VOL. XXVIII—PART I

No. 1365—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—
27TH AND 28TH OCTOBER AND 3RD NOVEMBER, 1942

COURT OF APPEAL—30TH NOVEMBER, 1ST, 2ND AND 3RD DECEMBER, 1943
AND 1ST FEBRUARY, 1944

HOUSE OF LORDS—11TH, 14TH AND 16TH JANUARY AND
22ND MARCH, 1946

COMMISSIONERS OF INLAND REVENUE *v.* L. B. (HOLDINGS), LTD. (IN LIQUIDATION) [1]

Sur-tax—Apportionment of income of investment company—Sale of business by sole owner to trading company and issue of its shares to investment company—Issue of investment company's shares to vendor—Vendor declaring himself, by deed of trust, sole trustee of (inter alia) *shares of investment company—Trust to pay income to wife and children—Dividends of investment company paid to trading company and credited to trustee—Drawings by trustee on this account for* (inter alia) *his own purposes—Whether trustee, as settlor, " able to secure " that income will be applied for his benefit—Whether settlor (being also trustee and a person to whom income can be apportioned) is a member of the company but has no relevant interests therein or, alternatively, is able to secure that income will be applied for his benefit to a greater extent than is represented by his relevant interests—Finance Act,* 1922 (12 *&* 13 *Geo.* V, *c.* 17), *Section* 21; *Finance Act,* 1937 (1 *Edw.* VIII *&* 1 *Geo.* VI, *c.* 54), *Section* 14 (2); *Finance Act,* 1939 (2 *&* 3 *Geo.* VI, *c.* 41), *Sections* 14 *and* 15.

The Respondent Company was incorporated on 17th March, 1934, *as an investment trust company with a capital of* 1,000 *shares of* £1 *each. On the same date, a trading company was incorporated and acquired from B the business of which he was sole proprietor; the shares which formed the consideration for the sale were directed by B to be issued to the investment company and that company issued to B or his nominees* 500 *shares. B, by reason of his shareholding and his powers as governing director, was in complete control of the investment company. On 22nd March,* 1934, *B, by a declaration of trust, declared himself sole trustee of such investments as should be specified in the schedule to the deed of trust, and a few days later he included in the schedule the shares of the investment company together with investments valued at* £100,000. *By the terms of the declaration of trust, B, as trustee, was to pay the annual income of the trust fund up to* £2,000 *to his wife and the balance equally between his five children and the survivors of them during their respective lives.*

Shortly afterwards B, as trustee, sold to the Respondent Company all the investments held in trust with the exception of the shares in the Respondent Company itself. The Respondent Company in consideration issued to the trustee a further 105 *shares at a premium of* £999 *per share, with the result that the only shares subject to the trust were the* 605 *shares in the Respondent*

[1] Reported (K.B. & C.A.) 170 L.T. 217; (H.L.) 175 L.T. 54.

Company, and the only income of the trust was derived from the dividends payable by the Respondent Company. The whole of the trust income was paid into the account of the trading company and in that company's books an account was kept in the name of B, to which was credited not only the trust income but payments due to B personally, and to this account were debited sums paid by B on his own account as well as sums paid as trustee. It was not possible to identify all the drawings for the benefit of beneficiaries nor to ascertain the balance of the trust fund in the hands of the trading company.

In July, 1939, *on the introduction of the clause which became Section* 15 *of the Finance Act,* 1939, *the Respondent Company went into liquidation and its assets were distributed in specie to B as trustee. In July,* 1940, *two additional trustees were appointed and a separate bank account opened for the trust. The three children who were then of age executed a deed of release in favour of B in respect of acts or omissions in the course of his trusteeship.*

Directions in respect of the income of the Respondent Company were made for the years 1938–39 *and* 1939–40 *under Section* 21 *of the Finance Act,* 1922, *Section* 14 (2) *of the Finance Act,* 1937, *and Section* 14 *of the Finance Act,* 1939; *and the income was apportioned for those years to the trustee under Section* 15 *of the Finance Act,* 1939. *Notice of appeal against the directions was withdrawn, but on appeal the Special Commissioners discharged the apportionments. The Crown required a rehearing by the Board of Referees, who affirmed the Special Commissioners' decision. They found that the declaration of trust was not a sham and that the trustee did not intend to deprive his children permanently of the trust income but did intend to retain control over the income; they held that the words " able to secure " in Section* 15 *of the Finance Act,* 1939, *meant " able to secure by lawful means ", and that the trustee was not able by lawful means to secure that the income or assets of the Company would be applied directly or indirectly for his benefit. In the High Court a point of law was taken, on behalf of the Respondent Company, as to the jurisdiction of the Special Commissioners and the Board of Referees to apportion income to the trustee.*

Held,

(1) *that the application of the words " by any means whatsoever " in Section* 15 (3) *of the Finance Act,* 1939, *was not limited to lawful means and that the word " secure " in the phrase " able to secure " in the Section did not imply some necessary element of permanency or certainty;*

(2) *that since " interest " for the purposes of Section* 15 *meant interest in the capital or profits or income of the Company, the beneficiaries as well as the trustee were to be regarded as members of the Company and the income was apportionable among them as was appropriate in accordance with their interests.*

CASE

Stated by the Board of Referees pursuant to the Finance Act, 1922, First Schedule, Paragraph 2, for the opinion of the High Court of Justice.

1. At meetings of the Board of Referees held on 12th and 18th December, 1940, pursuant to the Finance Act, 1922, First Schedule, Paragraph 2, the Board reheard appeals by L. B. (Holdings), Ltd. (in liquidation) (hereinafter called " the Holding Company ") to the Special Commissioners of Income Tax (hereinafter called " the Special Commissioners ") against apportionments which had been made by the Special Commissioners on 1st December, 1939,

of the actual income of the Holding Company from all sources for the years of assessment 1938–39 and 1939–40 (period 6th April, 1939, to 22nd July, 1939).

The said apportionments were made in pursuance of the Finance Act, 1939, Section 15, consequent upon directions which had been made pursuant to the Finance Act, 1922, Section 21; the Finance Act, 1937, Section 14 (2); and the Finance Act, 1939, Section 14. Notice of appeal was given against the said directions, but the appeals were subsequently withdrawn at the hearing before the Special Commissioners on 17th June, 1940.

The actual income of the Holding Company was computed for the year of assessment 1938–39 to be £18,585 and was apportioned wholly to Mr. Luke Brady (hereinafter called "Mr. Brady"), and for the year of assessment 1939–40 (period 6th April, 1939, to 22nd July, 1939), was computed to be £5,569 and was similarly apportioned.

2. At the hearing before the Special Commissioners they had, after hearing the evidence and arguments in the case, allowed the Holding Company's appeal and discharged the said apportionments.

3. Thereupon the Commissioners of Inland Revenue (hereinafter called "the Commissioners") had required the said appeals to be reheard by the Board of Referees, and accordingly the appeals were reheard by the said Board on 12th and 18th December, 1940.

4. The Holding Company was incorporated on 17th March, 1934, with the object (*inter alia*) of carrying on the business of an investment trust company. The Holding Company is an investment company within the meaning of the Finance Act, 1936, Section 20 (1). A copy of the memorandum and articles of association is attached hereto, marked "A" and forms part of this Case (1).

5. The share capital of the Holding Company is £1,000 divided into 1,000 shares of £1 each of which 605 have been issued.

6. The issued share capital of the Holding Company was originally £500 in 500 shares of £1 each which, for the consideration set out in paragraph 9, were allotted as follows:—

Mr. Brady	499
Rebecca Mary Brady (wife and nominee of the above, hereinafter referred to as "Mrs. Brady")	1
	500

A further 105 shares were allotted to Mr. Brady on 21st October, 1935, in the circumstances hereafter mentioned.

7. The directors of the Holding Company at all material times were Mr. Brady and Mrs. Brady, Mr. Brady being the governing director.

8. On 17th March, 1934, there was also incorporated a company under the name of Luke Brady, Ltd. A copy of the memorandum and articles of association is attached hereto, marked "B", and forms part of this Case(1). Mr. and Mrs. Brady were the first directors and entitled to hold office for life, Mr. Brady being governing director.

9. On 22nd March, 1934, Mr. Brady executed an agreement for the sale to Luke Brady, Ltd. of his business of licensed victualler in consideration of 49,998 shares of £1 each out of an issued capital of 50,000 shares. Shortly afterwards Mr. Brady agreed to sell the 49,998 shares to the Holding Company in consideration of the issue of 500 shares of £1 each in the Holding Company, as

(1) Not included in the present print.

set out in paragraph 6 ; and the shares in Luke Brady, Ltd. were by his direction allotted to the Holding Company. A copy of the vending agreement, marked " C ", is attached hereto and forms part of this Case(1).

10. Luke Brady, Ltd. did not acquire the debts due to the business, and Mr. Brady undertook to satisfy and discharge the debts and liabilities of the business. Actually, however, the debts collected (with other receipts mentioned in paragraph 16) were paid into the banking account of Luke Brady, Ltd., and Mr. Brady's liabilities, including Income Tax and Sur-tax, were paid by drawing on that account.

At the time of the sale it was expected that the liabilities would not exceed the amounts collected by more than about £4,000 ; but by 6th January, 1935, the excess was over £15,000. The reason for this increase was that liabilities for Income Tax and Sur-tax for prior periods were overlooked. Thereafter Mr. Brady's indebtedness to Luke Brady, Ltd. fluctuated, as set out in paragraph 16.

11. On 22nd March, 1934, Mr. Brady executed a declaration of trust in regard to such of his investments as he should from time to time specify in the schedule thereto. It was thereby provided that Mr. Brady as trustee should stand possessed of the said investments and the investments for the time being representing the same (viz., the trust fund), and of the annual income thereof, upon trust to pay the annual income of the trust fund in each calendar year up to £2,000 to Mrs. Brady, and the balance thereof in equal shares to James Luke Brady, Kathleen May Brady, Thomas Joseph Brady, Patrick John Brady, and Michael Brady (the children of the settlor), and the survivors or survivor of them, during their, his or her respective lives or life. There then followed certain trusts for the benefit of the children of the children of the settlor. A copy of the said declaration of trust and the schedule thereto, marked " D ", is attached to and forms part of this Case(1).

12. The dates of birth of the said children are as follows :—

James Luke Brady	23rd April, 1913.
Kathleen May Brady (now Mrs. W.J. Coffey)	7th March, 1915.
Thomas Joseph Brady	14th October, 1917.
Patrick John Brady	17th July, 1920.
Michael Brady	22nd August, 1922.

13. Mr. Brady from time to time after the execution of the declaration of trust added certain shares and securities to the trust fund. He also added the 500 shares in the Holding Company referred to in paragraph 9 hereof, and acquired for the trust by purchase shares worth £315 4*s*. 0*d*. The whole of the shares and securities then comprising the trust fund, except the 500 shares in the Holding Company, were sold to the Holding Company on 2nd May, 1935, for £101,000 (which was their then market value), payable within six months with interest at 3 per cent. per annum. On 16th October, 1935, Mr. Brady transferred to the Holding Company a further block of investments which belonged to him personally, the market value of which was £4,000. The transaction was closed by the issue and allotment to Mr. Brady at a premium of £999 per share, of a further 105 shares in the Holding Company, all of which he held thereafter as trustee, and by the transfer to Mr. Brady personally of the sum of £4,315 4*s*. 0*d*. out of the trust funds.

14. At all material times, therefore, the sole capital asset of the trust was a holding of 605 shares in the Holding Company, 604 of which stood in the name of Mr. Brady and one in the name of Mrs. Brady (as his nominee), Mr. Brady being the sole trustee.

(1) Not included in the present print.

15. After making the settlement Mr. Brady remained the freeholder of two valuable licensed premises, one of which was let to Luke Brady, Ltd. at a rent of £1,000 a year, freehold ground rents producing £136 a year, some other unspecified investments, and a freehold residence worth about £6,000. He was entitled to £2,000 a year as director's remuneration, and he and Mrs. Brady were entitled to expenses allowances, totalling £1,000 a year, of which £364 was drawn as from 6th January, 1936. His income was rather more than sufficient to meet his requirements, but not sufficient to enable him also to make any large reduction in his indebtedness to Luke Brady, Ltd.

16. At all material times the whole of the trust income was paid into the account of Luke Brady, Ltd. In the books of Luke Brady, Ltd. the trust income was credited to an account entitled " Mr. Brady's Personal Account ", to which there were also credited Mr. Brady's fees and expenses allowance as a director, the amounts collected for him referred to in paragraph 10, and some other payments received by Mr. Brady. There were debited to this account the liabilities paid, as mentioned in paragraph 10, and all other sums drawn by Mr. Brady for his personal use or as trustee. The income of the trust can easily be traced, as it consisted solely of dividends paid by the Holding Company, but some only of the drawings for the beneficiaries can be identified. It is therefore impossible to ascertain the balance of the trust funds in the hands of Luke Brady, Ltd. For the purposes of this case Mr. Vincent, the Company's accountant, analysed this account upon the assumption that after 6th January, 1936, £4,000 a year was spent for the benefit of the beneficiaries (being approximately £500 a year for each of the children, which is Mr. Brady's estimate, and £2,000 a year, less Income Tax, for Mrs. Brady), and the costs and stamp duties of the trust deed. These accounts collected in a bundle, marked " E ", are attached hereto and form part of this Case (1). Taking together the so-called " Vendor's Account ", and the " Current Account ", the amounts due from Mr. Brady to Luke Brady, Ltd. on the above-mentioned assumption were as follows :—

	£	s.	d.
6th January, 1935	14,887	18	8
,, 1936	12,369	7	1
,, 1937	11,667	8	10
,, 1938	13,157	16	0
,, 1939	17,467	18	4
,, 1940	10,344	5	3

The increase in the amount owing at 6th January, 1939, was due to money being lent to the Holding Company and debited to Mr. Brady's account. This money was repaid during the following year.

A summary of the balance sheets and profit and loss accounts of Luke Brady, Ltd., marked " F ", is attached hereto and forms part of this Case(1). The items in the balance sheets described as " Mr. Brady's Account ", or " Director's Account ", are in each case the balance of the account hereinbefore mentioned. The balance sheets were prepared by Mr. Vincent, and Mr. Brady accepted them as correct without proper consideration. We, the members of the Board present at the hearing, did not accept Mr. Vincent's evidence that he thought it right to show Mr. Brady's indebtedness reduced by receipts of trust income. No interest was paid by Mr. Brady.

17. Mr. James Luke Brady was not aware, and there was no evidence that any of the other children were aware, of the fact that up to some date in 1939 the liquid assets of Luke Brady, Ltd. were depleted by Mr. Brady to a greater extent than they were increased by the receipt of the trust income. Mr. Brady

(1) Not included in the present print.

in effect misled his elder children into the belief that by " lending the surplus trust income to Luke Brady, Ltd." he was increasing the value of that company's business by enabling it to undertake capital expenditure which it could not otherwise have undertaken, whereas the fact is that, if Mr. Brady had paid his debt to the company, the surplus trust income would not have been needed.

18. In or about September, 1938, a loan was made by the Holding Company to Dr. W. J. Coffey at the time of his marriage to Mr. Brady's daughter Kathleen. The loan amounting to £3,500 was to enable Dr. Coffey to purchase a freehold house and to set up in practice. Interest at 4 per cent. was chargeable on the loan, but it has not in fact been paid. £1,500 of the loan has been paid off. Mr. Vincent advised on the form which the transaction took. Mr. Brady had at first suggested that the money might be paid to Kathleen Brady out of the money due to her as her share of the trust income, but, following Mr. Vincent's advice, the loan was made by the Holding Company, and appeared amongst its investments.

19. The following dividends were declared by Luke Brady, Ltd. in the years 1937–38 and 1938–39, and forms the larger part of the income of the Company.

For the year ended 6th January, 1938	£12,000 gross.
" " " " " " 1939	£14,000 gross.

20. The dividends paid by the Holding Company (tax free) were as follows:—

For the year ended 30th April, 1938	£10,587.
" " " " " " 1939	£11,697.

A summary of the balance sheets of the Holding Company, marked " G ", and a summary of the Income Tax account, marked " H ", for all years up to 22nd July, 1939, are annexed hereto and form part of this Case(1).

21. The Holding Company went into liquidation on 22nd July, 1939, and the liquidator distributed the assets in specie to Mr. Brady as the shareholder entitled thereto, which assets Mr. Brady was then holding as trustee.

22. The reason for the liquidation was the clause in the Finance Bill, 1939, which subsequently became Section 15 of the Finance Act, 1939.

23. On 31st July, 1940, Mr. Brady appointed by deed the said Peter Alan Clarke Vincent and the said James Luke Brady to be additional trustees.

A copy of this deed, marked " I ", is annexed hereto and forms part of this Case(1). A separate banking account was then opened for the trust in the names of the trustees, and the investments were registered in their names.

24. On the same day the three children of Mr. Brady who were then of age, viz., James Luke Brady, Mrs. W. J. Coffey, and Thomas Joseph Brady, executed a deed of release, releasing Mr. Brady from all liability for acts or omissions done in respect of his trusteeship.

In a schedule to the deed there was set out the amounts of the trust income year by year, the amounts estimated to have been expended on behalf of the children, and the balance due to each of them at 5th April, 1940. This latter sum was agreed to be £4,319 16*s.* 7*d.* for each of the five beneficiaries, making a total of £21,599 2*s.* 8*d.* A copy of the said deed, marked " K ", is attached hereto and forms part of this Case(1).

25. Evidence was given on behalf of the Holding Company by Mr. Brady; by Mr. Peter Alan Clarke Vincent, a chartered accountant who assisted in the formation of the two companies and generally advised Mr. Brady on his financial affairs, and by Mr. James Luke Brady, the eldest son of Mr. Brady. The proofs

(1) Not included in the present print.

of these witnesses and a transcript of the shorthand note of the evidence, marked "L", are attached hereto and form part of this Case(1).

26. It was contended on behalf of the Commissioners of Inland Revenue that the whole of the income of the Holding Company for the two years in question had been properly apportioned to Mr. Brady pursuant to Section 15 of the Finance Act, 1939, and that the powers of the Special Commissioners had been properly exercised under that Section for the following reasons :—

(1) That the declaration of trust dated 22nd March, 1934, was never intended to bind Mr. Brady by creating the strict relationship of trustee and beneficiaries, and was a sham.

(2) Alternatively, that Mr. Brady was, or was likely to be, able to secure that the income or assets of the Company or of Luke Brady, Ltd. would be applied either directly or indirectly for his benefit in view of the following :—

(*a*) Mr. Brady by virtue of his voting control of the Holding Company, and his position as governing director, could ensure that its income or assets could be paid or transferred to himself or his wife by way of remuneration under article 22.

(*b*) Similarly by reason of his voting control of the Holding Company, which owned all the shares in Luke Brady, Ltd., and his position as governing director of Luke Brady, Ltd., Mr. Brady could ensure the payment of the income or assets of Luke Brady, Ltd. to himself or his wife by way of remuneration by amending article 81 of the articles of association of Luke Brady, Ltd., or under article 83.

(*c*) Any dividends declared by the Holding Company were payable to Mr. Brady as the sole shareholder, and although he was so entitled as trustee he was at all material times the sole trustee, and in such relationship with the beneficiaries, that he was in fact in a position substantially to ignore the terms of the trust, and to deal with the said dividends for his own benefit.

(3) Alternatively that the requirements of Sub-section (3) (*a*), Section 15, Finance Act, 1939, were satisfied, as was admitted on behalf of the Company.

(4) Alternatively that the requirements of the first part of Sub-section (3), or alternatively of Sub-section (3) (*a*) and of Sub-section (3) (*b*), were satisfied by reason of the position of governing director of the Holding Company and of Luke Brady, Ltd. held by Mr. Brady, and of the provisions of the articles of the two companies which operated to vest the control of the two companies and the exercise of its powers exclusively in Mr. Brady.

It was therefore contended on behalf of the Crown that the apportionments as originally made by the Special Commissioners should be restored.

27. It was not contended on behalf of the Crown that, even if the children were not likely to consent to anything more, they had consented or were likely to consent to forgo any claim that Mr. Brady should be charged interest on his loan from Luke Brady, Ltd., and that this brought the case within Section 15 of the Finance Act, 1939, and justified some small apportionments appropriate to the benefit obtained by the avoidance of interest. It was agreed that no useful purpose would be served by apportioning to Mr. Brady any part of the income due to Mrs. Brady.

28. It was contended on behalf of the Holding Company :—

(1) That the declaration of trust of 22nd March, 1934, was always intended to bind Mr. Brady to the beneficiaries in the relationship of a trustee to them ;

(1) Not included in the present print.

that it was not a sham, and that the relationship of trustee and beneficiaries was recognised during the material years, and has continued to be recognised since.

(2) That Mr. Brady was not in such a relationship with the beneficiaries that he was in a position to ignore the terms of the trust, and to deal with the dividends from the Holding Company for his own benefit.

(3) That Mr. Brady was not, nor likely to be, able to secure that the income or assets of the Holding Company would be applied directly or indirectly for his benefit.

(4) That the requirements of Section 15(3) of the Finance Act, 1939, were not satisfied.

(5) That the determination of the Special Commissioners should be affirmed.

29. We, the members of the Board present at the hearing, found the following facts :—

(*a*) That Mr. Brady did not intend to deprive his children permanently of the trust income or any substantial part of it ; but he did intend, so long as his children allowed him to do so, to retain control over the income and to use most of it temporarily to increase the liquid assets of Luke Brady, Ltd., depleted by his own borrowing. He took a lax view of his duty as a trustee and as a director, and, although he knew that he was liable to account, he did not expect that his children would ever call upon him to account strictly.

(*b*) That prior to the deed of release none of the children who were of age had agreed to forgo any of their rights, and the rights of the infant children could not be released. Mr. Brady's assets were sufficient to enable him to make good any claim by the beneficiaries. We therefore held that the declaration of trust was not a sham.

(*c*) That it was likely that the children who were of age would consent to a substantial part of the trust income being lent to Mr. Brady, if he asked for it.

(*d*) That there was not sufficient evidence to satisfy us that any of the children were likely to have consented to assets or income of the Company being given to Mr. Brady, unless he had been in serious financial difficulty. That event has not occurred, and up to the date of the direction appeared to be unlikely to occur. We considered it likely that, in that event, some of the children would have helped their father, but there was too much uncertainty to make it appropriate to apportion any of the income to Mr. Brady.

30. We held that the words " able to secure " in Section 15 of the Finance Act, 1939, mean " able to secure by lawful means ", and that the consent of the beneficiaries was necessary before Mr. Brady could secure that assets or income of the Holding Company could lawfully be applied for his benefit.

31. Having regard to the findings of fact as set out in paragraph 29 and the conclusions of law as set out in paragraph 30, we found that Mr. Brady was not able and was not likely to be able to secure that the income or assets of the Company would be applied directly or indirectly for his benefit.

32. We therefore determined that the determination of the Special Commissioners be affirmed.

33. Thereupon on behalf of the Commissioners of Inland Revenue dissatisfaction was expressed with the determination of the Board and the Board were required to state and sign a Case for the opinion of the High Court of Justice, which Case we have stated and do sign accordingly.

34. The questions for the opinion of the Court are :—

(1) Whether there was any evidence to support our findings of fact as set forth in paragraphs 29 and 31 ;

(2) Whether our conclusions of law as set forth in paragraph 30 were correct.

F. E. BRAY, Chairman.
H. WYNN PARRY.
W. E. BLACKBURN.
C. E. BARTHOLOMEW.
WILLIAM MCLINTOCK.
WILLIAM MACKINNON.

17th September, 1941.

The case came before Wrottesley, J., in the King's Bench Division on 27th and 28th October, 1942, when judgment was reserved. On 3rd November, 1942, judgment was given in favour of the Crown, with costs.

The Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. J. Millard Tucker, K.C., and Mr. N. E. Mustoe for the Company.

JUDGMENT

Wrottesley, J.—The facts relevant to the two questions which have to be answered in this case are shortly these. Mr. Brady was the owner of a flourishing public house business, but had also saved up and invested a large sum of money, well over £100,000. In 1934 he decided to transfer the public house business to a limited company, Luke Brady, Ltd. On 17th March this company was incorporated, and Mr. Brady became governing director until resignation or death, and took all the powers vested in directors generally. Of the 50,000 £1 shares he was entitled to all but 2, and this was the consideration for the transfer of the business. The company did not, however, acquire the debts due to the business, nor did they become liable to satisfy the debts of the business.

Before the shares were in fact issued to Mr. Brady, he had caused to be incorporated another company, L.B. (Holdings), Ltd., which I shall refer to as the " Holding Company ". The share capital of this Company was 1,000 £1 shares. Here, too, Mr. Brady was governing director for life, and the governing control of this Company too was vested in him absolutely. 500 shares were issued—499 to Mr. Brady and one to his wife as his nominee. The shares which Luke Brady, Ltd. had agreed to issue to Mr. Brady, in exchange for the public house business, were issued from the beginning not to Mr. Brady, but to the Holding Company. The position, therefore, was that the Holding Company, by owning all the share capital in Luke Brady, Ltd., owned and controlled the public house business. Mr. Brady, as owner of the 500 shares issued by the Holding Company, in this indirect way still owned and controlled the public house business.

On the same day as Mr. Brady sold his public house business to Luke Brady, Ltd., and also sold the shares in Luke Brady, Ltd. to the Holding Company, he executed a declaration of trust in regard to such of his investments as he should from time to time specify in the schedule. By its terms Mr. Brady became trustee of all such investments and of the annual income upon trust to pay the yearly income up to £2,000 to Mrs. Brady, and to apply the balance between his five children and their survivors in equal shares

(Wrottesley, J.)

during their respective lives. There were other further trusts. Here again Mr. Brady was alone in control; he was sole trustee.

The trust fund at first had only one investment of comparatively small value, but four days later about £100,000 worth of investments were added to it, and in addition Mr. Brady's 500 shares in the Holding Company.

Mr. Brady was now trustee through the medium of (*a*) the Holding Company and (*b*) Luke Brady, Ltd. of the public house business, and of all the investments for his wife and children; but soon afterwards, on 2nd May, 1935, Mr. Brady sold all the investments, other than the 500 shares in the Holding Company, to the Holding Company at their market value, £101,000, payable within six months with interest at 3 per cent.; and in October, 1935, he transferred another £4,000 worth of investments, his private property, to the Holding Company. The Holding Company thereupon issued and allotted to Mr. Brady a further 105 shares in the Holding Company, and paid Mr. Brady personally £4,315 4*s*. 0*d*. out of the trust funds. The odd £315 was in respect of some other shares which Mr. Brady had bought for the trust and sold to the Holding Company.

By these manipulations it was brought about that the trust had only one capital asset, namely, 605 shares in the Holding Company. Accordingly the only annual income which the trust could receive was dividend from the Holding Company. According to the declaration of trust this income, after Mrs. Brady had received her £2,000, should have been divided amongst the five children, but at no time was any such provision made, nor indeed was any account kept or endeavoured to be kept to show what was due to the five children. Indeed the whole of this trust income was paid by cheque to Luke Brady, Ltd., the company which owned the public house business. That company kept books in which was included an account called " Mr. Brady's " Personal Account ". These payments of trust income appear in that account, as did various payments due to Mr. Brady, for instance, as director of the company.

Mr. Brady drew money he wanted, whether for himself or for the beneficiaries of the trust, from the moneys of this company, but it is impossible to ascertain from the books of the company how much of the trust income remained in the hands of Luke Brady, Ltd.

Mr. Brady's debts in respect of the business turned out to be substantially greater than the debts due to the business. Mr. Brady paid these debts out of moneys in Luke Brady, Ltd. Up to some date in 1939 the liquid assets of Luke Brady, Ltd. were depleted by Mr. Brady for this purpose to a greater extent than they were enriched by the receipt of trust income. " Mr. Brady in " effect misled his elder children into the belief that by ' lending the surplus " ' trust income to Luke Brady, Ltd.' he was increasing the value of that " company's business by enabling it to undertake capital expenditure which " it could not otherwise have undertaken, whereas the fact is that, if Mr. " Brady had paid his debt to the company, the surplus trust income would not " have been needed." (Those words are quoted from the Case.)

The following dividends were declared by Luke Brady, Ltd. in the years 1937-38 and 1938-39, and formed the larger part of the income of the Holding Company: For the year ended 6th January, 1938—£12,000 gross; For the year ended 6th January, 1939—£14,000 gross. The dividends paid by the Holding Company (tax free) were as follows: For the year ended 30th April, 1938—£10,587; For the year ended 30th April, 1939—£11,697

The Holding Company went into liquidation on 22nd July, 1939, and the liquidator distributed the assets in specie to Mr. Brady as the shareholder

(Wrottesley, J.)

entitled thereto, which assets Mr. Brady was then holding as trustee. The reason for the liquidation was the clause in the Finance Bill, 1939, which subsequently became Section 15 of the Finance Act, 1939.

In July, 1940, two more trustees were appointed, and for the first time a separate bank account was opened for the trust, and investments were registered in their names. The three children who were of age executed a deed of release, releasing Mr. Brady from all liability for acts or omissions done in respect of the trusteeship.

At the hearing before the Board of Referees it was contended on behalf of the Crown (*inter alia*) (1) that the declaration of trust was a mere sham; (2) that Mr. Brady was or was likely to be able to secure that the income or assets of the Holding Company or of Luke Brady, Ltd. would be applied, either directly or indirectly, for his benefit, having regard to the controlling powers given to him in the Holding Company and in Luke Brady, Ltd., and his position of governing director of both. Mr. Brady was therefore a person who came within Section 15, Sub-section (2), of the Finance Act, 1939, and the Special Commissioners (or on appeal the Board of Referees) might therefore apportion to him such part of the income as appeared to them to be appropriate.

The Holding Company, on the other hand, contended that the declaration of trust was not a sham, and that Mr. Brady never was able or likely to be able to secure that the income or assets of the Holding Company would be applied, directly or indirectly, for his benefit.

The relevant part of Section 15 (2) is as follows: " In apportioning for " the purposes of the said section twenty-one the income of an investment " company "—that is to say, Section 21 of the Finance Act, 1922—" . . . (*b*) " to any person who is a member of the company but has no relevant interests " in the company, and in their opinion is, or is likely to be, able to secure " that income or assets, whether present or future, of the company will be " applied either directly or indirectly for his benefit; or (*c*) to any person who " is a member of the company and in their opinion is, or is likely to be, able " to secure that income or assets, whether present or future, of the company " will be applied either directly or indirectly for his benefit to a greater extent " than is represented in the value for apportionment purposes of his relevant " interests in the company, considered in relation to the value for those pur- " poses of the relevant interests of other persons therein; the Special Com- " missioners may apportion to him such part of the income of the company as " appears to them to be appropriate and may adjust the apportionment of the " remainder of the company's income as they may consider necessary." Sub-section (3) of the same Section contains these definitions: " For the " purposes of this section, a person shall be deemed to be able to secure that " income or assets will be applied to his benefit if he is in fact able so to do " by any means whatsoever, whether he has any rights at law or in equity " in that behalf or not ". For the moment I will pause there.

The Board found the following facts.

" (*a*) That Mr. Brady did not intend to deprive his children permanently " of the trust income or any substantial part of it; but he did intend, so long " as his children allowed him to do so, to retain control over the income " and to use most of it temporarily to increase the liquid assets of Luke Brady, " Ltd., depleted by his own borrowing. He took a lax view of his duty " as a trustee and as a director, and, although he knew that he was liable to " account, he did not expect that his children would ever call upon him to " account strictly.

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" (*b*) That prior to the deed of release none of the children who were of " age had agreed to forgo any of their rights, and the rights of the infant " children could not be released. Mr. Brady's assets were sufficient to enable " him to make good any claim by the beneficiaries. We therefore held that " the declaration of trust was not a sham.

" (*c*) That it was likely that the children who were of age would consent " to a substantial part of the trust income being lent to Mr. Brady, if he " asked for it.

" (*d*) That there was not sufficient evidence to satisfy us that any of the " children were likely to have consented to assets or income of the company " being given to Mr. Brady, unless he had been in serious financial difficulty. " That event had not occurred, and up to the date of the direction appeared to " be unlikely to occur. We considered it likely that, in that event, some " of the children would have helped their father, but there was too much " uncertainty to make it appropriate to apportion any of the income to " Mr. Brady."

They also held that the words " able to secure " in Section 15 of the Finance Act, 1939, mean " able to secure by lawful means ", and that the consent of the beneficiaries was necessary before Mr. Brady could secure that assets or income of the Holding Company could lawfully be applied for his benefit. And on the above findings and conclusions found that Mr. Brady was not amenable to the provisions of Section 15.

They asked two questions, first, whether there was any evidence to support their findings of fact. As regards the pure findings of fact there was clearly evidence upon which they could come to the conclusions to which they came. But as regards the second question, the conclusion of law, I think they came to a wrong conclusion.

The question asked by the Board in this connection is whether they were right in holding that the words " able to secure " in Section 15 of the Finance Act, 1939, meant " able to secure by lawful means ", and that the consent of the beneficiaries was necessary before Mr. Brady could be said to have secured that assets or income of the Holding Company could lawfully be applied for his benefit.

In the circumstances of this case we are not concerned with breaches of the criminal law. When the Board speak of lawful means, they mean acts which were not breaches of trust, not acts in respect of which the beneficiaries of the trust could, by taking the proper proceedings, have caused Mr. Brady to make restitution. And it is clear from the Case Stated that the Board of Referees thought that, if and in so far as Mr. Brady's ability to secure that the income of the Holding Company would have been applied for his benefit involved a breach of trust, he was not within the meaning of Section 15 of the Finance Act, 1939, and so was not a person against whom they could apportion any part of the income of the Holding Company.

If this were the true meaning of the phrase " able to secure " which occurs throughout Section 15, the result would in this sense be remarkable. Whereas the Special Commissioners (and on appeal the Board) are empowered to apportion income (and so liability to tax) to a person who is content to rely on legal rights in order to control the property which he has apparently transferred to an investment company, yet they are helpless to make this apportionment if the person in question uses bolder methods, and relies on his relationship to the apparent owners to obtain their consent later.

On the other hand, in a careful analysis of the whole Section, Mr. Tucker was at pains to point out the apparent absurdities that would flow from an

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interpretation of the words " able to secure " if it were to include ability to secure by criminal or tortious or other unlawful means. Such an interpretation would, he said, mean that the category of persons against whom apportionment was possible would include the whole world, or at any rate all the persons who might be tempted to make criminal efforts to possess themselves of the assets or income of the company. This was, he pointed out, more unreasonable inasmuch as a reasonable meaning and context had to be found for the phrase—and so for the class of persons referred to later in the Section—persons who were not able, but were " likely to be able to secure " that the assets or income of the Company would be applied . . . . for their " benefit ". This class must, he said, be a class perhaps including but anyhow larger than the class of persons who were actually able to secure such an end. Yet Sub-section (3) of the Section drastically limits this larger class. I will read it; I have read the first part of Sub-section (3), and I will go on from where I left off: " and the Special Commissioners may draw the " inference that a person is likely to be able to secure that assets or income " of a company will be applied for his benefit, or, as the case may be, will be " so applied to a greater extent than is represented in the value for appor- " tionment purposes of any relevant interests which he has in the company, " if and only if they are satisfied (*a*) that he has, directly or indirectly, trans- " ferred assets to the company the value of which is not represented, or is " not adequately represented, in the value for apportionment purposes of any " relevant interests which he has in the company; and (*b*) that the persons " who, whether as directors or shareholders or in any other capacity, have, " or will at any material time have, powers or rights affecting the disposal or " application of the income or assets of the company are likely to act in " accordance with his wishes or that he is able to secure that persons who at " the material times will have such powers or rights will be persons likely to " act in accordance with his wishes." So the persons must be the persons who have transferred to the company the assets in question, and they must be persons who can influence and so control the apparent owners, or controllers, that is, the directors and shareholders.

Now, it may be that the definition of persons " likely to be able to " secure ", etc., in Sub-section (3) is one to which resort can be made in order to control and limit the meaning of the phrase " able to secure " used in the same Section. Upon this I express no opinion. But so far as this case is concerned I find that even if I were to regard the phrase " able to secure " as so controlled, I still find that the definition in Sub-section (3) of persons likely to be able to control, so far from excluding a case of the kind which I have to consider, rather appears to include it. The considerations which must be present before a person can be regarded as " likely to be able to secure " that income or assets will be applied to his benefit " are (*a*) that they should have been transferred to the company by the person in question—that applies in this case; (*b*) that the persons who as directors, shareholders or in any other capacity (for instance as *cestui que trust* of the trustee shareholder) have the disposing power over the assets or income are likely to act in accordance with the wishes in question. That applies in the most pointed way in this case. The children were clearly persons likely to act in accordance with their father's wishes, and have actually done so, releasing him from his various breaches of trust, so far as they could.

But there are stronger and more direct reasons impelling me to think that the Board's view cannot be sustained; they are to be found in the language of this same Sub-section, where it defines as or at any rate adds to the class of persons who are " able to secure " within the meaning of the Section the

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following: any person who " is in fact able so to do by any means whatsoever, " whether he has any rights at law or in equity in that behalf or not ". That is not the language which Parliament would have used had it intended to boggle at a person who gained his ends by a breach of trust. Indeed it seems to me to be the very language it would have used in order to make it clear that what was to be looked at was the fact, and not the particular method employed in bringing it about.

To this question, therefore, my answer is that the words " able to secure " used throughout Section 15 of the Finance Act, 1939, are not to be interpreted as meaning by lawful means, if by that the Board means, as it obviously does, without committing a breach of trust.

Nor do the words mean " able to secure permanently, and so that the " person securing the benefit can retain it, and not be compelled by appro- " priate proceedings to disgorge it." That was one way in which Mr. Tucker presented his argument. The rather absurd result which would flow from any such restricted meaning as that was well illustrated by Mr. Stamp in his reply. It is not difficult, as he pointed out, to conceive of a trust, the nature of which is such that there never will be a person in existence who can come to Court to enforce it, unless the trustee has died. Moreover, a person who is able to secure that income or assets of a company can be applied even temporarily for his benefit is clearly a person who has an interest in them and can derive a profit or advantage from them.

Other matters were debated in the course of the argument. Mr. Tucker was at pains to point to two matters which might if the Board accepted them lead them to apportion nothing or a comparatively small amount to Mr. Brady. One was that in no circumstances could Mr. Brady, nor did he in fact, appropriate to his own personal benefit the income of the Holding Company. It went, he pointed out, into the liquid assets of one of the chief properties owned by the Company, the public house business.

Then, as to the finding of the Commissioners in paragraph 17 and the finding in paragraph 29 (*a*) that the assets of the public house business were depleted by Mr. Brady's borrowing to pay his own debts, and that, had they not been, there would have been no need to pay to that company the trust income, Mr. Tucker submitted that, even if this was what happened, it did not amount to an application of the income of the Holding Company to his own benefit.

Another point taken by Mr. Tucker was that the income which Mr. Brady paid into his personal account in Luke Brady, Ltd. was not the income of the Holding Company, but the dividends it declared, and so the income of the trust.

For my part I find it difficult, having regard to Mr. Brady's triple role as sole trustee, and governing and really sole director of both companies, to say in what role exactly he was acting at any particular moment. And the evidence in more places than one appears to suggest that he himself neither knew nor cared, but left such troublesome questions to be resolved by the accountant, when that gentleman some time later came to make out the accounts. But all these matters are essentially for the Board, with the special qualifications that they have for disentangling the facts and putting the proper complexion upon them. They will have to bear in mind that, as Mr. Stamp points out, this Section deals with indirect as well as direct application of income and assets to Mr. Brady's benefit.

There was, however, one point of law taken of necessity here for the first time, and which, if sound, strikes at the root of the whole proceedings. Section 15, Sub-section (2) (*b*), was, as it happens, the Section through which

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the Attorney-General claimed more particularly that the Board ought to act in this case. That Section provides that " In apportioning for the purposes of " Section 21 of the Finance Act, 1922 " the income of an investment company... " (*b*) to any person who is a member of the company but has no relevant " interests in the company, and in their opinion is, or is likely to be, able " to secure that income or assets, whether present or future, of the company " will be applied either directly or indirectly for his benefit ". Relevant interests is defined in Sub-section (6) as follows: " the expression ' relevant " ' interests ' means, in relation to a person connected in any way with a " company, interests by reference to which income of the company could be " apportioned to him for the purposes of section twenty-one of the Finance " Act, 1922, apart from the provisions of this section ".

It has now been decided in the cases of *Penang and General Investment Trust, Ltd.* v. *Commissioners of Inland Revenue* and *Roomwood Investments, Ltd.* v. *Commissioners of Inland Revenue,* 25 T.C. 219, that, even though he was a trustee, the income of the Company could be apportioned to him, the whole of it. He, therefore, it is said, was not a person with no relevant interest. Similarly as regards Sub-section (2) (*c*) of Section 15, which is as follows: " to any person who is a member of the company and in their opinion " is, or is likely to be, able to secure that income or assets, whether present or " future, of the company will be applied either directly or indirectly for his " benefit to a greater extent than is represented in the value for apportionment " purposes of his relevant interests in the company ", it is said he had all the shares, and the value for apportionment was the full value. So that he could not be said to be a person able to secure that the income would be applied to his benefit to a greater extent than is represented by the value for apportionment purposes of his relevant interest.

The point is highly technical, and the answer given by Mr. Stamp, though also technical, is sufficient. Having regard to the meaning of the word interest, which means interest in the capital or profits or income of the Company—Mr. Brady, the trustee, and the beneficiaries are all members of the Company; and the Special Commissioners and the Board, therefore, when they come to apportion income in accordance with the interests of the members, have before them both trustee and beneficiaries, and if they find one of them is within the words of Section 15, Sub-section (2) (*b*) or (*c*), it is their duty to weigh that interest, and to apportion to it what they think is the appropriate part of the income.

This objection to the jurisdiction of the Special Commissioners and of the Board therefore fails. As a result this case will have to go back to the Board, will it not?

Mr. Stamp.—Yes, my Lord, it must be sent back to the Board of Referees.

Wrottesley, J.—It was the appeal of the Crown?

Mr. Stamp.—Yes, my Lord.

Wrottesley, J.—The appeal succeeds, and the case is remitted to the Board of Referees with those directions contained in my judgment.

Mr. Stamp.—If your Lordship pleases.

Wrottesley, J.—What about costs?

The Attorney-General.—Yes, I ask for costs.

Wrottesley, J.—The appeal succeeds with costs.

An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Scott, Luxmoore and du Parcq, L.JJ.) on 30th November and 1st, 2nd and 3rd December, 1943, when judgment was reserved. On 1st February, 1944, judgment was given substantially against the Crown (Luxmoore, L.J., dissenting) on the first point, and in favour of the Crown on the second.

Mr. J. Millard Tucker, K.C., and Mr. N. E. Mustoe appeared as Counsel for the Company, and the Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Scott, L.J.—In this case du Parcq, L.J., will deliver the judgment of himself and myself, but I will ask Luxmoore, L.J., to deliver his judgment first.

Luxmoore, L.J.—On 1st December, 1939, the Special Commissioners made apportionments of the actual income from all sources of L. B. (Holdings), Ltd., hereinafter called " the Holding Company ". The apportionments were made for the year of assessment 1938–39 and for the part of the year of assessment 1939–40 between 6th April, 1939, and 22nd July, 1939, the last-mentioned date being the day on which the Holding Company was put into voluntary liquidation. These apportionments were made in pursuance of Section 15 of the Finance Act, 1939, consequent upon directions made pursuant to Section 21 of the Finance Act, 1922, Section 14 (2) of the Finance Act, 1937, and Section 14 of the Finance Act, 1939. Notice of appeal was given by the Holding Company against the directions, but such notice was withdrawn on 17th June, 1940.

Consequent upon the directions the actual income of the Holding Company was computed for the year of assessment 1938–39 to be £18,585, and for the period from 6th April to 22nd July, 1939, to be £5,569. The whole of both these sums were apportioned to one Luke Brady (hereinafter called " Mr. Brady "). The Holding Company appealed against these apportionments, and the Special Commissioners allowed both appeals and the apportionments were discharged. The Commissioners of Inland Revenue required the appeals to be reheard by the Board of Referees (hereinafter referred to as " the Board "). The Board affirmed the determination of the Special Commissioners, and a Case for the opinion of the High Court was stated at the request of the Commissioners of Inland Revenue.

The Board found certain facts which are set out in paragraph 29 of the Case Stated, and came to a conclusion with regard to the construction to be placed upon Section 15 of the Finance Act, 1939. This conclusion is set out in paragraph 30 of the Case Stated. The Board further found, as stated in paragraph 31 of the Case, that having regard to the findings of fact as set out in paragraph 29 and the conclusion of law as set out in paragraph 30, Mr. Brady was not able, and was not likely to be able, to secure that the income or assets of the Holding Company would be applied directly or indirectly for his benefit. The questions raised by the Case for the opinion of the Court are:—(1) Whether there was any evidence to support the findings of fact as set out in paragraphs 29 and 31 thereof, and (2) Whether the conclusion of law as set forth in paragraph 30 was correct.

The case was heard by Wrottesley, J., who decided that there was evidence to support the findings of fact set out in paragraph 29 of the Case,

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but that the conclusion of law set out in paragraph 30 was erroneous and that consequently the determination of the Board affirming the decision of the Special Commissioners was erroneous, and he allowed the appeal and remitted the case to the Board to do what was consistent with his decision. The Holding Company has appealed to this Court with regard to the conclusion of law.

The first question to be decided is what is the true construction of Section 15 of the Finance Act, 1939. The Section so far as material is in the following terms: " (2) In apportioning for the purposes of " Section 21 of the Finance Act, 1922, " the income of an investment company—(*c*) to any " person who is a member of the company and in their " (that is, the Special Commissioners') " opinion is, or is likely to be, able to secure that income " or assets, whether present or future, of the company will be applied either " directly or indirectly for his benefit to a greater extent than is represented " in the value for apportionment purposes of his relevant interests in the " company, considered in relation to the value for those purposes of the " relevant interests of other persons therein; the Special Commissioners may " apportion to him such part of the income of the company as appears to them " to be appropriate and may adjust the apportionment of the remainder of " the company's income as they may consider necessary."

Obviously the power conferred on the Special Commissioners to make an apportionment under the provisions set out is only exercisable if the Special Commissioners are of opinion that the person against whom an apportionment is to be made " is, or is likely to be, able to secure that income or assets, " whether present or future " will be applied in the manner defined. It is said that the words " is, or is likely to be, able to secure " are limited and must be construed as referring to ability to secure by lawful means, and consequently cannot apply to a case where the benefit can only be obtained in breach of trust. There would appear to be much force in this contention if the Section had not contained any definition of the phrase " is, or is likely " to be, able to secure ". The Section, however, contains such a definition in Sub-section (3), which so far as is material provides: " For the purposes " of this section, a person shall be deemed to be able to secure that income " or assets will be applied for his benefit if he is in fact able so to do by any " means whatsoever, whether he has any rights at law or in equity in that " behalf or not ". Pausing here, it seems to me that the crucial words are " by any means whatsoever, whether he has any rights at law or in equity " or not ". The express reference to rights at law or in equity in my opinion covers all lawful means, for I am unable to call to mind any *right* which can exist except at law or in equity. The words " by any means whatsoever " are necessarily of much wider import and include means which are neither legal nor equitable, and this is emphasised by the use of the words " or not ". But the definition clause does not end here, for it proceeds to define the phrases " able to secure " and " likely to be able to secure ". The latter phrase, apart from any definition, is of wider import than the former. " Able " to secure " must, I think, depend on the existence of particular facts, while " likely to be able to secure " must of necessity depend on the weighing of probabilities and even possibilities. The definition of the latter phrase depends on the drawing of inferences which do not require to be considered in construing the phrase " able to secure ". This is made clear by the subsequent part of Sub-section (3), which is as follows:—" the Special " Commissioners may draw the inference that a person is likely to be able " to secure that assets or income " will be applied for the benefit of a person in the manner stated " if and only if " (and these are limitations on the

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meaning of the phrase) " they are satisfied—(*a*) " that the person in question has " transferred assets to the company " as there stated, and " (*b*) that the " persons who, whether as directors or shareholders or in any other capacity, " have, or will at any material time have, powers or rights affecting the dis- " posal or application of the income or assets of the company are "—and these are the important words—" likely to act in accordance with his wishes or that " he is able to secure that persons who at the material times will have such " powers or rights will be persons likely to act in accordance with his wishes." These words in their ordinary significance are not applicable if the person whose wishes are referred to has any legal or equitable right. In any such case his wishes do not come into the picture, for he can direct the other persons to act in accordance with his legal or equitable rights and is independent of their wishes. I am, therefore, of opinion that the learned Judge was right in holding that the conclusion of law arrived at by the Board that the words " able to secure " are confined to and must be construed as meaning " by lawful means only " is erroneous. It is to be observed that the Board does not attempt to differentiate between the phrases " able to secure " and " likely to be able to secure ". In my judgment the latter phrase has, in the manner I have endeavoured to explain, a wider import than the former.

The learned Judge said that " In the circumstances of this case we are not " concerned with breaches of the criminal law. When the Board speak of " lawful means, they mean acts which were not breaches of trust, not " acts in respect of which the beneficiaries of the trust could, by taking " the proper proceedings, have caused Mr. Brady to make restitution."(1) The Attorney-General, on behalf of the Crown, in his argument clearly stated—as I gather he did also in the Court below—that it was not and never had been the contention of the Crown that the possibility that a criminal action might be committed was sufficient to bring any particular case within the Section. In my judgment the Section only applies and must be limited to cases in which the unlawful act is likely to be condoned by the beneficiaries, for plainly, on the true construction of the Section, it is not every trustee who acts in breach of his trust and uses trust money for his own purposes that can be said either to be able to secure, or is likely to be able to secure, that trust money may be applied for his own benefit. It must be borne in mind that a trustee who so uses trust money cannot be assailed if he obtain the *ex post facto* assent of his beneficiaries, or an *ex post facto* release from them in respect of his liability. This point of view seems to be in accord with the judgment of the learned Judge. It was argued both in the Court below and in this Court that the words " able to secure " must be construed as meaning " able to secure permanently ", and it may well be that this is right in the case of the phrase " able to secure ", but it cannot, in my view, apply to the wider phrase " likely to be able to secure ", for the word " likely " seems to me to negative any idea of certainty. It might well happen that on the evidence the probability might be established, but later events might upset the probability, as in other spheres of activity what I believe is described as a dead certainty does not always fulfil expectations. This, I think, is what the learned Judge meant when he said: " Nor do the " words mean ' able to secure permanently, and so that the person securing " ' the benefit can retain it, and not be compelled by appropriate proceedings " ' to disgorge it.' "(2)

On the facts of the present case it seems to me that Mr. Brady in his capacity as trustee might well be likely to be able to secure an *ex post facto* assent or release from his beneficiaries, although no one can say that he will

(1) *See* page 12 *ante*. (2) *See* page 14 *ante*.

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certainly do so. It is difficult to understand why the various arrangements made were so made unless it was with some such prospect in view. Let the facts speak for themselves. They are as follows. Mr. Brady was a rich man, his main interests being in the public house business. On 17th March, 1934, he caused to be incorporated the Holding Company to carry on the business of an investment trust company, within the meaning of Section 20 (1) of the Finance Act, 1936. Its issued share capital was originally £500 divided into 500 shares of £1 each, 499 of these shares were issued to him and the remaining one share was issued to his wife as his nominee. So far he had the whole beneficial interest in the Holding Company. A further 105 shares of £1 each were issued to Mr. Brady on 21st October, 1935. Mr. Brady and Mrs. Brady were at all material times the sole directors of the Holding Company, Mr. Brady being the governing director and as such invested with the widest possible control and powers.

On the same date Mr. Brady caused to be incorporated another company under the name of Luke Brady, Ltd., with a capital of £50,000 divided into 50,000 shares of £1 each. Again Mr. and Mrs. Brady were the first directors, and again Mr. Brady was the governing director, with control and powers of the same nature as that which he had in the case of the Holding Company.

Five days later Mr. Brady agreed to sell his public house businesses, other than the book debts then owing to him, to Luke Brady, Ltd., for a total consideration of £49,998, which was satisfied by the allotment to him of 49,998 shares credited as fully paid up. The debts owing by Mr. Brady in respect of the public house business remained his personal liability. Shortly afterwards Mr. Brady sold the 49,998 shares in Luke Brady, Ltd., the consideration being the 500 shares in the Holding Company already allotted to him and his wife. On the same day as that on which the businesses were sold to Luke Brady, Ltd., Mr. Brady executed a declaration of trust in favour of his wife and children. Subsequently 605 shares of the Holding Company (the whole of its issued capital) were, with other investments, included in the declaration of trust. From the beginning the whole of the trust income was paid into the account of Luke Brady, Ltd., and was in the books of that company credited to an account entitled " Mr. Brady's Personal Account ". No trust accounts were ever kept, although some payments were made by Mr. Brady to the beneficiaries or for their benefit. This state of affairs continued until the Holding Company went into liquidation on 22nd July, 1939. The liquidator distributed the assets in specie, transferring them to Mr. Brady. The reason of the liquidation was the legislation then contemplated which was subsequently embodied in Section 15 of the Finance Act, 1939, the Section under consideration in this litigation.

On 31st July, 1940, Mr. Brady appointed two additional trustees of the declaration of trust to act jointly with himself, and for the first time the trust was put on a proper basis and proper trust accounts were opened. Three of the children beneficiaries were then of full age, but two were still infants. A release was prepared to which all of the five children beneficiaries (including the two children under age) are expressed to be parties. This document purports to release Mr. Brady from liability for all income received by him and not paid or applied to or for the benefit of the children beneficiaries, which plainly is a not inconsiderable amount. Strictly speaking, the present trustees of the settlement ought on behalf of the infant beneficiaries to take proper steps to protect their interests and to have the breaches of trust committed by Mr. Brady made good at once. Obviously there is no such intention and the breaches of trust are to be allowed to stand unremedied,

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at any rate until the infant beneficiaries respectively attain their majority. Why is this? Surely the answer must be because the infant beneficiaries are likely to act in accordance with Mr. Brady's wishes and to execute the release in due course. In that event Mr. Brady will have secured the benefit of the trust income retained by him in the past.

Having regard to the manner in which the affairs of the trust were dealt with, it seems material to consider why were the several transactions entered into, and was it in order to avoid to any extent Mr. Brady's liability to Sur-tax. Mr. Brady would clearly have avoided such liability if he contemplated using either the whole or part of the income derived under the declaration of trust in reliance upon the likelihood of his children ultimately releasing him from all liability, and they in fact executed such a release.

In my judgment the Board are bound to consider this aspect of the case in arriving at a conclusion on the question whether Mr. Brady is a person likely to be able to secure the application of income or assets for his benefit in the manner described in the material Section. The Board does not appear to have done so.

It is said Mr. Brady does not fall within the Section because, although he is a member of the Holding Company, the income or assets of the Company cannot be applied for his benefit to a greater extent than is represented in the value for apportionment purposes of his relevant interests in the Company (see Sub-section (2) (*c*) of Section 15), because he is the legal owner of all the shares in the Holding Company, and therefore the value for apportionment is the full value, and consequently he is not a person able or likely to be able to secure that the income or assets would be applied for his benefit to a greater extent than is represented by the value for apportionment purposes of his relevant interest.

Interest in this connection means interest in the capital or profits or income of the Company, and consequently Mr. Brady as the trustee of and the beneficiaries under the settlement are, for the purposes of the Acts, in the position of and deemed to be members of the Company (see Section 21, Sub-section (7), of the Finance Act, 1922); and so when the Special Commissioners come to apportion income in accordance with the interests of members, having both Mr. Brady and the beneficiaries before them and finding (if they do so) that Mr. Brady is within Sub-section (2) (*c*) of Section 15 of the Finance Act, 1939, after weighing his interest, they can apportion to it the appropriate part of the income.

For these reasons I am of opinion that the judgment of Wrottesley, J., is correct, and that he was right in ordering that the case should be remitted to the Board for reconsideration in the light of the construction laid down in his judgment. In my opinion this must necessarily involve further findings of fact.

An important question arises with regard to the form of the Order drawn up to give effect to the judgment of Wrottesley, J. The material part provides as follows: " It is ordered that the case be remitted to the said " Board of Referees for them to do what is consistent with the judgment " of this Court." An Order in this form leaves it to the reader to discover for himself what are the directions given by the Court, and may result in a misinterpretation of those directions. The proper function of an Order is to state clearly and without ambiguity what the Court has ordered to be done. In the present case the Court has interpreted the material Section of the Act (Section 15 of the Finance Act, 1939), and the Order should embody that interpretation in an appropriate declaration or series of declarations. In framing the declaration or declarations, it must be borne in mind that the

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Court has not attempted to formulate an exhaustive list covering all cases which may fall within the Section. In the first place the Judge has held that the Section is not limited to lawful means, and has proceeded to hold that a breach of trust may fall within the purview of the Section if the case falls within the definition of either of the phrases " able to secure " or " likely to " be able to secure ", and the other conditions required by the Section are fulfilled. I think the proper Order to be made on the appeal is to vary the Order of Wrottesley, J., by inserting in it the appropriate declaration or declarations, followed by an Order directing the reconsideration of the case by the Board in accordance with those declarations. This only goes to form and does not affect the judgment of the learned Judge. In my opinion, subject only to this question of form, I would dismiss the appeal with the usual consequences. I gather my brethren take a different view and think that the appeal should be allowed. My criticism of the form of Order applies in either event. I respectfully suggest that Counsel should be requested to bring in Minutes of the Order required to give effect to their conclusion, so that the Court may have the opportunity of approving the form of the Order to be drawn up.

Scott, L.J.—du Parcq, L.J., will read his and my judgment.

du Parcq, L.J.—The principal question in this case was whether Mr. Brady, at the material time, was able, or likely to be able, to secure that income or assets whether present or future of L.B. (Holdings), Ltd. would be applied either directly or indirectly for his benefit. Both the Special Commissioners and the Board of Referees have answered the question in the negative. It is conceded that there was evidence to support the findings of fact of the Board of Referees. It is contended, however, that they came to wrong conclusions of law, and Wrottesley, J., has upheld this contention. An important question arises as to the construction of Section 15 of the Finance Act, 1939.

That Section was enacted, as appears from the words of Sub-section (1), in order to extend the provisions of Section 21 of the Finance Act, 1922, which itself was introduced into the code " with a view to preventing the avoidance " of the payment of super-tax through the withholding from distribution of " income of a company which would otherwise be distributed ". Stated broadly, the object of the extension was to enable an appropriate apportionment to be made to persons who, though not members of the company " for " the purposes of section twenty-one of the Finance Act, 1922, and the enact- " ments relating thereto ", were in a position to enjoy the benefit of some part of its income or assets, and to persons who, being members of the company, could enjoy such a benefit to a greater extent than their apparent interest in the company would warrant. It is, we think, plain that Parliament meant to tax not only those who would, or were likely to, enjoy such benefits, but those who had secured the power to enjoy them. It seems equally plain that the object of the Legislature was to enable the Commissioners of Inland Revenue to make an earlier intervention than was permitted by existing legislation in cases where the machinery of company law was being used for the avoidance of Sur-tax, the method adopted by the Legislature being to tax those who had secured the power to avoid Sur-tax even though they had not used it, and even if it were not proved that they intended to use it. The purpose of the enactment is, from one aspect, remedial, from another, penal: remedial in the sense that it seeks to cure the evil of tax evasion and to remedy a defect in earlier legislation which had become apparent, thus relieving from an excessive burden the more scrupulous or less ingenious taxpayer; penal in the sense that it exposes those who are

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regarded as seeking to avoid the payment of tax to the penalty of paying tax, which is nominally a tax on income, when in fact they have never received the income. It is not surprising, therefore, that it should be argued on the one hand that the Section should be construed in a wide sense so that no loophole may be left for the evader of tax, on the other, that it should be construed with the strictness appropriate in the case of a penal Act. The various canons of construction which were cited to us do not, we confess, give us much assistance. The only safe rule, we think, is to give the words of the Section, reading it as a whole, their full, and no more than their full, meaning. If they are found to be of doubtful meaning, it is proper to have regard to the probable intention of the Legislature, in so far as any intention can be inferred from the Section itself, and from any other relevant Sections in the code.

The words "able to" must clearly be interpreted with reference to the object which the person concerned is to be able to achieve. Here the object is "to secure that income or assets, whether present or future, of the "company will be applied either directly or indirectly for his benefit". The words "to secure" necessarily import certainty: he must be able to make sure of the application for his benefit of the company's income or assets, though the application may be indirect and may be postponed for a time. It is not enough that he is able to put himself in a position where there is a mere possibility that he may obtain and retain the benefit. The benefit of one person's income or assets is no doubt secured by another when such income or assets are transferred to that other so that he may himself enjoy them without any obligation to return them. That benefit, in our opinion, is also secured when it is reasonably certain that such income or assets, though not transferred, will be used for his advantage, for instance to produce money's worth for him. What of a mere loan of income or assets? In our opinion this question cannot be answered simply. A loan at a commerical rate of interest, repayment of which the lender intends to exact and the borrower knows he must make, does not, in our judgment, represent a transfer of income or assets by the lender to the borrower. The man who borrows from a banker is not securing that income or assets of the bank will be applied for his benefit. Nor can it be said that a banker secures that the income or assets of a customer who has a current account with him will be applied for the benefit of the banker. If, on the other hand, there is no intention of demanding repayment of the loan, or it is made for so long a term and at so low a rate of interest that the borrower is in effect enjoying part of the income of the lender, the borrower may, we think, be considered to be securing the application of that part of the lender's income or assets for his benefit. The question in such cases is one of fact and degree. What is to be "secured" is the application for the benefit of the person concerned of income or assets of the company in the sense that he derives as much advantage from some part of that income or of those assets for a substantial period of time as if that part of the income or assets were his own.

In what circumstances, then, may a man be said to be able, and in what circumstances may he be said to be likely to be able, to secure the object envisaged by the Section? The answer is in part supplied by the Section itself. It is, of course, obvious that he is within the Section if he has a legal or equitable right which will enable him to secure that object. But though he may have no such right, he is to be deemed to be able to secure it "if "he is in fact able so to do by any means whatsoever". These are wide words and the power which they confer on the Special Commissioners is correspondingly wide. On the other hand the inference that a man is

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" likely to be able " to secure the object in question is not to be drawn unless the Special Commissioners are satisfied of the matters set out under (*a*) and (*b*) of Sub-section (3), which we need not here transcribe. In our opinion the Legislature has made its intention reasonably plain in that Sub-section. A man who has transferred considerable assets to a company is likely enough so to arrange matters that he can exercise dominion over the company, whether he is a member of it or not. It is not difficult for him to arrange that all the shareholders, or the shareholders with voting rights which give them control of the company, shall be persons who are subservient to him. An obedient wife, or a complacent friend, or a relative or employee who depends on his bounty, may be trusted to act in accordance with his wishes. If the shares are held in trust, he may himself be the trustee and may be reasonably certain that the beneficiaries, if *sui juris*, will acquiesce in the use of what is rightfully theirs for his own purposes. He may have good reason to know, if some other person is a trustee, that the trustee and the beneficiaries will unite in assisting him to accomplish his purpose. Such cases seem clearly to be covered by the Section.

We can now deal with the precise point which was submitted by the Board of Referees for the consideration of the Court. Was their conclusion of law correct when they held that the words " able to secure " in the Section meant " able to secure by lawful means "?

As we understood the argument of the Attorney-General, he did not suggest that even the wide words " by any means whatsoever " were wide enough to cover a case in which a man could only be said to be able to secure the object aimed at by the commission of a crime. That this concession was rightly made we do not doubt. For reasons which we have already indicated and will presently recapitulate, we are of the further opinion that no one is brought within the Section if he is only able to secure his object in the sense that he might obtain a temporary and precarious hold on income or assets of the company by resorting to unlawful means. We include in the expression " unlawful means " torts, breaches of contract, and breaches of trust, with the reservation, that wherever the acquiescence or condonation of the parties concerned can put the wrongdoer in as good a position as if his conduct had been lawful from the first, the unlawful nature of the means employed will not preclude a finding that he was able to secure the end if there is evidence which satisfies the Commissioners (or Board of Referees) that the acquiescence or condonation of those parties will not be withheld. Unless the tribunal is so satisfied the inference of ability to secure cannot, in our opinion, be drawn.

We may summarise our reasons shortly as follows. 1. Criminal means are plainly excluded because to say that a man was " able to " enjoy the benefit of another's income or assets merely because he could do so by stealing it, or by embezzling it, or by a fraudulent and criminal breach of trust, would be to use the language of the thieves' kitchen, not of honourable men. If Parliament had meant the words " by any means whatsoever " to be the equivalent of " *per fas aut nefas* " this would assuredly have been more clearly expressed. 2. No one can be said to secure the application of money or property for his benefit if he possesses himself of it wrongfully and has no right to retain it, unless his wrongdoing has been condoned, or it is reasonably certain that it will be condoned, by such persons (if any) as may have the power to condone it. 3. The Section itself precludes the Special Commissioners from inferring that a man is " likely to be able to " secure " the end in question if all that is likely is that he will be able to do so wrongfully, and without the acquiescence or condonation of those who have

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a right to complain of his wrongdoing. This we think is plain from Subsection (3) (*b*).

There is clearly a distinction to be drawn between the various kinds of unlawful acts. A crime can be neither licensed nor condoned, though it is true, of course, that some acts are criminal only in the absence of consent by the person or persons affected by them. The King alone can pardon a crime. A breach of contract may be condoned by the other contracting party and so, in some cases, may a tort by the party who is aggrieved. A breach of trust gives to the *cestui que trust* an equitable right, which he is in no way bound to exercise: he may acquiesce in or condone the breach of trust, which then entails no ill-consequences for the peccant trustee. When an unlawful act is in a strict sense venial, and has been pardoned or condoned, it may properly be regarded as a means by which the end in question can be " secured ".

In our judgment the words " by any means whatsoever, whether he has any " rights at law or in equity in that behalf or not " authorise the Commissioners to deem a person to be " able to secure " his ends although he is not armed with any enforceable right to secure them, provided that they are satisfied that he can count on the concurrence or co-operation of all those whose concurrence or co-operation is necessary to his achievement of those ends. It matters not whether those persons will be induced to do so by persuasion, or from motives of benevolence or affection, or of self-seeking, or by reason of some unenforceable promise, for instance of the kind of pact which is sometimes called a " gentleman's agreement ". We cannot, however, construe the words which we have quoted as if they were equivalent to " by any means " whatsoever, whether those means are lawful or unlawful ". We do not regard this as a possible construction, and even if the words were susceptible of it, as we do not think they are, we should hesitate to adopt it if another were possible, since its adoption would involve taxing a man on the ground that he was able to enjoy income which he could only enjoy if he were prepared to take advantage of opportunities to appropriate to himself unlawfully the money of others.

It remains to consider the findings of fact in the present case, which this Court must accept, in the light of the conclusions of law at which we have arrived. We do not propose to recapitulate those findings. It is apparent from them that Mr. Brady was in a position in which he might, as trustee, secure the application for his benefit of dividends of the Company, in the sense in which we understand those words, provided that the consent or acquiescence of the beneficiaries who were of full age, or of some of them, were obtained. It must, however, be borne in mind in this connection, that such consent or acquiescence could avail him nothing unless the beneficiaries, when they were induced to accord it, were fully informed of the circumstances, and that even a formal release is inoperative unless the beneficiaries executing it are so informed. The finding contained in paragraph 17 of the Case raises a doubt, which it is for the Board of Referees to resolve, whether the beneficiaries who executed the deed of release dated 31st July, 1940, were so informed, and whether the misleading representation made to them by Mr. Brady vitiates the deed of release. If these questions be answered in a manner favourable to the adult beneficiaries, it will follow that he remained liable to them in respect of what was undoubtedly a breach of trust, namely, the payment of trust income which consisted of dividends of L. B. (Holdings), Ltd., by way of loan to Luke Brady, Ltd., for Mr. Brady's personal advantage. Thus there is at present no clear finding that any of the beneficiaries effectively concurred or acquiesced in Mr. Brady's borrowing.

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We call it " borrowing " by reason of the finding (in paragraph 29 (*a*)) that Mr. Brady " did not intend to deprive his children permanently of the trust " income or any substantial part of it ".

So far as the interests of the infant beneficiaries were concerned, it is clear that Mr. Brady was not at any material time " able to secure that income " or assets would be applied for his benefit " in the sense in which we interpret these words. Was he at the material times " likely to be able to " secure " that end? The answer to this question depends not solely, or even mainly, on Mr. Brady's intentions, but on the probable conduct of the infant beneficiaries when they became of full age. As we read the Case, the Board of Referees has answered it in paragraph 29 (*d*) which (in pointed contrast with paragraph 29 (*c*)) applies to all the children, and not only to those of full age. Perhaps, not unnaturally, the Board of Referees did not find it possible to affirm that there was any likelihood that the infants would consent to any assets or income being " given to " Mr. Brady unless he were " in serious financial difficulty ", an event which there was no apparent reason to apprehend. This finding is conclusive, subject only to one matter, relating both to the infant and the adult beneficiaries, which on our construction of the Section calls for further consideration. We refer to the question whether or not any of the beneficiaries were likely to consent to a temporary use of the trust income (represented by dividends of the Company) by Mr. Brady (or, in other words, a loan of the trust income to him) which might fairly be said to amount to an application of income of the Company for his benefit.

For the reasons which we have given it is necessary that the Case should be remitted to the Board of Referees for their further consideration of the facts in the light of the principles which we have stated.

It is further to be observed that we know, as a fact, what Mr. Brady did, and there can be no better evidence that he was able to do at least that. The question remains open whether, by doing what he in fact did, he " secured " the object stated in the Section, and we do not find in the Case a completely satisfactory answer to that question.

There is one other matter which calls for consideration in connection with what we have called the principal question in the case. Mr. Brady had wide powers as governing director of L. B. (Holdings), Ltd. He could in effect have determined what his remuneration should be, under article 22 of the articles of association. He could have procured that the Company should lend him money (paragraph 3 (8) of the memorandum of association), or guarantee the performance of any contract of his (paragraph 3 (10)), and make payments to others which would indirectly benefit himself (paragraph 3 (16)). If he took no more than a fair and reasonable remuneration for his services, he was not, in our opinion, securing the application for his benefit of income or assets of the Company. It would, we think, be a misuse of language to say that a salaried employee of a company, paid reasonably and not excessively, is securing that advantage. The Company was wound up in July, 1939, and it is not suggested that Mr. Brady at any time so exercised his powers as governing director as to do any such irregular things as those which we have mentioned. In these circumstances it ought not, we think, to be held against him that he was able, or likely to be able, to secure the application of income or assets of the Company for his benefit by doing them, since there is nothing to suggest that, if he had the inclination to do them, he was in a position to obtain the consent of the beneficiaries or of the other shareholders, without which he could not have succeeded in " securing " (in the sense in which we understand the word) any advantage for himself.

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Without such consent he would necessarily have been exposed to the risk that the Court would deprive him of any such ill-gotten gains. In our opinion, therefore, the Board of Referees were justified in making no finding adverse to Mr. Brady on this aspect of the case.

One other point was argued, on behalf of the Appellants. It may be stated shortly. Mr. Brady is clearly not within Section 15 (2) (*a*) of the Finance Act, 1939, since he was a member of the Company, holding 499 out of its 500 shares, albeit as a trustee. It was submitted that he was equally clearly not within Sub-section (2) (*b*) since he had " relevant interests " in the Company, as is clear from the decision in the case of *Penang and General Investment Trust, Ltd.* v. *Commissioners of Inland Revenue,* [1943] A.C. 486; 25 T.C. 219. Does he then come within Sub-section (2) (*c*)? No, said Mr. Tucker, because the *Penang* case shows that an apportionment could rightly be made to him in respect of the whole of his holding, so that " the value for apportionment purposes of his relevant interests in the com- " pany, considered in relation to the value for those purposes of the relevant " interests of other persons therein " is as 499 to 1. It is irrelevant for this purpose (Mr. Tucker contends) that the apportionment to Mr. Brady would be followed up by an assessment on the beneficiaries: what the Section is concerned with is not the assessment, but the apportionment.

This argument certainly has a flawless appearance, but we do not think that it can prevail. In our opinion the beneficiaries had relevant interests in the Company. They had, that is to say, " interests by reference to which " income of the Company could be apportioned to them." There is not, it must be admitted, binding authority for this view, but it was at least tentatively expressed by the Lord Chancellor, at page 495 of the *Penang* case (25 T.C., at page 240). There is nothing in the trust deed in the present case to preclude such an apportionment, as there was in the *Penang* case. We think, therefore, that the observations of Lord Macmillan, at pages 501/2 (25 T.C., at pages 244/5), support the view which we are adopting. If that view is right, it appears to us that as between trustee and beneficiaries, the value of whose relevant interests for apportionment purposes Sub-section (2) (*c*) bids us compare, it is impossible to say that the value of the trustee's interest is greater than that of the beneficiary. Nor, we think, are the values equal. We can see no reason why the Special Commissioners should not say: " We will apportion the income of the Company wholly among the beneficiaries " and regard the value of the interests of the trustee for apportionment pur- " poses as nil." This, if they knew of the existence of the trust, as, by reason of Paragraph 11 of the First Schedule of the Finance Act, 1922, they were likely to do, would, in our opinion, be a proper course for the Commissioners to take. In this way Mr. Brady is brought within the Sub-section.

The conclusion at which we have arrived is, therefore, that the case should be remitted to the Board of Referees, in order that they may find the further facts which we have indicated and apply the law as we have stated it to those facts. When the further findings are arrived at it may still appear that some apportionment should be made to Mr. Brady. What, if any, apportionment should be made to him will depend on the extent to which he was, on our interpretation of the statutory provisions, able, or likely to be able, to secure the application of the Company's income or assets for his benefit.

Although there is much in the careful judgment of Wrottesley, J., with which we agree, we think that in some respects he has stated the law too favourably to the Respondents. As will have been seen, we disagree with his view as to the meaning of the word " secure " in this context. Further, we think that the proposition: " A person who is able to secure that income or

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" assets of a company can be applied even temporarily for his benefit is " clearly a person who has an interest in them and can derive a profit or " advantage from them "(1) is stated in too wide terms. It might be read, and we think was intended to be read, as applying even to a temporary loan at a commercial rate of interest, or a temporary appropriation of another person's assets which will have to be made good subsequently. So read, it is not, in our view, an accurate statement of the effect of the Section.

It follows, in our judgment, that although the Respondents were justified in appealing against the decision of the Board of Referees, their appeal succeeded beyond its deserts, and the Appellants were no less justified in coming to this Court for relief. In these circumstances we think that the learned Judge's Order as to costs should be set aside, and that no costs should be awarded to either party here or below.

Scott, L.J.—The judgment will be accordingly that the Court proposes that the parties should bring in the Minutes of the Order of the Court for consideration. In order to assist them we have drafted a suggestion for consideration upon which we should welcome the comments of Counsel.

Luxmoore, L.J.—I drafted out something just really to clear my own mind on the matter. If it is of any assistance to you, Mr. Hills, you may have it. It is not very full. If I had had to draw the Minute of the Order it would have been in a little different form, I expect.

Scott, L.J.—Perhaps the parties will be so kind as to let the Court have copies of the drafts that I am now handing down. (*The same were handed to learned Counsel.*)

Mr. Hills.—So far as my clients are concerned they can have copies made, I think, fairly soon.

Scott, L.J.—It is merely for the convenience of the Court.

Luxmoore, L.J.—You need not worry about making a copy of mine.

Scott, L.J.—I should like to have a copy of Luxmoore, L.J.'s draft.

Luxmoore, L.J.—It is not in any sense a final draft. It is only the merest outline.

Mr. Hills.—I do not know whether your Lordship wants anything more to be said about the preparation of these Minutes of the Order now. If your Lordship does not, I was going on to another obvious point, which your Lordship would expect me to go on to, and that is to ask that, when my clients have had an opportunity of perusing your Lordships' judgments and seeing the implications of both of them and their impact one on the other, if they think, they should have leave to appeal to the House of Lords. This Section has never been construed there before.

Scott, L.J.—You had better consider the judgments and perhaps the draft Minutes of the Order of this Court, and on that occasion—

Mr. Hills.—If your Lordship will forgive me, I am afraid one has had difficulty about that before. We shall have to get the same Court here, and if we want to go to the House of Lords, it has not been, with great respect to your Lordship, found convenient to postpone asking for leave, and I would invite your Lordship to give me leave now.

Luxmoore, L.J.—You must come back to the same Court with the Minutes of the Order.

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(1) *See* page 14 *ante*.

Mr. Hills.—No doubt, my Lord.

Luxmoore, L.J.—Is not that the time to ask? So far as I understand it I think you will find that there is not very much difference in the judgments of the Court.

Mr. Hills.—What I am quite clear about is that your Lordships do not agree with the judgment of Wrottesley, J., and my clients, on a very clear point, want to have the right to go to the House of Lords and say that Wrottesley, J., was right. The time runs from today. I have had experience of this matter before.

Mr. Mustoe.—I am not sure that I ought not also to be asking for leave to appeal to the House of Lords.

du Parcq, L.J.—Yes, perhaps so. I think you will both want to consider that question.

Mr. Mustoe.—As I understand it, the case, on your Lordships' Order, will go to the Board of Referees, for them to find certain further facts.

Scott, L.J.—I think it is very much better that you should consider the form of Order after you have read the judgments, and that would be the time.

Luxmoore, L.J.—Had we not better say now that we shall give them both leave to go to the House of Lords?

Scott, L.J.—If you both want leave to go you may have it.

Mr. Hills.—If your Lordship pleases.

Mr. Mustoe.—If your Lordship pleases.

Mr. Hills.—I ought to remind your Lordship, now that your Lordship has given leave, that time does, as regards the House of Lords, run from today and not from any settlement of the Order—that is the difficulty.

Scott, L.J.—Yes.

du Parcq, L.J.—It may take some time to settle the Order and to get the same Court collected together.

Appeals having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Lord Jowitt, L.C., and Lords Thankerton, Porter, Goddard and Uthwatt) on 11th, 14th and 16th January, 1946, when judgment was reserved. On 22nd March, 1946, judgment was given unanimously in favour of the Crown.

The Solicitor-General (Sir Frank Soskice, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. J. Millard Tucker, K.C., and Mr. N. E. Mustoe for the Company.

JUDGMENT

Lord Thankerton.—My Lords, this appeal and cross-appeal raises a question as to apportionments of the income of L. B. (Holdings), Ltd., the Respondents in the appeal and Appellants in the cross-appeal, to whom I will refer as " the Holding Company ", for the years of assessment 1938–39 and 1939–40 to one Luke Brady under Section 15 of the Finance Act, 1939, whereby the income so apportioned to Mr. Brady fell to be treated as part of his total income for purposes of Sur-tax under Section 21 of the Finance Act, 1922, as amended. The main question relates to the proper construction of Section 15 of the Act of 1939, and the material for the consideration

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of this House is contained in a Case stated by the Board of Referees under Paragraph 2 of the First Schedule to the Finance Act, 1922, on the requisition of the present Appellants. The Special Commissioners had allowed an appeal against the apportionments and discharged them, and this decision was affirmed by the Board of Referees.

On the present Appel'ants' appeal against the decision of the Board of Referees on the Case Stated, the appeal was allowed and the decision of the Board of Referees was reversed by Order of the King's Bench Division (Wrottesley, J.) dated 3rd November 1942; but an appeal against that Order was allowed by the Court of Appeal by an Order dated 1st February, 1944, and the case was remitted to the Board of Referees to draw such further inferences and find such further facts as might be necessary by reason of the answer of the Court to the question of law asked in the Case Stated.

These apportionments were made under Section 15 of the Finance Act, 1939, following directions made under Section 21 of the Finance Act, 1922, as later amended, that the income of the Holding Company should be treated as the income of the members. An appeal against these directions was withdrawn at the hearing before the Special Commissioners, leaving the question whether, on a proper construction of Section 15 of the Act of 1939, Mr. Brady's position in relation to the Holding Company was such as to warrant the apportionment of its income to him. The material portions of Section 15 are as follows:—

" 15.—(1) If in the case of any investment company the Special Com- " missioners are of opinion that any person who is not a member of the " company for the purposes of section twenty-one of the Finance Act, 1922, " and the enactments relating thereto is, or is likely to be, able to secure " that income or assets, whether present or future, of the company will be " applied either directly or indirectly for his benefit, they may, if they think " fit, treat him as a member of the company for the said purposes.

" (2) In apportioning for the purposes of the said section twenty-one the " income of an investment company—

" (*a*) to any person who is treated as a member of the company by " virtue of the preceding subsection; or

" (*b*) to any person who is a member of the company but has no relevant " interests in the company, and in their opinion is, or is likely to " be, able to secure that income or assets, whether present or " future, of the company will be applied either directly or in- " directly for his benefit; or

" (*c*) to any person who is a member of the company and in their " opinion is, or is likely to be, able to secure that income or " assets, whether present or future, of the company will be applied " either directly or indirectly for his benefit to a greater extent " than is represented in the value for apportionment purposes of " his relevant interests in the company, considered in relation to " the value for those purposes of the relevant interests of other " persons therein;

" the Special Commissioners may apportion to him such part of the income " of the company as appears to them to be appropriate and may adjust the " apportionment of the remainder of the company's income as they may " consider necessary.

" (3) For the purposes of this section, a person shall be deemed to be able " to secure that income or assets will be applied for his benefit if he is in fact

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" able so to do by any means whatsoever, whether he has any rights at law " or in equity in that behalf or not, and the Special Commissioners may " draw the inference that a person is likely to be able to secure that assets " or income of a company will be applied for his benefit, or, as the case may " be, will be so applied to a greater extent than is represented in the value " for apportionment purposes of any relevant interests which he has in the " company, if and only if they are satisfied—

" (*a*) that he has, directly or indirectly, transferred assets to the company " the value of which is not represented, or is not adequately " represented, in the value for apportionment purposes of any " relevant interests which he has in the company; and

" (*b*) that the persons who, whether as directors or shareholders or in " any other capacity, have, or will at any material time have, " powers or rights affecting the disposal or application of the " income or assets of the company are likely to act in accordance " with his wishes or that he is able to secure that persons who at " the material times will have such powers or rights will be persons " likely to act in accordance with his wishes . . .

" (6) For the purposes of this section—

" (*a*) references to a person shall, in the case of an individual, be deemed " to include the wife or husband of the individual; . . .

" (*c*) the expression ' relevant interests ' means, in relation to a person " connected in any way with a company, interests by reference " to which income of the company could be apportioned to him " for the purposes of section twenty-one of the Finance Act, 1922, " apart from the provisions of this section, and the expression " ' value for apportionment purposes ' means, in relation to any " relevant interests in any company, the value falling to be put " thereon in apportioning income of the company for the purposes " of the said section twenty-one ".

It should be remembered that by Sub-section (7) of Section 21 of the Act of 1922 it is provided that in that Section the expression " member " is to include any person having a share or interest in the capital or profits or income of a company. It is admitted that the Holding Company is an investment company within the meaning of Section 15 of the Act of 1939.

The facts may be shortly stated as follows. On 17th March, 1934, Mr. Brady, who owned a valuable public house business, caused to be incorporated the Holding Company to carry on the business of an investment company, with a share capital of £1,000 divided into 1,000 shares of £1 each, of which 605 have been issued. Of these, 500 were originally issued, 499 to Mr. Brady and 1 to Mrs. Brady; a further 105 shares were issued to Mr. Brady on 21st October, 1935. At all material times Mr. and Mrs. Brady were the only directors of the Holding Company, Mr. Brady being the governing director, and as such invested with the widest possible control and powers.

On the same date Mr. Brady caused to be incorporated another company, Luke Brady, Ltd., with a capital of £50,000 divided into 50,000 shares of £1 each. Mr. and Mrs. Brady were the first directors, entitled to hold office for life, Mr. Brady being governing director, with powers and control similar to those which he had in the Holding Company. By agreement dated 22nd March, 1934, he sold his public house business to Luke Brady, Ltd. in consideration of 49,998 fully paid shares of that company. Under that agreement the debts owing by Mr. Brady in respect of the business so sold remained

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his personal liability. Shortly afterwards Mr. Brady sold the 49,998 shares in Luke Brady, Ltd. in consideration of the 500 shares in the Holding Company already allotted to him and Mrs. Brady.

On 22nd March, 1934, Mr. Brady also executed a declaration of trust in favour of his wife and children in regard to such of his investments as he should from time to time specify in the schedule thereto. The income of the trust fund in each year was payable to Mrs. Brady up to £2,000, any balance being payable in equal shares to their five children. Mr. Brady was sole trustee, and in sole control. In the schedule to the declaration of trust, and thereafter from time to time, a large number of shares and securities, including the 500 shares in the Holding Company already mentioned, were brought into the trust fund by Mr. Brady. On 2nd May, 1935, all the shares and securities held in trust, except the 500 shares in the Holding Company, were sold to the Holding Company for £101,000 (their then market value) payable with interest within six months. On 16th October, 1935, the transfer of these shares and securities was completed, along with the transfer of further investments belonging to Mr. Brady personally, the market value of which was £4,000; and the transaction was completed by the issue and allotment to Mr. Brady, at a premium of £999 per share, of a further 105 shares in the Holding Company, all of which he held thereafter as trustee, and by the transfer to Mr. Brady personally of the sum of £4,315 4*s*. 0*d*. out of the trust funds.

Accordingly, at all material times the sole capital asset of the trust was a holding of 605 shares in the Holding Company, 604 of which stood in the name of Mr. Brady and one in the name of his nominee, Mrs. Brady, and these shares constituted the whole issued capital of the Holding Company.

The whole trust income was paid into the account of Luke Brady, Ltd., in whose books it was credited to an account entitled " Mr. Brady's Personal " Account ", in which there were also credited sums due to Mr. Brady personally, such as director's fees and debts due to him in respect of the public house business prior to its sale. Mr. Brady drew on this account for discharge of the liabilities of that business, for such payments as he made to the beneficiaries under the trust, and for his personal needs. No trust accounts were kept by Mr. Brady, and it does not seem possible to ascertain the balance of the trust funds in the hands of Luke Brady, Ltd., though the income of the trust consisted solely of dividends paid by the Holding Company and can easily be traced.

Mr. Brady's debts in respect of the business turned out to be substantially greater than the debts due to the business, and Mr. Brady paid these debts out of moneys in Luke Brady, Ltd. It is stated in the Case (paragraph 17) that Mr. Brady's eldest son, Mr. James Luke Brady, " was not aware, and " there was no evidence that any of the other children were aware, of the fact " that up to some date in 1939 the liquid assets of Luke Brady, Ltd. were " depleted by Mr. Brady to a greater extent than they were increased by the " receipt of the trust income. Mr. Brady in effect misled his elder children " into the belief that by 'lending the surplus trust income to Luke Brady, Ltd.' " he was increasing the value of that company's business by enabling it to " undertake capital expenditure which it could not otherwise have undertaken, " whereas the fact is that, if Mr. Brady had paid his debt to the company, " the surplus trust income would not have been needed."

The following dividends were declared by Luke Brady, Ltd. in the years 1937–38 and 1938–39, and formed the larger part of the income of the Holding Company:—

For the year ended 6th January, 1938 ... £12,000 gross.
For the year ended 6th January, 1939 ... £14,000 gross.

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The dividends paid by the Holding Company (tax free) were as follows:—

For the year ended 30th April, 1938 ... £10,587.
For the year ended 30th April, 1939 ... £11,697.

The Holding Company went into liquidation on 22nd July, 1939, and the liquidator distributed the assets in specie to Mr. Brady as the shareholder entitled thereto, which assets Mr. Brady was then holding as trustee.

By deed dated 31st July, 1940, Mr. Brady appointed two additional trustees, and for the first time a separate banking account was opened for the trust in the names of the trustees, and the investments were registered in their names. On the same day the three children of Mr. Brady who were then of age executed a deed of release, releasing Mr. Brady from all liability for acts or omissions done in respect of his trusteeship.

In paragraph 29 of the Case Stated the Board of Referees found the following facts:—

" (*a*) That Mr. Brady did not intend to deprive his children permanently " of the trust income or any substantial part of it; but he did " intend, so long as his children allowed him to do so, to retain " control over the income and to use most of it temporarily to " increase the liquid assets of Luke Brady, Ltd., depleted by his " own borrowing. He took a lax view of his duty as a trustee " and as a director, and, although he knew that he was liable to " account, he did not expect that his children would ever call " upon him to account strictly.

" (*b*) That prior to the deed of release none of the children who were of " age had agreed to forgo any of their rights, and the rights of " the infant children could not be released. Mr. Brady's assets " were sufficient to enable him to make good any claim by the " beneficiaries. We therefore held that the declaration of trust " was not a sham.

" (*c*) That it was likely that the children who were of age would consent " to a substantial part of the trust income being lent to Mr. Brady, " if he asked for it.

" (*d*) That there was not sufficient evidence to satisfy us that any of the " children were likely to have consented to assets or income of " the Company being given to Mr. Brady, unless he had been in " serious financial difficulty. That event had not occurred, and " up to the date of the direction appeared to be unlikely to occur. " We considered it likely that, in that event, some of the children " would have helped their father, but there was too much un- " certainty to make it appropriate to apportion any of the income " to Mr. Brady."

Paragraphs 30 and 31 of the Case Stated are as follows:—

" 30. We held that the words ' able to secure ' in Section 15 of the " Finance Act, 1939, mean ' able to secure by lawful means ', " and that the consent of the beneficiaries was necessary before " Mr. Brady could secure that assets or income of the Holding " Company could lawfully be applied for his benefit.

" 31. Having regard to the findings of fact as set out in paragraph 29 " and the conclusions of law as set out in paragraph 30, we found " that Mr. Brady was not able and was not likely to be able to " secure that the income or assets of the Company would be " applied directly or indirectly for his benefit."

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The Board stated two questions for the opinion of the Court:—

" (1) Whether there was any evidence to support our findings of fact " as set forth in paragraphs 29 and 31;

" (2) Whether our conclusions of law as set forth in paragraph 30 were " correct."

After an affirmative answer by Wrottesley, J., to the first question, it dropped out of the case, and the second question was the only one before the Court of Appeal or this House. In all these three stages an additional contention, which does not appear in the Case Stated, was maintained on behalf of the Holding Company, to which I will refer later.

The only express point of construction in paragraph 30 of the Case Stated was that the words " able to secure " in Section 15 of the Finance Act, 1939, mean " able to secure by lawful means." Wrottesley, J., stated that in the circumstances of this case he was not concerned with breaches of the criminal law, and that it was clear that the Board of Referees thought that if and in so far as Mr. Brady's ability to secure that the income of the Holding Company would have been applied for his benefit involved a breach of trust, he was not within the meaning of Section 15, and he held that that construction was wrong, and answered the question by stating that the words " able to secure " used throughout Section 15 were not to be interpreted as meaning by lawful means, if by that the Board meant, as it obviously did, " without committing a breach of trust." On the appeal by the Holding Company, Luxmoore, L.J., agreed with the view of Wrottesley, J., but he thought that the Order of the King's Bench Division remitting the case should have been elaborated so as to give fuller guidance to the Board of Referees. The majority, consisting of Scott and du Parcq, L.JJ., delivered a joint judgment, in which they stated that, while there was much in the judgment of Wrottesley, J., with which they agreed, they thought that he had stated the law too favourably to the Crown; in particular they thought that " able " to secure " meant " able to secure permanently ", and they thought that the case should be remitted to the Board of Referees for their further consideration of the facts in the light of the principles stated in their judgment. Thereafter the Court of Appeal made the Order appealed against, by which the Order of the King's Bench Division was set aside and the case was remitted to the Board of Referees with an elaborate series of directions, to which I will refer later.

Coming then to Section 15 of the Act of 1939, Sub-section (1) does not apply to Mr. Brady as he is a registered member of the Holding Company; and as he also, admittedly, has relevant interests in the Company, heads (*a*) and (*b*) of Sub-section (2) do not apply; but head (*c*) applies, subject to the Special Commissioners being of the opinion therein specified, and in that event the Special Commissioners have a discretion as to apportionment to him of an appropriate part of the income of the Company.

In Sub-section (1) and heads (*b*) and (*c*) of Sub-section (2) the same phrase is repeated—" is, or is likely to be, able to secure that income or " assets, whether present or future, of the company will be applied either " directly or indirectly for his benefit "; and in Sub-section (3) is to be found a definition of this phrase for the purposes of the Section, and it is at once noticeable that it deals separately with the case of " is able to secure . . . " and the case of " is likely to be able to secure . . . ", and their respective treatment is markedly different. The first case relates to a person who is able to secure the application of the company's assets or income for his benefit; the second case relates to a person who is likely to be able to

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secure that other persons having powers or rights affecting the disposal or application of the income or assets of the company are or will be likely to act in accordance with his wishes. A second important difference is that the words, " by any means whatsoever, whether he has any rights at law " or in equity in that behalf or not ", are omitted from the second case, and further, in my opinion, the second case contemplates that the powers or rights are to be properly exercised in a question with the company by the parties having such powers or rights. A third difference is that the first case is a question of fact, while the second is a question of an inference to be drawn by the Special Commissioners.

The Board of Referees held that " able to secure " meant " able to secure " by lawful means "; this view has been disapproved of by Wrottesley, J., and by all the learned Judges of the Court of Appeal. So far I agree, and the question of law falls to be answered in the negative. I can see no good reason for placing any such limit on the words " any means whatsoever ", especially when it is constituted a question of fact and is expressly not confined to rights at law or in equity. The limit proposed by the Board of Referees may perhaps be said to be implied in the second case, in which there is no such wide description of the means.

My Lords, it has been suggested that " secure " implies some necessary element of permanency or certainty, but I am unable to accept either of these elements as a necessary or proper test. On the facts of this case it seems correct to say, though the Board of Referees have not drawn any distinction in their findings—as I am strongly of opinion that they should have done—that it falls under the first part of Sub-section (3), and I proceed on that footing. The first part of the Sub-section, which I have ventured to refer to as the first case, requires a finding of fact as to ability to secure, whether that ability has been already put into action or not. If it has already been put into action, that, of course, may afford good evidence of the existence of the ability. In this first case there is no question of future ability as in the second case. Now, what is to be secured is the application of the company's income or assets for his benefit, and a temporary application may be of great benefit, even as a loan repayable later, and I see no reason for excluding such a benefit from the purview of the Special Commissioners, though doubtless they will not trouble themselves with doubtful ability or with benefits which are unsubstantial.

As regards criminal means, Wrottesley, J., said that he was not concerned with them, and the learned Judges in the Court of Appeal were content with the statement of Counsel for the Crown, that it was not contended by the Crown that any criminal action could be within the means referred to in Sub-section (3). In my opinion, however, this question cannot be so lightly brushed aside on such a question of construction as the present one. It appears to me that the point may be settled by a consideration of the whole phrase—" to secure that income or assets (of the company) will be applied " for his benefit ". In my view this means that such application will be made by, or on behalf of, the company, which would exclude any criminal action by the person in question.

As regards the directions embodied in their Order by the Court of Appeal, I am of opinion that they are out of place, and I therefore find it unnecessary to criticise them. The question for the Special Commissioners under the first case of Sub-section (3) is one of fact, and is peculiarly one for the application of their business knowledge and common sense. They will naturally accept the construction of Sub-section (3) as expressed in this

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House, and if any fresh or further question of law arises, it will be for the Court to decide it on the facts then placed before the Court.

There remains the further point raised on behalf of the Holding Company, namely, that Mr. Brady's case could only fall under head (*c*) of Sub-section (2) of Section 15 of the Finance Act, 1939, as he and his wife were the registered shareholders of the whole share capital of the Holding Company throughout the material periods; that the value of their relevant interests for the purposes of apportionment as defined in Sub-section (6) (*c*) of Section 15 was the whole of the income, and, as established by the case of ***Penang and General Investment Trust, Ltd.*** v. ***Commissioners of Inland Revenue,*** [1943] A.C. 486 (25 T.C. 219), the whole income could be apportioned to Mr. Brady alone in view of Sub-section (6) (*a*), and it did not matter on whom the assessment was finally made; that, accordingly, there was no room for the adjustment of the apportionment of any remainder, as contemplated by the last part of Sub-section (2). This contention rests on a completely false basis. When, as here, you have the further extension of the provisions of Section 21 of the Finance Act, 1922, by the provisions of Section 15 of the Finance Act, 1939, you have the problem of 100 per cent. of the income to be apportioned among a variety of interests, one or more of which, taken by itself, may amount to 100 per cent., but that does not alter the problem. The Special Commissioners would have before them the trustees, the beneficiaries, and Mr. Brady's further personal interest ascertained under the provisions of Section 15, in order to consider whether it was appropriate to apportion to Mr. Brady personally any part of the income of the Holding Company. Counsel for the Holding Company, if I understood him correctly, maintained that there were passages in the speeches in the *Penang* case which expressed the view that, once the apportionment was made on the trustees, that could not be altered, though subsequently, on getting the necessary information, the beneficiaries might be assessed. No such point was raised or involved in the *Penang* case; the apportionment had been made on the trustees, and the assessment had been made on the settlor, and the only question was whether it was competent to apportion to trustees. It was admitted that, if the apportionment was competent, the assessment was competent and valid. I confess that I have difficulty in understanding how, if the information as to the beneficiaries is obtained subsequently to an apportionment on the trustees, you can assess the beneficiaries separately, with a view to their liability to Sur-tax, without a fresh apportionment. I am of opinion that this contention of the Holding Company is untenable.

I am accordingly of opinion that the appeal of the Crown should be allowed, and that the cross-appeal should be dismissed; that the Order of the Court of Appeal should be set aside; that question No. (2) asked in the Case Stated should be answered in the negative, and that the case should be remitted to the Board of Referees for further procedure.

Lord Porter.—My Lords, I find myself in general agreement with the reasoning and result of the opinion just expressed by my noble and learned friend, Lord Thankerton. I have also had an opportunity of seeing the opinion about to be expressed by my noble and learned friend, Lord Uthwatt, with whom I find myself also in agreement.

Lord Uthwatt.—My Lords, the point at issue is stated by the Board of Referees in a form which raises the question whether they were correct in their conclusion of law that the phrase "able to secure" as used in Section 15 of the Finance Act, 1939, means "able to secure by lawful "means." That phrase appears many times in the Section but always,

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either expressly or impliedly, as part of the wider phrase " able to secure " that income or assets will be applied for his benefit ", but wherever it appears there is, by virtue of the " deeming " part of Sub-section (3), included in its ambit a particular meaning. The real question that arises—and it is this question which is raised by the Case in a shortened form—is not whether the words " able to secure " are subject to the qualification suggested, but whether, in construing the sentence " a person shall be deemed " to be able to secure that income or assets will be applied for his benefit if " he is in fact able so to do by any means whatsoever "—in which, necessarily, the words " so to do " mean " able to secure that income or " assets will be applied for his benefit "—there is implied the limitation that the means must be lawful. The gloss can be put only upon the phrase " by any means whatsoever ", not upon the words " able to secure ". But the question is the construction of the sentence as a whole, not the interpretation of a particular phrase contained in it.

The point arises for determination by reason of the fact that the Commissioners of Inland Revenue appear (see paragraph 31 of the Case Stated) to have failed to convince the Board of Referees that, breach of duty apart, Mr. Brady could have secured an application of income or assets of the Company for his benefit. It was indeed urged in argument before this House that Mr. Brady might have achieved the specified object without involving himself in any breach of duty. That matter is not raised by the Case Stated and, accordingly, I do not propose to embark upon a consideration of it.

In the Court of Appeal the argument for the Crown upon the point of construction apparently proceeded on the lines that the sentence under consideration did not cover criminal means. In this House the Solicitor-General, rightly in my view, did not pursue this line. The choice was to lie between any means whatsoever and any lawful means whatsoever.

I turn to the question of construction. The language of the sentence is unambiguous; the grammatical meaning is clear. Ability of itself involves means, and the emphasis is on the existence of the ability whatever the means by which it is exercised. If there is to be a departure from the grammatical meaning—and it is for this that the Respondents to the appeal contend—a compelling reason must be shown. The applicable rule of construction which has been stated in many cases (see, for example, *Grey* v. *Pearson* (1857), 6 H.L. Cas. 61, 106; *Becke* v. *Smith* (1836), 2 M. & W. 191, 195; *The Duke of Buccleuch* (1889), 15 P.D. 86, 96) amounts in substance to this, that a departure from grammatical construction is justifiable only when that construction would be repugnant to the intention of the Act or would lead to some manifest absurdity or to some inconsistency. Inconsistency is not here in question, and the only question, therefore, is whether the grammatical construction is contrary to the intention of the Act or in itself absurd. Is that true in this case? The two matters may be considered together.

To ascertain the object of the legislation, one must go back to Section 21 of the Finance Act, 1922. Under that Section, with a view, it is stated, to preventing the avoidance of the payment of Super-tax through the withholding of income from distribution, powers were given to the Special Commissioners, where a company had not distributed a reasonable part of its income, to apportion the income of the company to its members as therein defined. In the Finance Act, 1936, Section 20, investment companies make their appearance as a class requiring special treatment for the purposes of Section 21 of the Finance Act, 1922. Loan creditors are to be treated as members. The Finance Act, 1937, Section 14, made further provisions as

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respects investment companies, the powers of the Special Commissioners being extended. It is unnecessary to go into details. So far the persons to whom an appointment may be made are to be determined by reference only to facts. Then comes the Finance Act, 1939, which adopts a new principle as regards investment companies. Broadly, investment companies—a narrow class—are treated as machines which are to be inspected and to have their possible methods of working considered. Under Section 14 (1) of that Act the whole of the investment income of an investment company, however much or little has been distributed, is to be deemed for Sur-tax purposes to be the income of the members, and the Special Commissioners are placed under a duty to give the direction mentioned in the Act of 1922. One then turns to Section 15. Under that Section there is set up an artificial class of persons to whom special treatment may be accorded. Persons not members who pass the ability test may, if the Special Commissioners think fit, be included in the class, and there must be included in the class those members who, under head (*b*) of Sub-section (2), merely pass the ability test, and those members who, under head (*c*) of Sub-section (2), pass that test with honours.

Turning to the test, its substance does not suggest that any limitation is to be implied. The actual exercise of the ability and the likelihood of its exercise are irrelevant; and there is no specific provision as to the amount of income or assets to which the ability is to extend. The test is, to some extent, an objective test, and the possibility of the particular *præpositus* in fact resorting to any particular means does not come up for consideration.

The general meaning of the words " secure an application for his benefit " embodied in the test is clear enough. Due regard must be paid to the words " secure " and " benefit ", but no technical meaning is attached to either word. Exact directions designed to help those called on to apply the test cannot, I think, be stated, and examples are apt to be misleading. To my mind what is required, and all that is required, is that the Special Commissioners, taking into account the whole position in which the *præpositus* is found embedded, should make a rational estimate of the consequences that might flow from some supposed course of conduct open to him had he embarked upon it, and should form a view on the question whether in the result the *præpositus* could or could not have secured an application of assets or income for his benefit. Can he rationally be said to be able to secure an application of income or assets for his benefit? That is the test. If that be so, there does not appear to be any reason for excluding unlawful means from consideration. Where resort to unlawful means is envisaged, one is faced with the possibility that the *præpositus* may, in the case supposed, be able to bring about an application of assets or income to his use, without thereby " securing " an application for his " benefit ". There is always the possibility, but never the certainty, of intervention by those whose rights have been infringed. Both the probability of appropriate action by them and the probable results of that action would have to be considered. After a consideration of these matters a view can be formed on the question at issue.

The Order of the Court of Appeal contains certain directions—I will advert to them in a moment—as to the matters to be taken into account when the means envisaged are unlawful. With all deference to the Court of Appeal, I do not think the matter admits of directions so specific and detailed as those contained in this Order. All the circumstances have to be considered and considered as a whole. If the view as to the nature of the duty cast upon the Special Commissioners which I have expressed is right, any specific directions would be merely an individual exposition of what is meant by an instruction to the Special Commissioners that, in reaching their conclusions,

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they should use their common sense as men of affairs, neither disregarding documents and rights nor being blinded by them. Heads may go in the air in imagining the possibilities open to the *præpositus,* but the feet must be kept on the ground in estimating the probable consequences.

In my view there is nothing absurd in including unlawful means among the means referred to in the Section. The contrary is, I think, the case. A consideration of the effect of the test reinforces this conclusion. Inclusion in the class as a result of the application by the Commissioners of the test does nothing save give rise to a discretionary power, to be exercised judicially, to apportion to an included person such part of the income of the company as appears to them appropriate. That being the only result of inclusion, why should not the net be widely cast?

One other consideration may be mentioned. In the realm of tax avoidance, ingenuity need not deny, and in practice does not deny, itself any extravagance. The thoughtful *præpositus,* if faced by the Section with the necessity of rendering any exercise of his ability unlawful, might readily secure the inclusion in the articles of association of the company a provision that no assets or income of the company shall be applied for his benefit by any means whatsoever, whatever that may mean in the Act of 1939, and set up trusts applicable to the shares in favour of a class no member of which could be ascertained in his lifetime. Surely it was not the intention of the Legislature in its repeated efforts to secure the avoidance of Sur-tax to leave such a door open.

For these reasons I am of the opinion that there is not implicit in the Section any such limitation as is suggested.

My Lords, I turn now to the directions given by the Court of Appeal, which are to be applicable when the supposed means are unlawful. It is true that a consideration of these directions is not essential to the question of construction raised by the Stated Case, but, as they have been given, I think it right to deal with them.

In form these directions merely state that if the Inland Revenue succeed in establishing certain matters to the satisfaction of the tribunal, an inference of the necessary ability or likelihood of ability may be drawn. If read strictly in this way, I do not quarrel with them. But it may well be that the directions would be read as stating what matters must be proved by the Inland Revenue in the particular case and perhaps also in all cases where unlawful means are supposed. It is only when read in this alternative way that I venture to criticise them. None of my observations is addressed to the facts of this particular case.

My main objection is implicit in what I have already said: I differ from an approach to the matter which involves precise directions. The Section requires a review of the whole situation, not the application of an exact formula. I agree that the burden of making out a case of ability rests on the Inland Revenue. In the course of any investigation the burden of proof on particular matters may vary in the light of the circumstances, and I do not think it is possible to say in general terms that the burden of proof on any particular point lies on the Inland Revenue.

As regards the formula itself, and matters suggested by its terms, I make these observations.

First, in my opinion, neither precariousness nor lack of permanence of enjoyment, or of substantial permanence of enjoyment, necessarily excludes the inference that a benefit could be secured. Those features may have to be considered in particular cases, whether the means supposed be lawful or

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unlawful, but only as part of the general question whether (the other qualities of a " benefit " being present) it was possible to obtain something worth having.

Second, the directions relating to acquiescence and condonation are open to criticism.

The directions require acquiescence or condonation in every case where unlawful means are envisaged, if ability to secure the application of income or assets for the benefit of the *præpositus* is to be established. It is a prerequisite of effective acquiescence or effective condonation that there should be knowledge of the relevant facts. In some particular cases there may well be barriers to such knowledge being acquired in due time, or in time enough to exclude the securing of a benefit. I give an example. Excessive remuneration to a governing director might, in the case of some such company as is present here (it holds all the shares in a subsidiary company), be voted to a governing director in general meeting and passed through the profit and loss account. The articles of association might lawfully provide that members were to be entitled only to obtain copies of the balance sheet and the auditors' report. The auditors would not be concerned to mention the matter in their report, because, for the company's purposes, the matter is in order. The governing director in the supposed company is, I assume, the sole trustee under a settlement of all the shares. How and when would the beneficiaries find out the supposed action? There is no one who is likely to spread abroad the supposed facts. What would lead them to think that there was any occasion for suspicion? Diminution in the divisible profits of the subsidiary might account for the drop in the trust income. Suspicion without due ground is not likely where a benevolent parent is concerned. But if the beneficiary does suspect, how can he find out? The governing director has no relevant accounts of the company in his possession as trustee, and it is only documents he holds as trustee that the beneficiaries as *cestuis que trust* have a right to see.

In such a case, it cannot, I think, be properly said that the tribunal is precluded from drawing an inference that the governing director is able to secure an application of income or assets for his benefit, though there is not present the probability of either acquiescence or condonation.

I do not accept the argument that in such a case the " income " would not be applied for the benefit of the *præpositus*. " Income " in the Section means, in my view, what it says, and does not mean the balance on the profit and loss account.

Other examples may possibly be given, directed to showing that the presence of acquiescence or condonation is not a condition precedent to the inference of ability (for example, none of the beneficiaries may know anything about the settlement), but one example sufficiently makes my point.

Again, in cases where it is necessary to consider the probability of acquiescence or condonation, it may well be that acquiescence or condonation by some only of the beneficiaries who would suffer would, despite objection taken and pursued by other suffering beneficiaries, be sufficient for practical purposes. Their acquiescence or condonation might be sufficient to ensure that the *præpositus* secured some benefit. The directions of the Court of Appeal suggest that, in their view, condonation or acquiescence by all the interested parties was necessary.

I do not doubt that in certain cases the probability of acquiescence or condonation by interested parties may well have to be taken into consideration when the only possible means are unlawful. But an enquiry into that

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probability is not the substance of the matter. It comes in as part of a wider question. Is there a reasonable probability that such effective action would be taken as would prevent the *præpositus* " securing a benefit " by the transaction supposed? The matter has to be reviewed as a whole. I have mentioned the difficulties there may be in ascertaining the supposed facts. But there are many other matters which may be reasonably regarded as likely to deter legal proceedings. My supposed man of affairs, in considering the probable family reaction to a situation merely envisaged—and as a rule it is a family which is concerned—comes back to the realities of the case and to a homely consideration of the facts. The substance of the case does not lie in the mysteries of acquiescence and condonation.

I desire to make two criticisms on paragraph 31 of the Case Stated. First, in applying the ability test, it is, as I have said, the possibilities open to a person in Mr. Brady's position that have to be envisaged, and the supposed consequences of the use of one of the means open to him. Anything actually done by Mr. Brady and the consequences of his acts are, at this stage, irrelevant, except in so far as they inform the mind as to a possibility and its probable consequences. On this basis, the facts stated in paragraph 29(*a*) and the second sentence of paragraph 29(*d*) are irrelevant in drawing the inference stated in paragraph 31. I may observe that head (*a*) of the direction given by the Court of Appeal may be thought by some to be open to a similar comment. Second, the wording of paragraph 29(*d*) raises in my mind a doubt whether the Board of Referees had sufficiently in mind that the ability test does not contain any provision as to quantum except such as is implicit in the word " benefit."

I would therefore allow the appeal and dismiss the cross-appeal.

Lord Thankerton.—My Lords, I have been requested by my noble and learned friends, **Lord Jowitt, K.C.**, and **Lord Goddard,** to express their concurrence in the opinions which have been delivered.

Questions put:

That the appeal be allowed, that the Order appealed from be set aside and the cross-appeal dismissed.

The Contents have it.

That question No. (2) asked in the Case Stated should be answered in the negative, and that the case be remitted to the Board of Referees for further procedure.

The Contents have it.

That no Order be made as to costs here or below.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Wetherfield, Baines & Baines.]