustees. In support of this conclusion it seems to me sufficient to refer to an earlier passage from Lord Morton of Henryton's judgment at page 110 where he says:-

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"It is first necessary to consider whether Lord Vestey had at any relevant time, by means of any such transfer as is described in the opening words of Section 18" (which were "for the purpose of preventing the avoiding by individuals ordinarily resident in the U.K. by means of transfers of assets by virtue or in consequence whereof either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the U.K. it is hereby enacted as follows:") "(either alone or in conjunction with associated operations) acquired any rights by virtue of which he had, within the meaning of Section 18, power to enjoy (whether forthwith or in the future) any income of the Paris trustees.... it is necessary to inquire in the case of each of them, whether he was at the material time 'an individual' in the position described in Subsection (1). I have not of course overlooked the fact that by reason of Section 1 of the Interpretation Act, 1889, the word 'individual' in Subsection (1) would be construed as including the plural unless the contrary intention appears, but in considering whether any income is to be deemed to be income of a particular individual under Section 18(1) I feel no doubt that one must have regard only to rights acquired by the same individual, and not rights acquired by a group of individuals, however small, which includes him. Difficulties would arise from any other construction of Section 18(1) which are, I think, so apparent that they need not be further discussed."

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In fact it seems to me that this passage renders it clear that Lord Morton's conclusions were based upon the wording of the particular section which he was there constrained to construe and are not to be regarded as necessarily applying to quite other words in some other statute. So too in Wolfson v. C.I.R. 31 Tax Case 141 at page 168 Lord Simonds said:-

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"My Lords, the main part of the argument has revolved round the simple words 'If and so long as the terms of any settlement are such that'. On the one hand it is said that it is only in the terms of this settlement that one may look for power which the Sub-section described, that the words bear the same meaning

as the words 'if and so long as the terms of the settlement provide'. On the other hand it is said that they have a meaning which, to do justice to the argument of the learned Solicitor-General, I will state in his own words. This was his formula:- 'If the settlement is so framed that its immediate impact on the circumstances in relation to which it was executed produces the result that some persons, whether settlors or others, get the power, whether by the exercise of some independent right they already possess or however else, to revoke and thus finally cancel or otherwise bring to an end the continued happening of something for which the settlement provides.'

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

Mr. Monroe then argued that as to have access to the funds of the settlement the appellant would first have had to join a partnership, then to persuade the partners to co-operate in his borrowing, then to persuade his co-trustees to lend - as it was conceded that the power to grant loans was a discretionary power and therefore not a power in relation to which the appellant as senior trustee could by virtue of the provisions of a clause (which in the appellant's settlement is mis-numbered 14, having already been preceded by another clause numbered 14 and which it appears from the identical provisions in the wife's settlement ought to have been numbered 15) override his co-trustee, but a power for the exercise of which concurrence by his co-trustee was requisite under that clause, and

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finally to persuade the partners to make the money available to him for his own purposes, it could not possibly be argued that the ability to have access to the funds of the settlement arose under the settlement but that in fact it arose by reason of the joining of the partnership. In support of this contention he referred to Wolfson v. Commissioners of Inland Revenue 31 Tax cases 141. In that case the material facts were that the appellant and his brother entered into a settlement for the benefit of their sisters whereby each settlor covenanted to pay to the trustees such annual sum as, after deductions of income tax, would leave a sum equal to the net dividends received by each such settlor from his shares in a company in which the appellant held the majority of shares. In the light of these facts the appellant sought to deduct the sums paid by him to the trustees of the settlement pursuant to the settlement from his gross profits for the purpose of sur-tax. The Commissioners of Inland Revenue however contended that the income under the settlement was by virtue of the provisions of section 38 of the Finance Act to be treated as income of the settlement. Atkinson J. said at page 148:-

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"The main question to determine is the meaning of Section 38(1) of the Finance Act, 1938. That Section begins in this way:

'(1) If and so long as the terms of any settlement are such that - (a) any person has or may have power whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor .... will or may cease to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement; (b) ... any sums payable by the settlor .... by virtue or in consequence of that provision of the settlement in any year of assessment shall be treated as the income of the settlor for that year and not as the income of any other person.'

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

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

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10 Reading the section unaided by authority I should say without much hesitation that the contention of the appellant is right. I think the words mean that the power must be found in the terms of the settlement. I am confirmed in that view by the following considerations

(1) The contrary view would give no effect whatever to the words in the opening line 'if and so long as the terms of the settlement are such'."

20 Mr. Monroe's argument was that the contention relied upon by the respondents in the instant case is precisely that which was rejected in the Wolfson case (supra), i.e. that one may go further than the terms of the settlement.

30 It seems to me that there is a clear distinction between the Wolfson case (supra) and the instant case. That distinction is that the words 'if and so long as the terms of any settlement are such' appear to me to mean if it is specifically provided by the terms of the settlement. A phrase of that nature is, in my view, very different from the phrase "under the terms of a settlement" inasmuch as paragraph (c) of subsection (3) of section 2 of the Act is so far as is material in the following terms:

"'under', in relation to any enactment ..... settlement or other document .... includes references to, in accordance with, by virtue of, and in consequence of, such enactment..... settlement or other document, as the case may be."

40 The phrase "in consequence of" which is one of the meanings ascribed to the word "under" in relation to a settlement seems to me 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.

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Quite apart from the foregoing it does not seem to me that for the reasons hereinafter stated any weight ought to be attached to the silence of the subsection as to the ability of the settlor to have access directly or indirectly which, according to Mr. Monroe, went directly to the partnership point. His contention in this regard, as I understood it, was that to borrow in the capacity of a member of a firm the appellant would have had first to persuade his partners to agree to the borrowing and then to persuade them to allow him to use the monies for his own purposes. This analysis of the situation seems to me to be, potentially at least, partly fallacious.

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An essential ingredient of any trading partnership is that any partner may borrow on behalf of the partnership. Thus in Rothwell v. Humphreys and Howell 1 ESP. 406, 170 E.R. 400, the facts were that Howell, having gone to Manchester to buy goods in the way of his trade and having purchased £500 worth of goods from the plaintiff, borrowed £10 from the plaintiff to defray his expenses to London. He then drew a bill on the partnership for £510 being the value of the goods purchased plus the £10 lent. The defendants having become insolvent and the goods having been stopped in transitu the plaintiff sued the defendant firm for the £10 lent. Lord Kenyon said that though the loan of the money was to one of the partners it was lent to him while employed on the partnership business, and on its account; as such, it was competent for him to bind the partnership to the payment of a debt so contracted. Nor does it seem to me that it would be necessary for the plaintiff to persuade the partnership to make any money borrowed available to him in his personal capacity because it might very well be that the reason for his wanting to borrow money was to use it in the partnership business.

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In this regard it should not be overlooked that each partner is personally liable for all the debts of the partnership contracted in the course of the partnership business.

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Furthermore, it seems to me that while to say that "A may borrow from the funds of the settlement with the consent of B" would, by implication, necessarily preclude his borrowing from those funds without that consent, even if the trustees were prepared to make the loan without consent, merely

to say "A may borrow from the funds of the settlement" gives A an unrestricted ability to borrow if the trustees consent to make the loan. In other words, no consent is necessary so far as he is concerned to his borrowing. From this it appears to follow that the omission from paragraph (b) of subsection (4) of the words "directly or indirectly" or "with or without consent" is consistent with an unrestricted ability to borrow.

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10 In this regard it may be worthwhile to point  
out that nothing in the settlement restricts the  
category of persons to whom loans may be made under  
clause 10 and that the disability of the appellant  
to borrow in his personal capacity from the trustees  
arises from the rule of equity whereby trustees may  
not lend to one of their number, a disability of  
which he might relieve himself at any time by re-  
tiring from his trusteeship. The possibility of  
the appellant's retiring at some time from his  
20 trusteeship would appear to have been contemplated  
by clause 8 of the settlement which is as follows:-

30 "8. Notwithstanding and in derogation of the  
trusts hereinbefore contained, the Trustees  
shall have power with the consent of the  
Settlor while living ..... at any time .....  
in relation to the whole or any part of the  
Trust Fund which shall not then have been vested  
absolutely and indefeasibly in any person ....  
to pay any of the income or to transfer any of  
the capital to or for the benefit of such one  
or more of the persons ..... as the Trustees  
shall in their absolute discretion think fit."

(sic) declared

40 So long as the trustees remained two in number only,  
and the appellant was one of the trustees, he could  
in his capacity as trustee have prevented any  
transfer of trust funds to any of the beneficiaries.  
Hence the insertion of the specific provision  
requiring the consent of the settlor to any such  
disposition of the trust fund seems to me clearly  
to contemplate a state of affairs in which either  
he was in a minority of the trustees or in which he  
was not a trustee at all, i.e. that he had retired  
from the trust and so on.

Mr. Monroe also referred to Lord Greene's  
observations in Jenkins v. Commissioners of Inland  
Revenue 26 Tax Cases 265 at 281 and 282 where he  
says:-

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"In my opinion that is placing much too wide a construction on the word 'irrevocable' in Sub-section (10) taking it in its ordinary sense. The distinction between a revocable and an irrevocable settlement is the veriest A.B.C. in legal language; and nobody familiar with the language of lawyers, and in particular of those concerned with settlements, could have the slightest doubt, I should have thought, when finding the word 'irrevocable' used in relation to a settlement, what that word was intended to mean. It seems to me quite illegitimate to take a word which has a technical and precise meaning in conveyancing and then to argue that it has some extended meaning. If the Legislature wished to give to the word 'irrevocable' some unusual and extended meaning of this sort, I ask myself why in the world did it not do so. The Legislature is the master of the draftmanship of these Acts, and if it intends to use a word which is to have the widest possible scope it is little short of carelessness or incompetence in drafting to select for that purpose a perfectly familiar word which to everyone has a quite limited scope. I cannot bring myself to give to the word 'irrevocable' in Sub-section (10) the meaning which the Crown wishes to place upon it.

But the Legislature has in fact shown that it does wish the word 'irrevocable' to be used in an extended sense because it has so provided in Sub-section (8). That Sub-section provides that 'a settlement shall not be deemed to be irrevocable, if the terms thereof provide' - then picking out the essential words - 'for the payment to the settlor ... or for the application for the benefit of the settlor ... of any income .... in any circumstances whatsoever during the life of any child of the settlor' who is a beneficiary under the settlement. Those last words are a paraphrase. The question then arises in this case whether it can truly be said that the terms of this settlement provide for the payment to the settlor of any income in any circumstances whatsoever during the life of the child. It is perfectly true that in the way things have worked out the trustees have paid income to the settlor in discharge of the debt. Can it be said that that was done because the terms of the settlement so provided?

Macnaghten, J. refused to accept one of the arguments of the Crown, namely, that, in applying those words to the circumstances of this case, it is legitimate to consider the whole structure of this tax evasion scheme and to say that as the result of the whole mechanism it would be possible for the settlor to get out of the settlement all the funds which at any given moment it comprised, whether they be capital or income. Macnaghten, J. rejected that argument and, in my opinion, rightly so. Such a disintegration of the scheme and recapture of the funds by the settlor, if it were to take place, would not be due to some provision in the terms of the settlement, but it would be due to the circumstance that the settlor, by virtue of extrinsic matters, is in fact in a position to produce that result. It seems to me to be quite wrong to say that the result would be due to some provision in the settlement within the meaning of Sub-section (8).

The other argument, which I think was not dealt with Mr. Macnaghten, J. was of a narrower description. It was to this effect, that 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

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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 have a perfectly clear, simple and straight-forward 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."

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The material facts in that case, very briefly summarised, were that the appellant constituted three trusts of which he, his wife and his secretary were the trustees, in favour of his daughters. He gave to the trustees of each of those trusts £500 for the purposes of each such trust. Each trust had extensive borrowing powers and investment powers. On the same day he constituted two interlocking companies. He then lent substantial sums of money to the trustees of each trust. The monies so borrowed together with the £500 donated to each trust were invested in shares of one or other of companies already referred to. By reason of his shareholding in the company he was able, however, at any time to wind up the company. In the light of this statement of the facts it seems to me, if I may say so, with the utmost of respect, that it was clear that in that case the power of the settlor to recapture the funds was due not to the provisions of the settlement but to the extraneous fact that he was himself, quite independently of the settlement, in a position to wind up the company. I therefore do not think that that case affords any assistance in the determination of the problem in the instant case.

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Mr. Monroe also referred to Jamieson v. Inland Revenue Commissioners (1962) 2 W.L.R. 1075. All that needs to be said of that decision, it seems to me, is that it is clearly distinguishable from the instant case in view of the observations of Pearson L.J. at 1093:-

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10 "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.'

20 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. Inland Revenue Commissioners."

30 Although Mr. Thornton, who appeared for the respondent dealt fully with the various arguments advanced by Mr. Monroe in the light of the comments already expressed in regard to those arguments I do not propose to summarise his contentions in any detail.

40 He stressed the difference, already referred to, between the phrase sought to be construed in the Wolfson case (*supra*) "if and so long as the terms of any settlement are such that" and the phraseology falling to be construed in the instant case and submitted that it was a fair use of language to say that the settlor had access to the funds of the settlement in consequence of the settlement, because being a trustee he could not have borrowed but for the provisions of clause 10 and also because but for those provisions no loan on personal security could be made to anyone. The latter is, of course, an answer to any argument that had the settlor divested himself of his fiduciary capacity he would have been able to borrow without resort to joining a partnership, and therefore otherwise than under the settlement. He also stressed that the

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phrase to be construed was "is able to have access under the terms of the settlement" and not merely "has access under the terms of the settlement".

Further, he emphasised the distinction between the words of sub-paragraph (a) which refers to a right to resume control and those of sub-paragraph (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".

In R. v. Inhabitants of Great Bolton 108 E.R. 969 Lord Tenterden said at page 890

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"Where the legislature in the same section uses different words, we must presume that they were used to express different ideas"

So too in H. Ricket v. The Directors of the Metropolitan Railway Company (1867) L.R., H.L. 175, Lord Westbury said at pages 206 and 207:

"It is singular that this 16th section of the Railway Clauses Act, and the alteration of the language employed therein, are not adverted to in the judgment of the Court of Exchquer Chamber. Perhaps it was tacitly assumed (for it is not so expressed) that the phrase 'parties interested' was equivalent to 'parties interested in lands injuriously affected'. This, however, would be a strong and, perhaps, unwarranted assumption; for the general rule is, that a deliberate change of expression must be taken prima facie to import a change of intention."

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I find 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 ability to do something seems to me not necessarily to extend to a power to do that thing, but merely to imply a capacity to do it. In my view, therefore, for the reasons already advanced 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 in the event of his doing whatever acts and things may be necessary for him to obtain such access.

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I would therefore dismiss this appeal with costs. I would also formally dismiss with costs the cross appeal which was withdrawn.

Dated at Nairobi this 30th day of November, 1962.

50

T.H. MAYERS  
ACTING JUSTICE OF APPEAL.



JUDGMENT OF SINCLAIR P.

In the Court  
of Appeal for  
Eastern Africa

\_\_\_\_\_  
No. 10

Judgment.

(b) Sinclair,  
P.

30th November,  
1962.

The sole question arising in this appeal is whether, under the terms of the settlement, the appellant, the settlor, "is able to have access, by borrowing or otherwise, to the whole or any part of the income arising under the settlement or of the assets comprised therein "within the meaning of section 25(4)(b) of the East African Income Tax (Management) Act, 1958 (hereinafter referred to as "the Act"). If, under the terms of the settlement, the appellant is able to have access to the income or assets of the settlement within the meaning of section 25(4)(b), by the provisions of that section the settlement is deemed to be revocable and the appellant has been properly assessed to tax. If not, the settlement is irrevocable and the charge raised against the appellant is bad. The answer to this question depends on the proper construction to be placed upon the words "if under its terms the settlor is able to have access" in section 25(4)(b).

The learned judge was of the opinion that the plain intention of the legislature was that "a settlement shall 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 held that by virtue of the terms of clause 10 of the settlement "there is no bar legal or equitable, to the settlor as partner in a firm, borrowing or taking on fixed deposit from the trustees, income arising out of the settlement, notwithstanding the fact that he (or she) is also trustee". Accordingly, he held that both the appellant's settlement and the wife's settlement are revocable within the meaning of the Act.

The contentions of counsel for the appellant and for the respondent are set out in the judgment of Mayers Ag. J.A., which I have had the opportunity of reading, and I do not propose to refer to them in detail. We were informed that there is no reported decisions as to the meaning to be attached to the words used in section 25(4)(b) of the Act and that no exactly similar words appear in any other statute. I derive little assistance from the authorities referred to by Mr. Monroe in which different words in a different context were being construed. After full consideration of the submissions of counsel, my conclusion is that those of Mr.

In the Court  
of Appeal for  
Eastern Africa

No. 10

Judgment.

(b) Sinclair,  
P.

30th November,  
1962

- continued.

Thornton are correct. The appellant, the settlor, is one of the trustees of the settlement. Clause 10 of the settlement empowers the trustees to make loans, secured or unsecured to, inter alia, any firm notwithstanding that the trustees may have an interest in the firm. Without that clause the trustees would not be empowered to lend money to a firm in which the appellant is a partner. The clause envisages the possibility that the appellant may be a partner in a firm which seeks to borrow trust funds. That is not a circumstance extraneous to the settlement, but one expressly provided for in the settlement. Under the terms of the settlement, therefore, the appellant is within the category of persons who could legally be competent to borrow trust funds.

10

I do not think that the words "is able to have access" are synonymous with "has a right to have access". In paragraph (a) of subsection (4) the words "has a right" are used and, as the legislature has used different words in paragraph (b) of the same section, *prima facie* it must be presumed to have intended to express a different idea. In my view the expression "is able to have access" is not a term of art and must be given its ordinary or natural meaning of competence to have access rather than a right to have access. On that construction, since the appellant, if he is not legally competent, can at any time make himself legally competent under the terms of the settlement to borrow the trust funds and so to have access to them, he is, in my view, able to have access to them by borrowing within the meaning of section 25(4)(b). The question of ability to have access, under the section, is linked by the phrase "under its terms" to the actual settlement, the investment clause in which points to the way in which access may be had. That being so I do not think that the possible necessity of the appellant's having to take a preliminary step which is well within his competence is a matter which disables him from having access under the terms of the settlement. I am therefore in agreement with the conclusions reached by Mayers Ag. J.A.

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The appeal is accordingly dismissed with costs. The cross-appeal having been withdrawn is formally dismissed with costs.

Dated at Nairobi this 30th day of November,  
1962.

R.O. SINCLAIR  
PRESIDENT.

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JUDGMENT OF GOULD, J.A.

I have had the advantage of reading the judgments of the learned President and acting Justice of Appeal.

In the Court  
of Appeal for  
Eastern Africa

No. 10

Judgment.

(c) Gould, J.A.

30th November,  
1962.

10 I agree with them that the appeal should be dismissed with costs: it is unnecessary for me to set out again the relevant legislation and I propose only to refer to what appear to me to be the essential elements of the problem. The argument to which I have acceded, and without which I would have had no hesitation in allowing the appeal, is that based upon the difference in the approach in paragraphs (a), (b) and (c) of section 25(4) of the East African Income Tax (management) Act, 1958 which governs the matter. Paragraph (a) speaks of the settlor, under the terms of the settlement, having a "right" to do certain things which result in the settlement being deemed revocable. Paragraph (c) similarly speaks of a "power" under the settlement. As the draftsman had these words present in his mind, the change to the concept of ability in paragraph (b) is so marked that I am satisfied that the intention must be to convey something less than a right or power. I think also that it is in accordance with 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. It is, of course, possible to argue as counsel for the appellant did, that the three words used, "right", "able" and "power" were intended to have similar significance, but I think the weightier consideration is that the draftsman having said "has a right to reassume control" in paragraph (a), would have said "has a right to have access" in paragraph (b) if that is what he meant.

40 Once the argument for the respondent on this point has been accepted a good deal follows, for I have found no half way house, no meaning less than ability as of right, which can in the context be attached to the word "able" in paragraph (b) except 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. This I think, is the meaning which the learned judge in the High Court attributed to the word and I agree that it is the only possible alternative meaning. It follows therefore that the fact that the trustees must agree to lend before the settlor can borrow, is

In the Court  
of Appeal for  
Eastern Africa

No. 10

Judgment.

(c) Gould, J.A.

30th November,  
1962

- continued.

not relevant. I have no doubt also, that the settlor's ability to borrow arises under the terms of the settlement, for it is clause 10 thereof which places him within the category of persons to whom it would be lawful for the trustees to lend. Apart from that clause, he would not, as a trustee himself, be competent to borrow from the trust, nor could the trustees lend to him.

It has been pointed out that clause 10 does not authorize lending to the settlor personally but only jointly as a member of a partnership. That is so, but I do not think that he would thereby not have access to the money lent, within the meaning of paragraph 4(b). There is, however, this difficulty, that there is no evidence that the settlor was or is a member of a partnership. He could undoubtedly create one if he desired and it may be that the onus was upon him to show that he was not such a member. It has been assumed in argument before this court that he was not, for counsel for the appellant relied upon the fact that he would have to create or join a partnership before he could obtain a loan under clause 10, as being an extraneous circumstance which brought the case within the principle of the case of Wolfson v. Commissioners of Inland Revenue 31 Tax Cases 141. In that case it was held that the terms of a deed were not such that a settlor had power to revoke or otherwise determine a settlement, although by the exercise of powers as a shareholder arising outside the deed he might have accomplished the same result. There is no parallel there to the circumstances of the present case. The settlor's ability to borrow would not arise from any power acquired as a partner, but because the terms of the settlement place him, as a partner, in the category of persons who may borrow. I do not think that his ability to have access within the meaning of the paragraph would be negatived by the fact that he had to take the preliminary step, itself within his ability, of forming a partnership, particularly as clause 10 of the settlement appears to have been drawn in contemplation of the settlor or another trustee being or becoming interested in a partnership.

For these reasons, as I have said, I agree that the appeal should be dismissed, but would add that I regard the problem posed as one of considerable difficulty and have arrived at my conclusion with hesitation.

DATED at Nairobi this 30th day of November, 1962.

T.J. GOULD  
JUSTICE OF APPEAL.

No. 12

O R D E RIN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICAAT DAR-ES-SALAAMCivil Appeal No. 58 of 1962

KANJEE NARANJEE

Appellant

- versus -

THE COMMISSIONER OF INCOME TAX Respondent

10 (APPEAL from a Judgment and Decree of the High Court of Tanganyika at Dar-es-Salaam (Mr. Justice Weston) dated the 9th day of June, 1962 in Civil Appeal No.5 of 1961

IN THE MATTER of an APPEAL against Assessment Number 21/7543 (year of Income 1958)

- and -

IN THE MATTER of THE EAST AFRICAN INCOME TAX (MANAGEMENT) ACT, 1958)

IN COURTOn the 30th day of November, 1962

20 BEFORE THE HONOURABLE PRESIDENT (SIR RONALD SINCLAIR)  
THE HONOURABLE SIR TREVOR GOULD, a Justice of Appeal  
THE HONOURABLE MR. JUSTICE MAYERS - Acting Justice of Appeal

O R D E R

30 This Appeal and Cross Appeal coming on for hearing on the 6th and 7th days of October 1962, AND UPON HEARING Hubert Holmes Monroe, Esquire, one of Her Majesty's Counsel (with him Gerald Harris, Esquire) of Counsel for the Appellant and Garth Cecil Thornton, Esquire, of Counsel for the Respondent, IT WAS ORDERED that this Appeal do stand for Judgment, and upon the same coming for Judgment this day, IT IS ORDERED

1. That the Appeal be, and is hereby dismissed;

In the Court  
of Appeal for  
Eastern Africa

No. 12

Order.

30th November,  
1962.

In the Court  
of Appeal for  
Eastern Africa

No. 12

Order.

30th November,  
1962

- continued.

2. That the Cross-Appeal be, and is hereby dismissed;

3. That the Appellant do pay to the Respondent taxed costs of, and incidental to this Appeal;

4. That the Respondent do pay to the Appellant taxed costs of, and incidental to the Cross-Appeal.

GIVEN under my hand and the Seal of the Court at Nairobi this 30th day of November, 1962.

(Sgd.) F. HARLAND.

REGISTRAR,

COURT OF APPEAL FOR EASTERN AFRICA.

10

ISSUED on this 3rd day of December 1962.

No. 13

Order granting  
Final Leave to  
Appeal to Her  
Majesty in  
Council.

4th December,  
1962.

No. 13

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER  
MAJESTY IN COUNCIL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

AT DAR ES SALAAM

Civil Application No. 6 of 1962

IN THE MATTER of an intended APPEAL to Her Majesty  
in Council

20

BETWEEN

KANJEE NARANJEE

Applicant

- and -

THE COMMISSIONER OF INCOME TAX

Respondent

APPEAL from the Judgment and Order of Her Majesty's Court of Appeal for Eastern African at Dar es Salaam dated the 30th day of November 1962 in Civil Appeal No. 58 of 1962

Between

KANJEE NARANJEE

Appellant

30

- and -

THE COMMISSIONER OF INCOME TAX

Respondent

IN CHAMBERS

this 4th day of December, 1962

BEFORE the HONOURABLE MR. JUSTICE MAYERS an acting  
Justice of Appeal.

O R D E R

Upon the Application presented to this Court on the 4th day of December 1962 by Counsel for the abovenamed Applicant for final leave to appeal to Her Majesty in Council AND UPON READING the affidavit of Gerald Harris of Nairobi and Dar es Salaam Advocate of the High Court of Tanganyika in support thereof AND UPON HEARING Counsel for the Applicant and for the Respondent THIS COURT DOTH ORDER that the Application for final leave to appeal to Her Majesty in Council be and is hereby granted AND DOTH DIRECT that the Record including this Order be despatched to England within two days from the date of issue of this Order AND DOTH FURTHER ORDER that the costs of this Application do abide the result of the appeal.

GIVEN under my hand and the Seal of the Court at Nairobi this 4th day of December, 1962.

(Sgd.) F. HARLAND  
REGISTRAR.

HER MAJESTY'S COURT OF APPEAL FOR  
EASTERN AFRICA.

ISSUED this 4th day of December, 1962.

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EXHIBIT - SETTLEMENT made by KANJEE NARANJEE

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THIS SETTLEMENT is made the 5th day of June, 1955 BETWEEN (1) KANJEE NARANJEE an Indian of Ngerengere (hereinafter called "the Settlor") of the one part and (2) HIMSELF that is to say the said Kanjee Naranjee and (3) UJAMBAI KANJEE NARANJEE an Indian married woman of Ngerengere (hereinafter called "the Trustees" which expression shall where the context requires or permits include the trustees or trustee for the time being hereof and the legal personal representatives of the last surviving trustee) of the other part:

WHEREAS the Settlor is desirous of declaring such trusts for the benefit of the existing and any future sons (hereinafter called "the Grandsons") of his three sons namely, 1. Dwarkadas Kanjee 2. Mangaidas Kanjee and 3. Devendra Kanjee and others as are hereinafter contained

AND WHEREAS with a view to the settlement intended hereby the Settlor has transferred and/or caused to

In the Court  
of Appeal for  
Eastern Africa

No. 13

Order granting  
Final Leave to  
Appeal to Her  
Majesty in  
Council.

4th December,  
1962

- continued.

Appellant's  
Exhibit

Settlement  
made by Kanjee  
Naranjee.

5th June, 1955.

Appellant's  
Exhibit  
—

be allotted to the Trustees certain of his investments being Shares and Securities more fully described in the Schedule hereto

Settlement  
made by Kanjee  
Naranjee

AND WHEREAS the Settlor intends that this settlement shall be absolutely irrevocable in all circumstances.

5th June, 1955  
- continued.

NOW THIS DEED WITNESSETH and it is hereby agreed and declared as follows:-

1. THE Trustees shall either continue the said shares and securities in their present form of investment or shall with the consent of the Settlor while living and afterwards in their absolute discretion sell call in or convert the same into money and with the like consent or in the like discretion invest such resulting money in investments of the nature hereby authorised with power from time to time with the like consent or in the like discretion to transpose such investments into others of a like nature AND shall hold the said shares and securities and also any additions accretions or augmentation thereto or thereof or any residue thereof and the investments from time to time representing the same (hereinafter called "the Trust Fund") and the income thereof upon trust to treat the same as divided into Three equal shares. 10 20

2. (a) THE Trustees shall stand possessed of one such share (hereinafter called "the First Grandsons' Share") upon trust during the life of the Settlor's said son 1. DWARKADAS KANJEE to pay the income thereof unto and equally between such of the sons of the Settlor's said son as shall for the time being be living PROVIDED that during the infancy of any such grandson of the Settlor the Trustees may in their absolute discretion pay to his parent or guardian if any or otherwise apply for or towards his maintenance education or benefit the whole or such part if any of his income as the Trustees may in their absolute discretion think fit and the Trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time and shall hold those accumulations in trust for such grandchild absolutely if he shall attain the age of twenty one years and if he shall not attain the age of twenty one years as an accretion to the First Grandson's Share and as one fund therewith for all purposes BUT the Trustees may at any 30 40



time during the infancy of such grandchild apply those accumulations or any part thereof as if they were income arising in the then current year PROVIDED ALSO that if any son of the Settlor's said son DWARKADAS KANJEE shall die during the life of the Settlor's said son leaving sons or a son him surviving such great grandsons or great grandson of the Settlor shall stand in the place of such deceased grandson and take equally between them if more than one the share of income which such deceased grandson would have taken if he had still been living AND the provisions hereinbefore set out in relation to the application or accumulation of income during a minority shall apply to the income of such great grandsons or great grandson as though the same were herein set out in full in relation to each such great grandson's share of income as the same are set out in relation to each said grandson's share of income.

Appellant's  
Exhibit

Settlement  
made by Kanjee  
Naranjee

5th June, 1955  
- continued.

10 2. (b) If at any time or times during the life of the Settlor's said son l. Dwarkadas Kanjee there shall be no male issue of his for the time being living the Trustees shall hold the income arising from the First Grandson's Share during such time or times on trust as follows:-

30 (i) if the Settlor shall be living the Trustees shall accumulate all the income of the First Grandson's Share at compound interest by investing the same and the resulting income thereof from time to time and shall hold those accumulations as an accretion to the capital of the First Grandson's Share and as one fund therewith for all purposes;

(ii) if the Settlor shall be dead the Trustees shall pay all the income of the First Grandsons' Share to the Settlor's said son Dwarkadas Kanjee.

40 3. ON the death of the Settlor's said son l. Dwarkadas Kanjee the Trustees shall hold capital and income of the First Grandsons' Share upon trust for such of the sons of the Settlor's said son l. Dwarkadas Kanjee as shall then be living and shall attain or shall have attained the age of twenty one years and if more than one in equal shares absolutely PROVIDED NEVERTHELESS that if any such grandson of the Settlor shall then have died leaving sons or a son him surviving who shall attain or shall have attained the age of twenty one years such great

Appellant's  
Exhibit

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Settlement  
made by Kanjee  
Naranjee

5th June, 1955  
- continued

grandson or great grandsons of the Settlor shall stand in the place of such deceased grandson and take equally between them if more than one the share which such deceased grandson would have taken if he had attained a vested interest PROVIDED ALSO that if any such grandson shall be living at the death of the Settlor's said son 1. Dwarkadas Kanjee but shall die without attaining the age of twenty one years leaving sons or a son him surviving such great grandsons or great grandson shall stand in the place of such deceased grandson and take equally between them if more than one the share which the deceased grandson would have taken if he had attained a vested interest.

10

4. THE Trustees shall hold another such share of the Trust Fund (hereinafter called the Second Grandsons' Share) upon such trusts as are hereinbefore set out in relation to the First Grandsons' Share with the substitution of the name of the Settlor's son 2. MANGALDAS KANJEE for the name of the Settlor's son 1. Dwarkadas Kanjee and with the substitution of the issue of that son MANGALDAS KANJEE for the issue of that son 1. Dwarkadas Kanjee.

20

5. THE Trustees shall hold the third such share of the Trust Fund (hereinafter called the Third Grandsons' Share) upon such trusts as are hereinbefore set out in relation to the First Grandson's Share with the substitution of the Settlor's son 3. DEVENDRA KANJEE for the name of the Settlor's son 1. Dwarkadas Kanjee and with the substitution of the issue of that son 3. Devendra Kanjee for the issue of that son 1. Dwarkadas Kanjee.

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6. IF the Trusts of the First Grandsons' Share the Second Grandson's Share or the Third Grandson's Share shall fail or determine the share (both original and by way of accruer) as to which the trusts shall fail shall be added to the other shares or share and if more than one in equal shares.

7. IF the trusts of the First Grandson's Share the Second Grandson's Share and the Third Grandson's Share shall all fail or determine then the Trustees shall hold the Trust Fund upon trust absolutely for such one or more of the following persons or purposes as the Trustees shall in their absolute discretion determine:-

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- (a) Any issue whether immediate or remote of the Settlor's said three sons and/or of his

daughters and the wives husbands widows  
and widowers of any such issue

Appellant's  
Exhibit

(b) Any of the Settlor's brothers and their  
issue whether immediate or remote

Settlement  
made by Kanjee  
Naranjee

(c) Any widows of the Settlor's said three  
sons

5th June, 1955  
- continued.

(d) Any charity or charitable purpose

in such proportions (if more than one) as the  
Trustees shall in their absolute discretion think  
fit.

8. NOTWITHSTANDING and in derogation of the trusts  
hereinbefore declared the Trustees shall have power  
with the consent of the Settlor while living and  
afterwards in their absolute discretion at any time  
or times in relation to the whole or any part of  
the Trust Fund which shall not then have vested  
absolutely and indefeasibly in any person or persons  
to pay any of the income or to transfer any of the  
capital to or for the benefit of such one or more  
of the persons or purposes set out in the preceding  
paragraph hereof (including among such persons all  
sons and grandsons of the Settlor's said three sons  
and the wives or widows of any such sons or grand-  
sons) and in such proportions (if more than one) as  
the Trustees shall in their absolute discretion  
think fit.

9. WHENEVER any money shall be paid or property  
shall be transferred under the trusts or powers  
herein contained to any parent or guardian the re-  
ceipt of such parent or guardian shall be a full  
discharge to the Trustees who shall not be answer-  
able for the application of such money or property.

10. 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 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.

11. THE Trustees shall have the following powers:-

Appellant's  
Exhibit

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Settlement  
made by Kanjee  
Naranjee

5th June, 1955  
- continued.

- (a) To pay all outgoings taxes assessments expenses and other charges payable in the administration and management of the Trust Fund and otherwise in respect of the trusts hereof
- (b) To employ and pay any person or persons including solicitors bankers or stockbrokers to transact any business or to do any acts in the administration and management of the Trust Fund including the receipt and payment of money and all charges and expenses so incurred shall be allowed to the Trustees as administration expenses 10
- (c) To cause the accounts of the Trust Fund including the three shares aforesaid by any professional accountant as may be selected for the purpose and to determine out of what part or parts of the Trust Fund or income thereof the cost of such audit shall be defrayed and to make any apportionment of such costs as may be desirable. 20
- (d) To delegate any of their powers to committees consisting of such members or member of their body as they think fit for the administration and management of the Trust Fund (but not for the purpose of exercising any discretion conferred on the Trustees) including the opening operation and discontinuance of bank accounts in joint names of the members of such committee. 30
- (e) To accept any composition or security for any debt or for any property or claim.
- (f) To allow any time for payment of any debt.
- (g) To compromise compound abandon submit to arbitration or otherwise settle or adjust any debts accounts claims disputes court or other proceedings or anything whatsoever relating to or touching the trusts or matters comprised in these presents.

12. THE Trustees may at any time or times at their discretion appropriate any part of the Trust Fund or any of the three shares aforesaid in its then actual state of investment in or towards satisfaction of the whole or any part of any share therein which has become absolutely vested in any person or 40

persons and in making such appropriation they may themselves estimate the value of the component parts of the Trust Fund or the said ~~three shares~~ or may employ to make such valuations such person or persons as in the circumstances they may select or deem proper and any appropriation so made shall be final and binding on all persons claiming under the trusts hereof.

Appellant's  
Exhibit  
—

Settlement  
made by Kanjee  
Naranjee

5th June, 1955  
- continued

10 13. THE Trustees shall not be responsible for any loss occasioned by any act or thing done by them in good faith and without any fraud or dishonesty on their part.

14. EVERY consent hereby required to any transactions hereby authorised shall until contrary be proved be deemed to have been properly given and at the expiration of six months from the completion of any such transaction every consent required thereto shall be deemed to have been properly given or unnecessary.

20 14. ALL questions arising in the administration or management of the Trust Fund (but not the question of exercise of any discretion) shall be decided by a majority of the Trustees and if on any such question the Trustees shall be equally divided the Senior Trustee shall have a casting vote. The expression "the Senior Trustee" means the Trustee who shall have been earliest appointed and as between Trustees appointed at the same time an earlier named Trustee shall be deemed to have been  
30 appointed earlier than a later-named Trustee.

15. NO female shall hereafter be appointed a trustee hereof and subject thereto the power of appointing new or additional trustees hereof shall be vested in the Trustees and the power to appoint new or additional Trustees shall permit an increase in the number of Trustees up to but not beyond seven Trustees for the time being.

40 16. THE Trustees shall pay all costs and charges and expenses of and incidental to the making of this settlement with power for them to pay the same out of the capital of the Trust Fund.

IN WITNESS whereof the parties hereto have hereunto set their respective hands the day and year hereinafter written

Appellant's  
Exhibit

THE SCHEDULE above referred to

Settlement  
made by Kanjee  
Naranjee  
5th June, 1955  
- continued

(1) ALL THOSE the 6,487 Ordinary Shares of Shillings 20/- each being Nos.1 to 6847, inclusive, in the capital of Kanjee Naranjee Finance Corporation Limited a company incorporated in Tanganyika having its registered office situate at Ngerengere.

(2) ALL THOSE the 4,500 Shares of Shillings 1,000/- each being Nos. 3 to 4502, inclusive, in the capital of Kanjee Naranjee Limited a company incorporated in Tanganyika whose registered office is situate at Ngerengere.

10

Signed and delivered by the said  
Kanjee Naranjee as the Settlor  
in Roman characters this 5th day  
of June, 1955 in my presence it  
having been first read over  
interpreted and explained to him  
when he appeared perfectly to  
understand its contents

20

Signed and delivered by the said  
Kanjee Naranjee as Trustee in  
Roman characters this 5th day of  
June, 1955 in my presence it  
having been first read over  
interpreted and explained to him  
when he appeared perfectly to  
understand its contents

Signed and delivered by the said  
Ujambai Kanjee Naranjee by  
making her mark thereto this 5th  
day of June, 1955 in my presence  
it having been first read over  
interpreted and explained to her  
when she appeared perfectly to  
understand its contents

30

Stamp Duty shs.52,790/-  
Adjudication fee shs.10/-

IN THE PRIVY COUNCIL

No. 47 of 1962

ON APPEAL  
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

---

B E T W E E N

KANJEE NARANJEE

Appellant

- and -

THE COMMISSIONER OF INCOME TAX

Respondent

R E C O R D      O F      P R O C E E D I N G S

---

LINKLATERS & PAINES,  
Barrington House,  
59-67, Gresham Street,  
London, E.C.2.  
Solicitors for the Appellant.

CHARLES RUSSELL & CO.,  
37, Norfolk Street,  
London, W.C.2.  
Solicitors for the Respondent.