NO. 1412—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—27TH AND 28TH MARCH AND 1ST APRIL, 1947

COURT OF APPEAL—2ND, 3RD AND 31ST JULY, 1947

HOUSE OF LORDS—12TH AND 13TH JULY AND 29TH OCTOBER, 1948

LORD HOWARD DE WALDEN* *v.* COMMISSIONERS OF INLAND REVENUE
COMMISSIONERS OF INLAND REVENUE *v.* LORD HOWARD DE WALDEN*[1]

Sur-tax—Settlement—No divestment of income from settlor—"Income "arising under a settlement"—Inter-connected companies incorporated abroad—"Subsidiary company"—Power to apportion income—Finance Act, 1922 (12 & 13 *Geo.* V, *c.* 17), *Section* 21; *Finance Act,* 1927 (17 & 18 *Geo.* V. *c.* 10), *Section* 32; *Finance Act,* 1938 (1 & 2 *Geo.* VI, *c.* 46), *Sections* 38 (3) *and* 41 (4); *Finance Act,* 1939 (2 & 3 *Geo.* VI, *c.* 41), *Section* 13 (3).

The father of the Appellant (in the first case) by a deed of gift in 1923 *gave to his son, S,* 25,000 *shares (the whole share capital) of D, a Canadian investment company. The shares of D stood in the name of E, another Canadian company, which was made a party to the deed of gift, and which thereafter held the shares as trustee for S.*

By a deed of settlement executed in 1934 *in anticipation of his marriage, S created trusts over* 15,000 *of these shares whereby the income therefrom was payable to himself during the joint lives of himself and his father; on the death of either, the intended wife was to receive an annuity which was to be increased on the death of the survivor and subject to these provisions the trust funds and the income therefrom were to be held on trust for the children of the marriage. S and his father were alive during the whole of the years under appeal, and any income arising would accordingly have been payable to S; no dividends were paid by D and no income was distributed by E, as trustee, during the relevant years.*

S held all but two of the shares of E and was able directly to control that company and indirectly to control D and six other companies incorporated in Canada or Kenya which were within the control of D.

Assessments to Sur-tax were made on S for the years 1938-39 *to* 1941-42 *on the footing that the deed of 20th August,* 1934, *was a "settlement" within the meaning of Sections* 38 *and* 41 (4) (*b*), *Finance Act,* 1938, *in which he had an interest in the income arising under the settlement. For the purposes of the assessments the income arising under the settlement included* 15/25*ths of the income of D (which was admitted to be correct if the deed was held to be a "settlement") and, on the view that the six companies within D's control were companies to which Section* 21, *Finance Act,* 1922, *applied,* 15/25*ths of the income of each of those companies also.*

* Formerly the Hon. J. O. Scott-Ellis.

(1) Reported (C.A.) [1947] 2 All E.R. 502; (H.L.) [1948] 2 All E.R. 825.

On appeal to the Special Commissioners it was contended on behalf of S :—

(a) *that the deed executed in* 1934 *was not a settlement within Sections* 38 *and* 41 (4) (*b*), *Finance Act,* 1938, *since no income had thereby been divested from the settlor to other persons, and*

(b) *that no part of the income of the six companies within D's control constituted income arising under the settlement since they were not companies to which Section* 21, *Finance Act,* 1922, *applied; they were not incorporated in the United Kingdom and were subsidiaries of a foreign company to which the Section did not apply.*

The Special Commissioners held that the appeal failed on the first point but succeeded on the second point.

In the Court of Appeal the first point was not disputed by the Appellant.

Held, *that the provisions of Section* 13(3) *of the Finance Act,* 1939, *did not necessitate any enlargement of the meaning of the expression "the body corporate" in Section* 41(4)(*a*) *of the Finance Act,* 1938; *that that Section did not extend to income apportioned or sub-apportioned to a foreign company; and that the income of the six foreign companies within the control of company D did not constitute income arising under the settlement.*

CASE

Stated under the Finance Act, 1927, Section 42(7), and the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 1st October, 1945, the Hon. J. O. Scott-Ellis (hereinafter called "the Appellant") appealed against additional Sur-tax assessments made upon him for the years 1938-39, 1939-40, 1940-41 and 1941-42.

2. By deed of gift dated 7th June, 1923, Lord Howard de Walden gave the Appellant (who is his son) 25,000 shares in Dufferin Investment Co., Ltd. (hereinafter called "Dufferin"), a company incorporated in Canada. The shares had previously been transferred into the name of Established Investments, Ltd. (hereinafter called "Established"), another Canadian company, who were parties to the deed of gift and thereafter held the shares as trustees for the Appellant. A copy of the deed of gift is hereto annexed, marked "A", and forms part of this Case(1). By a further deed dated 11th December, 1933, the Appellant, who had come of age on 27th November, 1933, gave his father back 5 shares, which continued to be registered in the name of Established as trustee. A copy of this deed is hereto annexed, marked "B", and forms part of this Case(1).

3. On 20th August, 1934, the Appellant, in view of his intended marriage, executed a deed whereby he created trusts over 15,000 out of the 24,995 shares in Dufferin then held (as above detailed) by Established as

(1) Not included in the present print.

trustee for him. Under clauses 3, 4 and 5 of the deed the whole income from the 15,000 shares was payable to the Appellant during the joint lives of himself and his father. On the death of either, the intended wife became entitled to an annuity of £1,000, and on the death of the survivor, such annuity was increased to £5,000. Under clause 6 the unexpended income of the trust property was to be held in trust for the children, and the Appellant had a power of appointment among them. The remaining provisions of the deed appear from the copy hereto annexed, marked "C", and forming part of this Case[1]. The Appellant and his father were alive during the whole of the years under appeal, so that the former was entitled to any income arising from the 15,000 shares.

4. By deed dated 28th October, 1937, the Appellant and his father purported to terminate certain provisions of the deed of 11th December, 1933, and the latter gave the Appellant back the five shares which had been given him. The provisions of this deed do not appear to be material, but a copy is hereto annexed, marked "D", for reference if required[1].

5. The Appellant had been assessed to Sur-tax upon the footing that the deed of 20th August, 1934, was a "settlement" within the meaning of that term in Sections 38 and 41(4)(*b*) of the Finance Act, 1938, and that the income arising under such settlement (to be computed as hereinafter appears) was to be treated as the income of the Appellant in accordance with Section 38(3) of the same Act, since he had an interest in such income. Dufferin had declared no dividends and the trustee under the deed had consequently made no distribution of income.

6. It was contended on behalf of the Appellant that the deed of 20th August, 1934, was not a settlement within Sections 38 and 41(4)(*b*) of the Finance Act, 1938, since no income had thereby been divested from the Appellant to other persons. Reference was made to the case of *Chamberlain* v. *Commissioners of Inland Revenue*, 25 T.C. 317.

7. It was contended on behalf of the Commissioners of Inland Revenue that the said deed was a settlement within the said Sections.

8. We, the Commissioners, held that the deed of 20th August, 1934, was a settlement within the meaning of that term in Sections 38 and 41 (4)(*b*), Finance Act, 1938.

9. The second point raised at the appeal relates to the computation of the income arising under the settlement (assuming our decision upon the first point to be correct). It is provided by Section 41(4)(*a*) of the Finance Act, 1938, that such income is to include:—

> "(ii) where the amount of the income of any body corporate has been "apportioned under section twenty-one of the Finance Act, 1922, for "any year or period, or could have been so apportioned if the body "corporate were incorporated in any part of the United Kingdom, so "much of the income of the body corporate for that year or period "as is equal to the amount which has been or could have been so "apportioned to the trustees of or a beneficiary under the settlement".

It was admitted on behalf of the Appellant upon the above assumption that under the above provision the appropriate proportion (i.e., 15/25ths) of the income of Dufferin fell to be included in the computation of the income arising under the settlement, since if Dufferin had been incorporated in the United Kingdom its income could have been apportioned

(1) Not included in the present print.

to the trustees under the provisions of Section 21 of the Finance Act, 1922. In computing such income, however, for the purposes of the assessments under appeal, there had been included not only the income received by Dufferin (subject to exceptions not now material) but also the undistributed income (subject to the same exceptions) of certain other companies in the following circumstances.

10. There were at material times in existence, besides Established and Dufferin, six other companies incorporated in Canada or Kenya. Dufferin held shares in five of them, and there was considerable reciprocal shareholding. There is attached hereto, marked "E"(1), a list of shareholdings, showing on the left the eight companies, including Established and Dufferin, and opposite each company the number of shares therein held by the company shown at the head of the column. Thus, for example, Dufferin held 600 out of 1,000 common shares in St. Francis Securities, Ltd. (hereinafter called "St. Francis").

11. There is attached hereto, marked "F", and forming part of this Case(1), a statement showing the voting rights attached to the classes of shares in the various companies. It will be apparent from this and the list of shareholdings (exhibit "E") that the Appellant directly controlled Established, which in turn controlled Dufferin. St. Francis was controlled by Dufferin, and so on. By means of his control of Established the Appellant was thus able indirectly to control the votes which controlled all the companies on the list.

12. The Appellant had been assessed to Sur-tax upon the footing that the undistributed income of all the companies shown in exhibit "E", other than Dufferin and Established, could (in accordance with Paragraph 8 of the First Schedule to the Finance Act, 1922, and Section 13 of the Finance Act, 1939) be apportioned and sub-apportioned among the various companies in accordance with their shareholdings, with the result that eventually all such income came to be apportioned to Dufferin, and that 15/25ths of such income should accordingly be included in the income arising under the settlement. (The income, however, to be apportioned in respect of certain "C" shares in Champlain Securities Corporation, Ltd. fell to be apportioned direct to Established as the holder of these shares, and thus did not form part of the income arising from the settled property, which comprised only the 15,000 shares in Dufferin.)

This view depended on the assumption that each of these companies was a company to which Section 21, Finance Act, 1922, applied, or would apply if the company concerned were incorporated in the United Kingdom. Sub-section (6) of that Section provides as follows:—

> "This section shall apply to any company which is under the "control of not more than five persons and which is not a subsidiary "company or a company in which the public are substantially inter- "ested. For the purpose of this subsection—A company shall be "deemed to be a subsidiary company if, by reason of the beneficial "ownership of shares therein, the control of the company is in the "hands of a company not being a company to which the provisions "of this section apply, or of two or more companies none of which "is a company to which those provisions apply... The expression "'company' means a company within the meaning of the Companies

(1) Not included in the present print.

"(Consolidation) Act, 1908."

By Section 19(3), Finance Act, 1936, the definition of the expression "company" was extended so as to include any body incorporated in any part of the United Kingdom under any enactment.

13. It was contended on behalf of the Appellant that the companies shown in exhibit "E", other than Dufferin and Established, were not within Section 21, Finance Act, 1922, because:

(1) they were not companies incorporated within the United Kingdom;

(2) they were "subsidiaries" within the definition of that term in Sub-section (6), since the control was in each case in the hands of a foreign company to which the provisions of the Section did not apply.

No part of the income of such companies could therefore be included in the assessments made on the Appellant even if the deed of 20th August, 1934, was a settlement within Section 38 of the Finance Act, 1938.

14. It was contended on behalf of the Commissioners of Inland Revenue that the income of each of the companies could have been apportioned to the trustees of the settlement, and accordingly that its income was to be included in the computation of the income arising under the settlement.

15. We, the Commissioners, held that the proportion of the income of Dufferin only could be included in the computation of the income arising under the settlement. Accepting the contention on this point advanced on behalf of the Appellant, we did not think that the provisions of the Finance Acts enabled the income of the other foreign companies to be apportioned to him or to the trustees of the settlement.

16. We left the figures of the assessments to be adjusted in accordance with our determination upon the two points at issue. Figures were subsequently agreed between the parties and we issued our final determination accordingly.

17. Immediately after such determination each party declared to us their dissatisfaction therewith (so far as unfavourable to them) as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1927, Section 42(7), and the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

B. TODD-JONES, } Commissioners for the Special
N. ANDERSON, } Purposes of the Income Tax Acts.

Turnstile House,
94/99 High Holborn,
London, W.C.1.
26th September, 1946.

The case came before Atkinson, J., in the King's Bench Division on 27th and 28th March and 1st April, 1947. Judgment was given in favour of the Crown on the first point on 27th March, 1947, and against the Crown on the second point on 1st April, 1947.

Mr. Frederick Grant, K.C., and Mr. L. C. Graham-Dixon appeared as Counsel for the Appellant, and the Solicitor-General (Sir Frank Soskice, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills (Mr. Geoffrey Tribe with them) for the Crown.

JUDGMENTS

Atkinson, J.—I think the language is too strong to enable me to accept Mr. Grant's argument. It seems to me that there can be no question whatever but that the document in question is a settlement. There was a deed executed whereby trusts were created for 15,000 shares in a certain company called the Dufferin Investment Co., Ltd. Those shares were held by another company called Established Investments, Ltd. as trustees for the settlor. The whole income was to be paid to the Appellant during the joint lives of himself and his father. On the death of either the intended wife became entitled to an annuity of £1,000, or on the death of both to an annuity of £5,000. Under a further clause property was to be held on various trusts for the children, and the Appellant had a power of appointment. There are various other provisions which have not been read.

It seems to me perfectly plain that, even apart from the definition, that was a settlement. Certain property was made safe from his creditors. Other people were given rights. He ceased to be the owner of the shares themselves, and had only a life interest in them. He could not dispose of any reversionary rights even with regard to the income. Therefore it seems to me it is a settlement.

But whether it is a settlement within the meaning of Sub-section (3) of Section 38 of the Finance Act, 1938, may very well not be determined by that view, or by the mere fact that it is in common parlance a settlement. But the words of Sub-section (3) seem too clear for me to get away from them. The Sub-section begins: "If and so long as the settlor has an "interest in any income arising under . . . a settlement". Let me take those words first. It is perfectly plain that he had an interest in "income "arising under a settlement". He had an interest in this income for life. Now take the words: "If and so long as the settlor has an interest in "any . . . property comprised in a settlement." He had an interest in the property "comprised" in this settlement. It is said that this Sub-section can only apply to cases where he has denuded himself of something. I doubt that, on the language used. Even supposing that there is something in that argument, he has denuded himself of the full ownership of the property, and has now only a life interest. He has denuded himself of part of the income after the death of his father if his father dies first. Therefore it seems to me the settlement comes within the Sub-section.

Some words were relied on that were used by Lord Macmillan in a case which was very complicated, namely, *Chamberlain* v. *Commissioners of Inland Revenue*, 25 T.C. 317. The facts of that case have not been gone through during the argument before me, but it is said there is a principle laid down there which makes it unnecessary to worry about the facts. Lord Macmillan certainly said, at page 331, that "a settlement or arrangement to "come within the Statute must still be of the type which the language of "the Section contemplates. I agree with Lord Moncrieff that the settle-"ment or arrangement must be one whereby the settlor charges certain "property of his with rights in favour of others". Well, it certainly does that. I cannot see how one can get away from that. "It must comprise "certain property which is the subject of the settlement; it must confer "the income of the comprised property on others"—well, he does not say at what point, but this settlement certainly does confer the income in certain events, or part of the income, on others—"for it is the income so "given to others that is to be treated as nevertheless the income of the

(Atkinson, J.)

"settlor." I cannot follow that. All I can say is that I do not think Lord Macmillan had this point in his mind. Certainly any narrow interpretation of these words did not meet with the approval of Lord Greene, M.R., in *Hood Barrs* v. *Commissioners of Inland Revenue,* [1946] 2 All E.R. 768. On page 773(1) he says that he can find nothing in any of the speeches which lends support to that suggestion. On the next page he says, I think, all that Lord Macmillan meant was something which is really quite obvious, that: "You never construe a word in a statute, whether it be in the body "of the statute or in an interpretation clause, without reference to the con- "text in which it appears.(2)" Therefore I do not think that there is anything very helpful to the Appellant in what Lord Macmillan said in *Chamberlain's* case(3). Whatever may be the intention of the draftsman, it seems to me that the words are so clear that this settlement must come within them.

What the result is I do not know, but, at any rate, I must decide that point against Mr. Grant.

That makes the second appeal effective.

Mr. Grant.—Yes, my Lord.

Atkinson, J.—The Respondent in this case appealed against a number of Sur-tax assessments for the years 1938-39, 1939-40, 1940-41 and 1941-42. Those assessments were based on a claim by the Commissioners of Inland Revenue to be entitled to assess him in respect of the undistributed profits of a number of companies registered in Canada. The only company in which Mr. Scott-Ellis held shares was a company called Established Investments, Ltd., referred to in the Case as "Established." He held them all. Established held all the shares but two in a company called the Dufferin Investment Co., Ltd., spoken of in the Case as "Dufferin." Therefore any income received and distributed by Dufferin would, in substance, come into the hands of Established, and the Respondent. Dufferin had subsidiary interests in five other companies. It held sufficient shares to control each of them directly or indirectly. The remaining shares were held by one or other of the five companies, and the shareholding scheme was so arranged that any distributed profits or portions of profits would ultimately find their way into the coffers of Dufferin and thence to Established, and the Respondent. But the profits undistributed would remain with the companies which earned them, and, so long as they were undistributed or unapportioned, they would escape taxation.

Section 21 of the Finance Act, 1922, was passed 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". It initiated a scheme, which has been developed since, by which the Revenue hope to get at profits of companies undistributed for the purpose of avoiding Super-tax or Sur-tax. The companies were not made liable to pay, it is the members of the companies who are to be assessed. It only applied to companies under the control of not more than five members and which were not subsidiary companies. A subsidiary company was one where the control was in the hands of a company in which the public were substantially interested, and which was not under the control of not more than five persons. "Company" was defined as

(1) 27 T.C. 385, at p. 401. (2) *Ibid.*, at p. 402. (3) 25 T.C. 317.

(Atkinson, J.)

being within the definition contained in the Companies (Consolidation) Act, 1908, and, therefore, the Section and the scheme did not apply to foreign companies, but only to companies which were incorporated in the United Kingdom.

Difficulties arose where there were a number of inter-connected companies, or where a holding company was interposed between the profit-earning company and the taxpayer. Where the member of the profit-earning company was itself a company, the question arose as to whether the part apportioned to that company could be apportioned on to the last company's members.

Section 32 of the Finance Act, 1927, was designed to deal with these difficulties. It is a long and complicated Section, but it aimed at getting at inter-connected companies. The definition still remained the same: the scheme only applied to companies registered in the United Kingdom. The Respondent, therefore, was in the happy position of escaping liability for Super-tax on profits earned by the various companies mentioned in the Case so long as they did not distribute them.

On 20th August, 1934, the Respondent executed a marriage settlement, whereby Established were made trustees in respect of 15,000 of the shares in Dufferin then held by Established. The whole income was payable to him during the joint lives of himself and his father. On the death of either of them his wife became entitled to an annuity of £1,000, and on the death of the survivor the annuity was increased to £5,000. Then there were certain trusts for children. Four years afterwards the Finance Act of 1938 was passed, and Section 38 dealt with settlements.

There were two appeals here. The Special Commissioners have held that this document is a settlement within Section 38. There was an appeal about that, which I have already dealt with, holding that the settlement was a settlement within Section 38 of the 1938 Act. Sub-section (3) provides: "If and so long as the settlor has an interest in any income arising "under or property comprised in a settlement, any income so arising dur-"ing the life of the settlor in any year of assessment shall, to the extent "to which it is not distributed, be treated for all the purposes of the Income "Tax Acts as the income of the settlor for that year, and not as the income "of any other person".

Section 41 (4) enacted: "For the purposes of this Part of this Act— "(*a*) the expression 'income arising under a settlement' includes . . . (ii) "where the amount of the income of any body corporate has been appor-"tioned under section twenty-one of the Finance Act, 1922, for any year "or period, or could have been so apportioned if the body corporate were "incorporated in any part of the United Kingdom, so much of the income "of the body corporate for that year or period as is equal to the amount "which has been or could have been so apportioned to the trustees of or a "beneficiary under the settlement". That means equal to the amount which has been, or could have been, so apportioned to Established Investments, Ltd., or to the Respondent. As I understand, it is agreed that this Section could only apply to the actual income of Dufferin.

The Commissioners have held that it brought within the expression "income arising under a settlement" the income belonging to Dufferin, but that it did not hit the income of any of the other companies, because their income could not be apportioned either to the trustee company or to

(Atkinson, J.)

the Respondent, as they were not companies incorporated in the United Kingdom. Obviously the only company hit by the final words of that Subsection was a company whose income could be apportioned to the trustees or to the beneficiary under the settlement. So far, I think, the position is common ground. The decision was: "We, the Commissioners, held that "the proportion of the income of Dufferin only could be included in the "computation of the income arising under the settlement. Accepting the "contention on this point advanced on behalf of the Appellant, we did "not think that the provisions of the Finance Acts enabled the income of "the other foreign companies to be apportioned to him or to the trustees "of the settlement."

The question whether they are right or wrong depends upon the effect of Section 13 (3) of the Act of 1939. I have found this Section extremely difficult to understand or to interpret, but I think both sides are agreed that the answer to the point raised does depend entirely upon the proper interpretation of this Section: "Subject to the last preceding subsection and to "any other express provision of this Act, any reference in any enactment "to apportioning income under or for the purposes of the provisions, or "any specified provisions, of the said section twenty-one or of the said "First Schedule shall be construed as a reference not only to apportioning "by means of an original apportionment but also to apportioning by "means of an original apportionment together with one or more sub-appor-"tionments or series of sub-apportionments, and in ascertaining under "paragraph (*c*) of subsection (1) of section nineteen of the Finance Act, "1936, whether or not income could be apportioned among not more than "five persons, account shall, in cases where an original apportionment and "any sub-apportionment are involved, be taken only of persons to whom "income could be finally apportioned as the result of the whole process of "original apportionment and sub-apportionment." The Section seems to deal merely with the question of apportionment. Apportionment would include all apportionments whether original or sub-apportionments. But I can see no words enlarging the power to apportion so that foreign companies could be dealt with as if they were companies incorporated in this country. The Section is linked up with Section 19 (1) (*c*) of the Finance Act, 1936. That was the Section providing that a company should be deemed to be under the control of not more than five persons if half the income could be apportioned among not more than five persons. The Section contains a complicated set of provisions. The definition of companies in Section 19 of the Finance Act, 1936, although somewhat more extensive than the definition of companies contained in the Companies Act, was still confined to companies incorporated in the United Kingdom.

It would seem to me quite impossible to construe this Section as extending Section 19 of the 1936 Act so as to include foreign companies in face of the definition in that Section. If it be impossible to read the Section as extending Section 19 of the Act of 1936 to foreign companies, it seems very difficult for me to read into this an enlargement of the powers of apportionment to include foreign companies for the purposes of Section 41 of the Act of 1938. As I say, it is linked up with one Section, but it is not linked up in any way with Section 41 of the 1938 Act. There is not a word there extending the powers to a body corporate not registered in the United Kingdom. Therefore it would seem Section 41, Sub-section (4) (*a*) (ii), should read somewhat in this way: "Where the amount of the

(Atkinson, J.)

income of any body corporate (including income which could have been apportioned to that company, directly or ultimately by a string of sub-apportionments) has been apportioned, or could have been apportioned if the body corporate were incorporated in the United Kingdom, so much as could be apportioned to the trustees or to the beneficiary." The body corporate to be considered is still Dufferin. No other apportionment could be made to the trustees or to the beneficiary. The income deemed to be apportioned to the trustees or to the Respondent is not only Dufferin's own income but all that income which could, by a series of sub-apportionments, have been apportioned to it if it, Dufferin, had been registered in the United Kingdom.

Mr. Grant, for the Respondent to this appeal, Mr. Scott-Ellis, accepts that, but says, and says quite truly: "There being no power to apportion income of foreign companies, the income, e.g., of Finance & Trusts, Ltd."—one of these subsidiaries—"is not income which could be apportioned to Dufferin; the Section could only incorporate apportionments in respect of British companies in which companies, in the position of Dufferin, might hold shares." Again, Mr. Grant argues that if, for example, you assume that Finance & Trusts, Ltd. is the company to be treated as if it were incorporated in the United Kingdom, none of its income could be apportioned to the trustees or to the Respondent. It could be apportioned to Dufferin and there it would stop.

To meet the difficulties pointed out by Mr. Grant, the Solicitor-General wants, in effect, to insert after the words "could have been so apportioned" the following words, "if each body corporate involved had been incorporated in the United Kingdom." That is to say, the whole string of foreign companies must be deemed to be incorporated in the United Kingdom. His exact words, if I got them down correctly, were these. He says the Section should be read in this way: "Whether apportioned by means of an original apportionment or by means of an original apportionment together with one or more sub-apportionments or series of sub-apportionments, or which could have been so apportioned if the body corporate in each case were incorporated in the United Kingdom, and so much of the income of the body corporate for that year or period as is equal to the amount which had been or could have been so apportioned to the trustees or a beneficiary under the settlement." That is the construction he suggested which now should be put on Section 41.

Mr. Stamp put it a little differently, but not very much. As I understood his argument it was this. He said Mr. Grant's argument overlooked the fact that Section 41 (4) applied only to a single company and the apportionment to a single company, and that this later Section expands that Section to a series of companies, so that in future the operation you are describing in Section 41 (4) becomes an operation affecting not merely one company but a series of companies. You have got to read in somewhere "all the companies", and, therefore, the expression at the end "body corporate" must refer to each body dealt with. It seems to me he is asking me to read a great deal into the Section. There is nothing to suggest that the Section is aimed at enlarging or amending Section 41 (4). There are no express words suggesting that its intention is to enlarge Section 41 (4), whereas there is very plain language showing it is aimed at extending the effect of Section 19 of the Act of 1936. It would have been very easy

(Atkinson, J.)

to have inserted words such as: "and for the purposes of all such apportionments each and every company involved shall be deemed to have been incorporated in the United Kingdom." If that had been really meant, nothing could have been easier than to insert words of that kind. But I doubt whether the Court ought to read into the Section words which have such a far-reaching effect as to bring within this scheme companies which till then were plainly outside it, that is to say, foreign companies, excepting the one company whose income could be apportioned direct to the trustees or the beneficiary.

Whether Parliament intended that result I have not the faintest idea. This Section is framed in a most difficult manner. But, as Rowlatt, J., has said more than once: "In Revenue matters there is no room for "intendment. Ambiguity must tell in favour of the taxpayer." I think this Section is ambiguous in the extreme. What effect, if any, it was intended to have on Section 41 I do not know, beyond the extent to which Mr. Grant admits it does affect the Section. But I cannot see my way to read into it the words suggested by the Solicitor-General or the meaning suggested by Mr. Stamp.

Therefore I think the Commissioners were right in their view, and that the cross-appeal fails. You will have to pay the costs of the cross-appeal, Mr. Tribe, and you will get the costs of the appeal, unless you wish to set off the one against the other.

Mr. Tribe.—The appeal and the cross-appeal will be both dismissed with costs?

Atkinson, J.—Yes, I hope you will go to the Court of Appeal, Mr. Stamp, and see what they have to say about it.

Mr. Stamp.—It is very much in the nature of a lottery, my Lord.

The Crown having appealed against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Greene, M.R., and Cohen and Asquith, L.JJ.) on 2nd and 3rd July, 1947, when judgment was reserved. On 31st July, 1947, judgment was given unanimously in favour of the Crown, with costs, reversing the decision of the Court below.

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. Frederick Grant, K.C., and Mr. L. C. Graham-Dixon for the Respondent.

JUDGMENT

Lord Greene, M.R.—I have had the advantage of reading the judgments prepared by my brethren, and I agree with them and do not wish to add anything.

Cohen, L.J.—It is now common ground between the parties (*a*) that the marriage settlement executed by the Respondent is a settlement within the meaning of Section 38 of the Finance Act, 1938; (*b*) that so much of the income of Dufferin as could have been apportioned to Established as trustee of the settlement under Section 21 of the Finance Act, 1922, for the relevant period if Dufferin had been incorporated in any part of the

(Cohen, L.J.)

United Kingdom is income arising from the settlement under the definition contained in Section 41 of the Act of 1938. The question that we have to decide is whether any part of the income of the remaining six companies, all of which were incorporated in Canada or Kenya, is included in that definition. To determine this question we must have regard to earlier legislative provisions dealing with the liability to tax on the income of companies under the control of a limited number of persons.

The start of this legislation is to be found in Section 21 of the Finance Act, 1922. Sub-section (1), so far as material, provides that: "Where it "appears to the Special Commissioners that any company to which this "section applies has not, within a reasonable time after the end of any year "or other period ending on any date subsequent to the fifth day of April, "nineteen hundred and twenty-two, for which accounts have been made "up, distributed to its members in such manner as to render the amount "distributed liable to be included in the statements to be made by the "members of the company of their total income for the purposes of super-"tax, a reasonable part of its actual income from all sources for the said "year or other period, the Commissioners may, by notice in writing to the "company, direct that for purposes of assessment to super-tax, the said "income of the company shall, for the year or other period specified in the "notice, be deemed to be the income of the members, and the amount "thereof shall be apportioned among the members".

It is to be noted (*a*) that the Sub-section deals only with actual income and does not include any notional income; (*b*) that the apportionment is solely for the purposes of Sur-tax, to which only individuals are liable. Sub-section (6), so far as material, is as follows: "This section shall apply "to any company which is under the control of not more than five persons "and which is not a subsidiary company or a company in which the public "are substantially interested. For the purpose of this subsection—A com-"pany shall be deemed to be a subsidiary company if, by reason of the "beneficial ownership of shares therein, the control of the company is in "the hands of a company not being a company to which the provisions "of this section apply, or of two or more companies none of which is a "company to which those provisions apply . . . The expression 'company' "means a company within the meaning of the Companies (Consolidation) "Act, 1908."

Having regard to these definitions it is clear that Section 21 would have applied to each of the six companies concerned had it been incorporated in any part of the United Kingdom.

It soon became plain that it was easy to avoid this Section by making use of a chain of companies since, if income of a company was apportioned under Section 21 to another company wherever incorporated, no tax would be payable on the amount so apportioned; the second company would not be liable to Sur-tax, and even if the second company were itself within Section 21, on an apportionment under that Section only the actual income of the second company could be apportioned, not any income notionally apportioned to the second company on the application of Section 21 to the first company.

To meet this difficulty Section 32 of the Finance Act, 1927, was passed. Sub-section (1) of that Section is in the following terms: "Where "a member of a company (in this section referred to as 'the first com-

(Cohen, L.J.)

" 'pany'), the income of which for any year or period has been deemed " to be the income of its members and has been the subject of an appor- " tionment (in this section referred to as 'the original apportionment') " under section twenty-one of the Finance Act, 1922, is itself a company " (in this section referred to as 'the second company') to which the pro- " visions of that section apply, the excess of the amount so apportioned to " the second company over the amount, if any, which has been received by " the second company out of the income as aforesaid of the first company " in such manner as would, in the case of an individual, render the amount " so received liable to be included in the statement of his income for the " purposes of super-tax, shall for the purposes of the said section be " deemed to be income of the members of the second company and shall " be apportioned among them in accordance with their respective interests " in that company, and the provisions of the said section shall, with any " necessary modifications, apply accordingly."

So far the Section dealt only with a chain containing two links. To meet the case of a chain with a larger number of links, Sub-section (4) provided: " Where a member of any such second company as aforesaid is " itself a company to which the said section twenty-one applies, the income " apportioned to it under the foregoing provisions of this section shall in " turn be deemed to be the income of its members and apportioned to " them, for purposes of assessment to super-tax, in accordance with their " respective interests, and so on successively where any member to whom " income of a company has been apportioned is itself a company to which " the said section applies, so that successive apportionments shall in like " manner be made until the entire amount of the income which was " apportioned under the provisions of this section among the members of " the second company has been apportioned to persons other than a " company to which the said section applies ".

The Legislature had thus covered completely the case of a chain of English companies, but no alteration was made in the definition of " com- " pany " and, accordingly, the chain could still be broken by the inclusion of a company incorporated outside the United Kingdom.

This was the state of the relevant legislation when the Finance Act of 1938 was passed. Section 41, Sub-section (4), of that Act, so far as material, was in the following terms: " For the purposes of this Part of " this Act—(*a*) the expression 'income arising under a settlement' includes "... (ii) where the amount of the income of any body corporate has been " apportioned under section twenty-one of the Finance Act, 1922, for any " year or period, or could have been so apportioned if the body corporate " were incorporated in any part of the United Kingdom, so much of the " income of the body corporate for that year or period as is equal to the " amount which has been or could have been so apportioned to the trustees " of or a beneficiary under the settlement ".

That Section, as I have said, plainly made the income of Dufferin taxable, since its income could have been apportioned under Section 21 of the Finance Act, 1922, and it would have been apportioned to Established who were the trustees of the settlement. But if it had been sought to tax the Respondent in respect of the income of, for example, Finance & Trusts, Ltd., the attempt would have been abortive. The income of Finance & Trusts would have been apportioned to Dufferin, but as Dufferin was not

(Cohen, L.J.)

a company incorporated in any part of the United Kingdom, it would have been impossible to sub-apportion under Section 32 of the Finance Act, 1927, that part of the income of Finance & Trusts which had been apportioned to Dufferin.

The law was, however, modified by Section 13 of the Finance Act, 1939. Sub-sections (3) and (4) of that Section are in the following terms: "(3) Subject to the last preceding subsection and to any other express "provision of this Act, any reference in any enactment to apportioning "income under or for the purposes of the provisions, or any specified "provisions, of the said section twenty-one or of the said First Schedule "shall be construed as a reference not only to apportioning by means of an "original apportionment but also to apportioning by means of an original "apportionment together with one or more sub-apportionments or series "of sub-apportionments, and in ascertaining under paragraph (*c*) of sub-"section (1) of section nineteen of the Finance Act, 1936, whether or not "income could be apportioned among not more than five persons, account "shall, in cases where an original apportionment and any sub-apportion-"ment are involved, be taken only of persons to whom income could be "finally apportioned as the result of the whole process of original apportion-"ment and sub-apportionment. (4) In this section the expression 'sub-"'apportionment' means such an apportionment of income as is provided "for by section thirty-two of the Finance Act, 1927 (which applies the said "section twenty-one to inter-connected companies) and the expression "'original apportionment' has the same meaning as in the said section "thirty-two."

The Crown contends that the effect of that Section is to render the Respondent liable in respect of the income of all six companies. This contention was rejected by the Commissioners and their decision was affirmed by Atkinson, J.

Section 13 of the Finance Act, 1939, is a good example of bad referential legislation. Applying that Section literally to Section 41 of the Finance Act, 1938, Section 41, Sub-section (4) (*a*) (ii), would read as follows: "Where the amount of the income of any body corporate has "been apportioned by means of an original apportionment under section "twenty-one of the Finance Act, 1922, for any year or period, or by "means of such an original apportionment together with one or more such "sub-apportionments or series of sub-apportionments as is provided for by "section thirty-two of the Finance Act, 1927, or could have been so "apportioned if the body corporate were incorporated in any part of the "United Kingdom, so much of the income of the body corporate for that "year or period as is equal to the amount which has been or could have "been so apportioned to the trustees of or a beneficiary under the settle-"ment".

The question for our decision turns on the meaning to be attributed to the expression "the body corporate" in the enlarged definition of "income "arising under a settlement" set out above. Mr. Grant, in his lucid argument for the Respondent, says that the expression must have the same meaning throughout. To make his point clear he assumed that the income to which it was sought to apply the definition was the income of Finance & Trusts, Ltd. That being so, he said, and I agree, that the expression "body corporate" must mean Finance & Trusts where that

(Cohen, L.J.)

expression secondly appears. So he said it must mean Finance & Trusts where it first appears. That being so, the definition even as enlarged by Section 13 of the Finance Act, 1939, did not render the income of Finance & Trusts taxable in the name of the Respondent. Section 13 of the Act of 1939 did not provide for any alteration in the meaning of the expression "the body corporate", and there was no need to enlarge its meaning. Even on his construction, said Mr. Grant, the Section would not necessarily be abortive since, had Dufferin been incorporated in the United Kingdom, sub-apportionment would have been possible under Section 32 of the Finance Act, 1927. The Solicitor-General and Mr. Stamp, however, said, and in our opinion rightly, that this argument gave too limited an effect to Section 13, Sub-sections (3) and (4), of the Finance Act, 1939.

These Sub-sections bring in sub-apportionments, and this change, in our view, necessarily involves giving an enlarged meaning to the expression "the body corporate", since applied to sub-apportionments the expression would otherwise be inept. The enlarged meaning which, in my view, is necessary, is to substitute for the words "the body corporate" the words "the relevant body corporate". Taking the illustration adopted by Mr. Grant, where the expression first occurs, the relevant body corporate where dealing with original apportionment is Finance & Trusts, but where dealing with sub-apportionments it is Dufferin. Where the expression secondly occurs it is Finance & Trusts, since it is only the income of that company to which the notional operation contemplated by the definition is being applied.

The learned Judge rejected the argument which commends itself to us because, he said, there was plain language extending the effect of Section 19 of the Finance Act, 1936, and no express words suggesting an intention to enlarge Section 41, Sub-section (4) (*a*) (ii). I do not think this argument is well founded. The express reference to Section 19 of the Finance Act, 1936, is not made for the purpose of extending the effect of that Section. The extension was effected by the earlier part of Section 13, Sub-section (3). The express reference is made for the purpose of limiting and defining the effect of that extension.

The learned Judge also relied on an aphorism of Rowlatt, J., for the conclusion which he reached. That aphorism is as follows: "In Revenue "matters there is no room for intendment. Ambiguity must tell in favour "of the taxpayer." I do not consider it necessary to consider how far that aphorism can be carried. Difficulty of construction cannot relieve the Court of its duty to construe and, in my view, upon the true construction of the Sections in question, the expression "body corporate" now bears the enlarged meaning for which the Crown contends.

For these reasons, in my opinion, the appeal must be allowed.

Asquith, L.J.—The short point involved in this appeal is what meaning should be given to the words "the body corporate" in the fourth line of Section 41, Sub-section (4) (*a*) (ii), of the Finance Act, 1938, in the light of Section 13, Sub-section (3), of the Finance Act, 1939. Unluckily the short point is not easy to disengage from the congeries of baffling and ill-drafted provisions in which it lies embedded. As Lord Macnaghten observed in the case of *Van Grutten* v. *Foxwell*, [1897] A.C. 658, at page 671, it is easy to put a case in a nutshell, but difficult to keep it there. So here, it

(Asquith, L.J.)

is necessary to review the provisions above referred to in order to see how the issue narrows down to the short point indicated.

Between 1922 and 1939 a succession of Finance Acts struck at devices for avoiding Sur-tax. The earliest and simplest device was for the taxpayer to transfer his assets to what is popularly called a "one-man" company, and for such company to retain its profits undistributed. Section 21 of the 1922 Finance Act (while defining "one-man" companies in terms quoted below) struck at this practice by providing that, if such a company distributed an unreasonably small proportion of its income, a "direction" might be given by the Special Commissioners as the result of which the whole of the company's actual income would be deemed to be that of its members, and would have to be apportioned to them by the Special Commissioners in proportion to their holdings. The members would, accordingly, become liable to Sur-tax on the amounts apportioned to them respectively.

The application of this provision was limited by Sub-section (6) of Section 21 to companies which were (*a*) registered in the United Kingdom, and (*b*) under the control of not more than five persons; not being subsidiaries or companies in which the public was substantially interested. I will call these for short "Section 21 companies."

What may be called device No. 2 sought to circumvent the 1922 Act by employing at least two companies, A and B. The taxpayer's assets were vested in company A, which was a one-man (or "one-member") company, controlled by company B, which was a one-man company controlled by the taxpayer. Assuming for the sake of simplicity one hundred per cent. control, the effect of Section 21 on this arrangement was that if company A distributed no profits or made an inadequate distribution the whole of its actual income, pursuant to a "direction" within Section 21, was deemed to be the income of company B, and there the matter rested, for company B, being a limited company, was not liable to Sur-tax.

Section 32, Sub-section (1), of the Act of 1927 was aimed at this artifice. Like the 1922 provision it was limited to Section 21 companies. It provided that where a company's income was under the 1922 Act deemed to be the income of its members and was apportioned to a member which member was also a company, the income so apportioned should be "sub-"apportioned" (to borrow an expression from a later Act), that is to say, it should be deemed to be the income and should be apportioned among the members of such last-named company in proportion to their holdings therein.

Sub-section (4) of the 1927 Act enables this process to be repeated as many times as there are companies in the chain. If company A's income is sub-apportioned to a member of company B which member is itself a company, namely, company C, it is further sub-apportioned to the members of company C, and so on until its progress is arrested. Its progress may be arrested either because a member to whom it is sub-apportioned is a natural person, who thereupon becomes liable to Sur-tax on the part sub-apportioned to him, or because a member to whom it is sub-apportioned, though an artificial person, is a company to which the Acts of 1922 and 1927 do not apply, for example, a non "one-man" company, or a foreign company, or a company which is both.

(Asquith, L.J.)

Device No. 3 took advantage of this limitation in the scope of previous Acts to elude the provisions just referred to. The taxpayer's assets could after all be vested in a foreign "one-man" company. Such a company, not being a Section 21 company, could accumulate profits and retain them undistributed without becoming liable to any of the existing apportionment provisions. Indeed, as has been seen, if a chain of companies were employed, the interposition of a foreign company at any point in the chain would halt the process of apportionment at that point, and intercept the notional passage of the income to the pocket of the taxpayer.

Section 41 of the Finance Act, 1938, is designed to frustrate such a proceeding. By an earlier Section of the same Act, Section 38, Sub-section (3), the material provisions are for some reason limited in their application to a "settlor" who retains an interest in a "settlement" as defined in the Act, whereas previous Acts had applied to the "one-man" at the end of a string of one-man companies, whether a settlor or not.

Section 38, Sub-section (3), reads as follows: "If and so long as the "settlor has an interest in any income arising under or property comprised "in a settlement, any income so arising during the life of the settlor in any "year of assessment shall, to the extent to which it is not distributed, be "treated for all the purposes of the Income Tax Acts as the income of the "settlor for that year, and not as the income of any other person".

Section 41 (4), so far as material, reads as follows: "For the purposes "of this Part of this Act—(*a*) the expression 'income arising under a "'settlement' includes . . . (ii) where the amount of the income of any "body corporate has been apportioned under section twenty-one of the "Finance Act, 1922, for any year or period, or could have been so "apportioned if the body corporate were incorporated in any part of the "United Kingdom, so much of the income of the body corporate for that "year or period as is equal to the amount which has been or could have "been so apportioned to the trustees of or a beneficiary under the settle-"ment".

This last provision stopped the loophole just referred to, in cases where the trustee or beneficiary was a member of a foreign company, by extending the apportionment provisions of the 1922 Act to such a case. As the result of this the undistributed income, for instance, of the Dufferin Company in which the Established Company, the trustees, were the predominant shareholders, was deemed to be included in "income arising from the "settlement", and was, therefore, to be treated under Section 38, Sub-section (3), "as the income of the settlor", Mr. Scott-Ellis.

But Section 41, Sub-section (4) (*a*) (ii), speaks only of "apportion-"ment", not of the process dealt with in Section 32 of the Finance Act, 1927, and christened later "sub-apportionment". There is therefore nothing in this Section to prevent device No. 4—recourse to two or more or a whole string of foreign companies, as illustrated by the present case.

There can be no doubt that Section 13, Sub-section (3), of the Finance Act, 1939, was designed so to affect the operation of Section 41 as to defeat device No. 4. The question is whether it has succeeded in doing so. Section 13, Sub-section (3), of the 1939 Act, so far as immediately material, reads as follows: "Subject to the last preceding subsection and to any "other express provision of this Act, any reference in any enactment to "apportioning income under or for the purposes of the provisions, or any

(Asquith, L.J.)

"specified provisions, of the said section twenty-one or of the said First "Schedule shall be construed as a reference not only to apportioning by "means of an original apportionment but also to apportioning by means "of an original apportionment together with one or more sub-apportion-"ments or series of sub-apportionments".

Now Section 41, Sub-section (4) (*a*) (ii), of the 1938 Act is an "enact-"ment" containing "a reference to apportioning". How would it be read if the extended meaning attributed to the word "apportioning" by the 1939 Act is read bodily into it? For this purpose it may be well also to fill in the blanks of Section 41 where it refers to "any body corporate" by naming one of the companies involved in this case, for example, the Finance & Trusts Company, the company immediately above the Dufferin Company in the chain, the trustees being shareholders in Dufferin. With the minimum alteration prescribed by Section 13 of the 1939 Act, Section 41, Sub-section (4) (*a*) (ii), would then read as follows: "'Income arising "'under a settlement' includes . . . (ii) where the amount of the income of "the Finance & Trusts Company . . . could have been apportioned under "section twenty-one of the 1922 Act ('so' apportioned) (or apportioned "by means of an original apportionment together with one or more sub-"apportionments), if Finance & Trusts Company were incorporated in any "part of the United Kingdom, so much of the income of the Finance & "Trusts Company as is equal to the amount which . . . could have been so "apportioned (or apportioned by means of an original apportionment with "one or more sub-apportionments) to the trustees of or a beneficiary under "the settlement".

Now, read in this way, the Section fails to frustrate device No. 4 because even if the Finance & Trusts Company had been a United Kingdom company, (as the Section deems it to be) its income could not have been sub-apportioned to the trustees unless Dufferin also were or were deemed to be a United Kingdom company. The only provisions enabling sub-apportionment are those of the 1927 Act. These provisions only apply when at least two companies are involved, one being a member of the other, and both of them (or if more than two, all of them) must be United Kingdom companies.

In order for Section 13, Sub-section (3), of the 1939 Act to enable Section 41, Sub-section (4) (*a*) (ii), to defeat device No. 4, it would be necessary to read the words "the body corporate" in line 4 of the latter not as limited to the body corporate whose income is involved—the "body corporate" in line 1—but as including any other body or bodies corporate in whose members a sub-apportionment would notionally vest that income in part or in whole, in this case the Dufferin Company.

Mr. Stamp argued that this was precisely how the Court ought to read the words. Section 13, Sub-section (3), of the 1939 Act would be entirely inoperative in relation to Section 41, Sub-section (4) (*a*) (ii), of the 1938 Act, unless "the body corporate" in line 4 were read as "each body "corporate" or "any appropriate or relevant body corporate" or "any "bodies corporate involved"; for this last variant he invoked the provisions in the Interpretation Act to the effect that the singular includes the plural.

More generally he contended that if statute "A" provides that a term used in a previous statute "B" shall receive an extended meaning, and

(Asquith, L.J.)

such term cannot receive such extended meaning without minor consequential changes in its context in statute B, statute A implies that these changes should be made, and made they should be rather than that the provision in statute A should be wholly stultified.

Mr. Grant for the Respondent, the taxpayer, contended *inter alia* that this amounted to rewriting Section 41, that the argument involves reading "body corporate" in line 1 of (ii) in one sense, as meaning the Finance & Trusts Company; reading "body corporate" in line 4 in a different sense, as meaning the Finance & Trusts Company plus any other company or companies involved in a sub-apportionment (in this case the Dufferin Company), and reverting, when body corporate is used in line 6, to the sense attributed to it in line 1. He argued that if reading the expression in all these passages in the sense which it has in line 1 stultifies Section 13, Sub-section (3), of the 1939 Act, then so much the worse for that Sub-section.

I am of opinion on this issue the Crown is entitled to succeed. No doubt Section 13, Sub-section (3), of the 1939 Act is inartistically drafted. But its intention is unmistakable, and I do not think that to read "the "body corporate" in line 4 of sub-paragraph (ii) as by implication amended to "each body corporate" or "the bodies corporate" is to do unpardonable violence to that sub-paragraph, or to rewrite it in the sense in which rewriting is prohibited.

One other contention around which much argument revolved, and which, if sound, supported the Crown's case, should be noticed. It was suggested during the argument that leaving the 1939 Act entirely aside, the Respondent could be caught by the unassisted operation of Section 41, Sub-section (4) (*a*) (ii), if "income" in the first line is read as including both actual and notional income, and if the Section is applied to each company in turn, taking into account when it is applied to a company lower down in the chain—say Dufferin—the effect of its having been applied to a company higher up in the chain.

Apply it first to the Finance & Trusts Company. The effect of doing this is, under the 1922 Act, to deem the undistributed income of the Finance & Trusts Company to be the income of the Dufferin Company. The Dufferin Company's income thus includes (*a*) that company's actual income, and (*b*) its notional income (actually the undistributed income of the Finance & Trusts Company). Dufferin distributes no part of (*a*) or (*b*). Then apply the Sub-section again, this time to the Dufferin Company, in respect of that composite income (*a*) plus (*b*). The result is that it is deemed to be that of the trustee and indirectly (by virtue of Section 38, Sub-section (3)) of the settlor.

I do not think this argument can be sustained. Mr. Grant is I think right in contending that the income of a company, upon failure to distribute which adequately the 1922 Act provides that certain consequences shall ensue, is the "actual" income of that company (the word "actual" is used in Section 21) and includes no notional or imputed element. If the case were otherwise the 1927 Act would never have been needed. In the case of United Kingdom companies, such as alone were contemplated by the 1922 Act, the intended result could have been reached by the operation of Section 21 of that Act, without more.

On its main contention, however, the Crown succeeds, and the appeal must be allowed.

Mr. Hills.—Then, my Lord, I ask that the appeal be allowed with costs; that the decision of the Special Commissioners on this point may be reversed, and that the assessment, unless there is an agreement as to figures (as there probably will be), be remitted to the Special Commissioners to settle the figure.

Lord Greene, M.R.—Yes.

Mr. Graham-Dixon.—May I ask for leave to go to the House of Lords?

Lord Greene, M.R.—What do you say about that, Mr. Hills?

Mr. Hills.—Well, my Lords, your Lordships are the final Court of Appeal in tax cases, subject to your giving leave, but I must leave the matter in your Lordships' hands.

Lord Greene, M.R.—I do not think you can say that the drafting of these Sections is a model of clarity.

Mr. Hills.—No, my Lord, it is a little "portmanteau" in some of its phraseology.

Lord Greene, M.R.—Portmanteau! That is not the word I should have used. You may have leave, Mr. Graham-Dixon.

Mr. Graham-Dixon.—If your Lordship pleases.

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Lords Porter, Uthwatt, du Parcq, Normand and Morton of Henryton) on 12th and 13th July, 1948, when judgment was reserved. On 29th October, 1948, judgment was given unanimously against the Crown, with costs, reversing the decision of the Court below.

Mr. Frederick Grant, K.C., and Mr. L. C. Graham-Dixon appeared as Counsel for the Appellant, and the Solicitor-General (Sir Frank Soskice, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

Consideration of report from the Appellate Committee

Lord Porter.—My Lords, I beg to move that the reports from the Appellate Committee be now considered.

Question put :

That the reports from the Appellate Committee be now considered.

The Contents have it.

Lord Porter.—My Lords, in this case I have had the advantage of reading beforehand the speeches of my noble and learned friends who will succeed me. I find myself in agreement with their reasoning and the result, and have not thought it necessary to provide a speech of my own.

Lord Uthwatt (read by Lord Porter).—My Lords, under a settlement dated 20th August, 1934, made by the Appellant, Established Investments, Ltd., as the trustees of the settlement, held 15,000 shares (part of a total issue of 25,000 shares) in Dufferin Investment Co., Ltd. (hereinafter called "Dufferin") upon trusts under which at all material times the whole of the income arising from such shares was payable to the Appellant. Dufferin is a company incorporated in Canada, and six other companies which were

(Lord Uthwatt.)

incorporated either in Canada or in Kenya come into the picture. All the share capital of each of these six companies was held beneficially either by others of the same companies or by Dufferin. All the companies are under the control of the Appellant.

In these circumstances a question arose whether, upon the true construction of Section 41(4)(*a*)(ii) of the Finance Act, 1938, when read in conjunction with Section 13(3) and (4) of the Finance Act, 1939, income of the six companies could be apportioned and sub-apportioned thereunder so that ultimately a due proportion was sub-apportioned to the trustees as holders of the shares in Dufferin and became income "arising under the "settlement".

Additional assessments to Sur-tax were made on the footing that such income could be so dealt with. The Court of Appeal, differing from the view taken by the Special Commissioners and Atkinson, J., held that the additional assessments were in order.

Section 41(4)(*a*)(ii) of the Finance Act, 1938, and Section 13(3) and (4) of the Finance Act, 1939, so far as relevant are as follows :—

Finance Act, 1938, Section 41 : "(4) For the purposes of this Part of "this Act — (*a*) the expression 'income arising under a settlement' includes ". . . (ii) where the amount of the income of any body corporate has been "apportioned under section twenty-one of the Finance Act, 1922, for any "year or period, or could have been so apportioned if the body corporate "were incorporated in any part of the United Kingdom, so much of the "income of the body corporate for that year or period as is equal to the "amount which has been or could have been so apportioned to the trustees "of or a beneficiary under the settlement . . . "

Finance Act, 1939, Section 13: "(3) Subject to the last preceding sub-"section and to any other express provision of this Act, any reference in "any enactment to apportioning income under or for the purposes of the "provisions, or any specified provisions, of the said section twenty-one or "of the said First Schedule shall be construed as a reference not only to "apportioning by means of an original apportionment but also to apportion-"ing by means of an original apportionment together with one or more "sub-apportionments or series of sub-apportionments . . . (4) In this sec-"tion the expression 'sub-apportionment' means such an apportionment of "income as is provided for by section thirty-two of the Finance Act, 1927 "(which applies the said section twenty-one to inter-connected companies) "and the expression 'original apportionment' has the same meaning as in "the said section thirty-two."

The effect of the amendment on the wording of the relevant provision of the Act of 1938 was conveniently and accurately stated by Cohen, L.J., by rewriting that provision as follows: "Where the amount "of the income of any body corporate has been apportioned by means "of an original apportionment under section twenty-one of the Finance "Act, 1922, for any year or period, or by means of such an original "apportionment together with one or more such sub-apportionments or "series of sub-apportionments as is provided for by section thirty-two "of the Finance Act, 1927, or could have been so apportioned if the body "corporate were incorporated in any part of the United Kingdom, so much "of the income of the body corporate for that year or period as is equal

(Lord Uthwatt.)

" to the amount which has been or could have been so apportioned to the " trustees of or a beneficiary under the settlement "(1).

Before dealing with the Section it is desirable to recall the principles on which Section 21 of the Finance Act, 1922, and Section 32 of the Finance Act, 1927, proceed. I will refer to bodies corporate incorporated in the United Kingdom as British companies, and to bodies corporate incorporated elsewhere as foreign companies.

Under the Act of 1922 the actual income of British companies which are under the control of not more than five persons and which are neither subsidiary companies nor companies in which the public are substantially interested (I will call them controlled British companies) is alone capable of an original apportionment.

Under the Act of 1927 it is that income when apportioned (less such part of it as has been distributed in a particular way) which is sub-apportionable, but sub-apportionment may be made only as respects income apportioned or sub-apportioned to a controlled British company. Income apportioned or sub-apportioned to a foreign company, in whosesoever hands the control of that foreign company may be vested, is not sub-apportionable. A foreign company finds a place in the process, but only as a body to whom income may be apportioned or sub-apportioned.

At no stage in the process is the income attributed on an apportionment or sub-apportionment to a controlled British company mixed up with that company's own income. Where an apportionment is directed to be made as respects the actual income of that company a new departure affecting only that income is made.

It is outside one's province to speculate why foreign companies were excluded from the class of bodies corporate whose actual income might be apportioned, or why income of a controlled British company attributed to a foreign company on an apportionment or sub-apportionment was excluded from sub-apportionment wherever control of that foreign company might lie. It is, however, pertinent to observe that there is no necessary or logical connection between the two exclusions. If income of a controlled British company attributed on any apportionment to a foreign company had been made sub-apportionable, the sanctity accorded to the foreign company's own income would not be affected, nor would the foreign company, under the provisions relating to collection, be liable to be assessed if income so sub-apportioned reached the hands of a person liable to Sur-tax. The facts that emerge are that, as a means of tracing the income of a controlled British company down to individuals through controlled concerns, the scheme of sub-apportionment is obviously defective, and that this defect is not dictated by or due to the circumstance that only the income of controlled British companies can be the subject of an original apportionment. The Legislature for good or bad reason has chosen that the flow of apportioned income along any particular channel is to be stopped by the appearance of a foreign corporate body in that channel.

As a result of the way in which the relevant Sections are drafted. the extension of the definition of the expression " company " so as to include a foreign company would not only make its actual income liable to appor-

(1) Page 358 *ante*.

(Lord Uthwatt.)

tionment but would also render actual income of any body corporate apportioned or sub-apportioned to a foreign company sub-apportionable. But if a provision is made which merely treats as subject to apportionment and sub-apportionment the actual income of a foreign company, and nothing else is done, the machinery of sub-apportionment remains unaffected and will work in exactly the same way as before, and, in particular, will suffer from exactly the same lack of completeness.

Turning now to Section 41 of the Act of 1938, it was common ground that as unamended it applied only to income which resulted from an original apportionment. The contention of the Appellant was to the effect that the amendment made by the Act of 1939 was merely to bring into play the ordinary machinery of sub-apportionment both to income apportioned under the first limb of the Section and to income treated as apportionable under the second limb. Any such income duly sub-apportioned to trustees or a beneficiary under a settlement would thereby become income arising under that settlement. In the particular case, as Dufferin was a foreign company no income apportioned to it would on this basis be sub-apportionable.

The contention of the Respondents was to the general effect that, in the circumstances, Section 41 of the Act of 1938, as amended, upon its true construction required it to be assumed that, for the purposes of sub-apportionment, any foreign company to which income was apportioned or sub-apportioned was incorporated in some part of the United Kingdom. The machinery of sub-apportionment was altered. Unless the Section bore this construction, income apportioned or sub-apportioned to a foreign company could not become " income arising under a settlement ". The Section, as amended, was in their submission patient of a construction which would give effect to their contention, if indeed its terms did not demand it. All that was needed was to read the first reference in Section 41 to " the body " corporate " as a reference to " the relevant bodies corporate " or as a reference to " the relevant body corporate ".

The Respondents were concerned to establish their proposition only in the case where a hypothetical apportionment was made under the second limb of Section 41(4)(*a*)(ii). It was left in doubt whether the assumption for which they contended was also to be made where an actual apportionment and sub-apportionment had been made as envisaged by the first limb of the Section. For the purpose of disposing of this case it is not, however, necessary to consider the exact ambit of the Respondents' contention.

The Court of Appeal accepted the Respondents' contention. With all respect to the Court of Appeal I am unable to see that the Section, as amended, is patient of the construction sought to be placed upon it by the Respondents. In my opinion the Section, as amended, is unambiguous and its proper construction clear. In its original form the only operation to be taken into account was an original apportionment; and any such original apportionment might be made as respects income of a foreign company as well as income of a British company. In the amended form the results not only of the original apportionment but of every possible sub-apportionment that can flow from an original apportionment are to be taken into account. But otherwise no attempt has been made to alter

(Lord Uthwatt.)

any word contained in the Section, and no attempt has been made to alter the process of sub-apportionment. The machinery of sub-apportionment is brought in *sans phrase*. Read without a gloss, the Section appears to me to be precise in expression.

The only bodies corporate referred to in the wording of the Section, as amended, are those whose income has been actually apportioned with or without sub-apportionment, or whose income on a certain assumption as to place of incorporation could have been apportioned with or without sub-apportionment. In the process of apportionment and sub-apportionment British companies and foreign companies may or may not appear as bodies to whom income of the original body corporate is attributed. I fail to see any line of reasoning by which references in a Section to bodies whose income is apportionable can be expanded so as to embrace bodies to whom that income is apportioned.

Taking this view of the Section it is not necessary to examine in detail the particular gloss suggested by the Respondents. I would merely observe that "the relevant bodies corporate" would as a matter of language still appear only as bodies in respect of whose income an apportionment, followed maybe by a sub-apportionment, could on a certain hypothesis be made, and that the possibility of making such an apportionment is in no way dependent on any matter affecting the status of the recipients under it.

There is no doubt that, under the Appellant's contention, the amendment made by the Act of 1939 may well add to the income arising under the settlement. Under the first limb, income of a controlled British company apportioned to another controlled British company and then sub-apportioned to the trustees of a settlement or a beneficiary under the settlement, would for the first time become income arising under the settlement. Exactly the same result emerges where income of a foreign company is hypothetically apportioned under the second limb to a controlled British company. It cannot therefore be said that the amendment is futile, but I must not be taken as suggesting that futility is a reason for the Courts, under the guise of construing an enactment, to depart from the plain meaning of unambiguous language appearing in it.

The case for the Respondents appears to me to rest merely on the indisputable fact that, on the Appellant's reading of the Section, income apportioned or sub-apportioned to a foreign company can never in any circumstances become income arising under a settlement. With all respect to the Court of Appeal I think they have attributed to this fact consequences which sound principles of construction deny to it.

Cohen, L.J., thought that bringing in sub-apportionments necessarily involved giving an enlarged meaning to the expression "body corporate", since applied to sub-apportionments the expression would otherwise be inept. The only possible ineptitude is failure to bring within sub-apportionable income any income apportioned or sub-apportioned to a foreign body corporate. That may or may not be a *casus omissus*, but I am unable to see any expression of an intention that such income shall be sub-apportionable.

Asquith, L.J., thought Section 13(3) of the 1939 Act inartistically drafted but its intention unmistakable. With all respect to the Lord Justice I cannot agree with his criticism of the drafting of Section 13(3). An

(Lord Uthwatt.)

exact technical description is given in Section 13(3). No difficulty arises by reason of the application of that Section to Section 41 of the 1938 Act unless an assumption is made that the intention was to bring in the omitted income. I differ, too, from him as to the intention. To my mind the only intention expressed is to bring in all possible sub-apportionments for what they are worth.

I agree with the Court of Appeal to the extent that the introduction of new words into an existing Section may alter the meaning of words already there. But no such alteration can result unless (1) the requirements of the English language demand it, or (2) those requirements permit it and the sense of the Section demands it. The alteration suggested by the Court of Appeal does not, in my view, fulfil either condition. I do not further criticise the gloss made by the Court of Appeal, for the real objection is not to the gloss selected to be made but to the making of a gloss at all.

My Lords, with all respect to the Court of Appeal, it appears to me that, while recognising the well settled principle that a statute must be construed according to the intention expressed in the statute itself, they have failed to apply it. The principle was put thus by Lord Watson in *Salomon* v. *Salomon & Co., Ltd.*, [1897] A.C. 22, at page 38: "'Intention "'of the Legislature' is a common but very slippery phrase, which, popu- "larly understood, may signify anything from intention embodied in positive "enactment to speculative opinion as to what the Legislature probably "would have meant, although there has been an omission to enact it. In "a Court of Law or Equity, what the Legislature intended to be done or "not to be done can only be legitimately ascertained from that which "it has chosen to enact, either in express words or by reasonable and "necessary implication." It is an application of this principle that a statute may not be extended so as to meet a *casus omissus*. As was said in *Crawford* v. *Spooner* (1846), 6 Moo. P.C.C. 1, at page 9: "We cannot "aid the Legislature's defective phrasing of the Act, we cannot add, and "mend, and, by construction, make up deficiencies which are left there."

In the present case I cannot but think that the absence of any stateable reason for not including foreign companies as part of the machinery for tracing actual income of a body corporate in any circumstances has led the Court of Appeal to read in the Act of 1939 words which are not there. In my opinion, therefore, no gloss falls to be put on the Section and the Respondents' contention is wrong.

A second contention was preferred by the Respondents in the alternative. This contention was to the effect that where actual income from all sources of company No. 1 is attributed to company No. 2 as the result of an apportionment, that attributed income forms part of the "actual "income from all sources" of company No. 2 within the meaning of Section 21 of the Finance Act, 1922. For this contention reliance was placed on the fact that the Act in terms provided that the attributed income is to be deemed to be the income of company No. 2, and that the phrase "actual "income" elsewhere appears in the Income Tax Acts as descriptive of income for tax purposes. The contention is somewhat surprising. Atkinson, J., passed it over in silence and the Court of Appeal rejected it, and, in my opinion, rightly rejected it.

(Lord Uthwatt.)

The phrase "actual income from all sources" appears but once in Section 21. It there appears in this sentence (I omit the immaterial words): "Where it appears to the Special Commissioners that any company . . . "has not . . . distributed . . . a reasonable part of its actual income from "all sources . . . the Commissioners may . . . direct that . . . the said "income . . . shall . . . be deemed to be the income of the members, and "the amount thereof shall be apportioned among the members". It is elementary that no part of the "deemed income" resulting from the application of the Section in fact enters into the coffers of a company to which it is attributed.

It is worth while stating the consequences that emerge if the Respondents' contention be correct. First, the result would be ridiculous—a pertinent matter if the relevant phrase is ambiguous. The income deemed to be the income of the members of company No. 1 is the whole of the actual income of that company, no deduction being made of sums in fact distributed thereout to its members. The actual income of company No. 2 to be apportioned among its members would therefore include (*a*) all sums received by way of dividend out of the actual income of company No. 1, and (*b*) its due proportion of the whole of such actual income. Sur-tax would be payable by members of company No. 2 in respect of a sum they never could have got.

Secondly, as Asquith, L.J., pointed out, if this contention be correct, no useful purpose to the Revenue was served by the enactment of Section 32 of the Finance Act, 1927. The application of Section 21 of the Act of 1922 to companies entering into a chain would do all that was necessary. That again is a relevant consideration if the words "actual income" are ambiguous.

Thirdly, the direction to the Commissioners is to decide at the outset whether a reasonable part of the actual income of a particular company has been distributed. It would be more than curious if in that task they were to direct their minds to an arithmetical total composed of income which is capable of distribution and of "deemed income" (such deemed income being merely a figure—not even a book entry) which is incapable of distribution. In a case where company No. 2 owned nothing but shares in company No. 1, the arithmetical total to be considered might well be only "deemed income."

My Lords, for myself I am content to take the view that, in light of the context, the words "actual income" can mean only income which is in some real sense capable of distribution. Apart from that context, indeed, the phrase "actual income" is hardly apt to include fictional income; and non-existent income composed of amounts deemed to be income is fictional income.

I would allow the appeal.

Lord du Parcq.—My Lords, I agree that this appeal should be allowed, for the reasons given in the opinion which has just been read by my noble and learned friend on the Woolsack. I also desire to express my agreement with the opinions about to be read, which I have had the pleasure of reading.

Lord Normand.—My Lords, I agree with the speeches delivered by my noble and learned friends. I have had the advantage of reading in

(Lord Normand.)

print the speech which my noble and learned friend Lord Morton of Henryton is about to deliver, and with it also I agree. But since I have had the misfortune to differ from the Court of Appeal, I shall state as succinctly as I can the broad ground on which I think that the Crown's case most clearly fails.

Section 13(3) of the Finance Act, 1939, so far as material to the appeal, is clear in its terms. It requires that any reference to apportionment for the purposes of the provisions of Section 21 or of the First Schedule of the Finance Act, 1922, shall be construed as a reference not only to apportioning by means of an original apportionment but also to apportioning by means of an original apportionment together with one or more sub-apportionments. It requires no more than that, and that requirement has been exactly applied to Section 41 (4) (*a*) (ii) of the Finance Act, 1938, by Cohen, L.J., in his judgment; the effect is that Section 41 (4) (*a*) (ii) reads as follows: "Where the amount of the income of any body corporate has been apportioned by means of an original apportionment under section twenty-one of the Finance Act, 1922, for any year or period, or by means of such an original apportionment together with one or more such sub-apportionments or series of sub-apportionments as is provided for by section thirty-two of the Finance Act, 1927, or could have been so apportioned if the body corporate were incorporated in any part of the United Kingdom, so much of the income of the body corporate for that year or period as is equal to the amount which has been or could have been so apportioned to the trustees of or a beneficiary under the settlement"(1).

This amended version of Section 41 (4) (*a*) (ii) is not abortive or inept, for it is common ground that this amendment widens the scope of both branches of the original enactment, though not sufficiently to enable the Crown to succeed. The Counsel who represented the Crown therefore argued that logically it was necessary to add to this amended version words which are not to be found in Section 13 (3) of the Finance Act of 1939, and without which, according to the argument, the intention of Section 13 (3) would be defeated. They presented the argument in a variety of forms, all of them ingenious and all, in my opinion, fallacious. For they arbitrarily assumed an intention, not discoverable from the terms of Section 13 (3) of the Finance Act, 1939, to deal with a chain into which foreign companies enter on precisely the same footing as a chain of companies incorporated in the United Kingdom, and they branded as illogical any construction which failed to give effect to this assumed intention. Liberties like these are not allowable in construing any statute, and they are peculiarly out of place in construing a taxing Act.

Lord Morton of Henryton.—My Lords, for the sake of brevity I shall refer to Dufferin Investment Co., Ltd. and Finance & Trusts, Ltd. respectively as "Dufferin" and "Finance & Trusts."

It is now admitted by the Appellant that 15/25ths of the income of Dufferin must be computed as income arising under the settlement of 20th August, 1934, and it is common ground between the parties that, for the purpose of this appeal, any reasoning which applies to the case of Finance & Trusts will also apply to the cases of the "other foreign companies" mentioned in paragraph 15 of the Stated Case.

(1) Page 358 *ante*.

(Lord Morton of Henryton.)

It is, therefore, only necessary to consider what is the effect of Section 41 (4) (*a*) (ii) of the Finance Act, 1938, coupled with Section 13 (3) of the Finance Act, 1939, in regard to the income of Finance & Trusts. Cohen, L.J., after observing that the latter Section was a good example of bad referential legislation, continued: "Applying that Section literally to Section "41 of the Finance Act, 1938, Section 41, Sub-section (4) (*a*) (ii), would "read as follows: 'Where the amount of the income of any body cor-"'porate has been apportioned by means of an original apportionment "'under section twenty-one of the Finance Act, 1922, for any year or "'period, or by means of such an original apportionment together with "'one or more such sub-apportionments or series of sub-apportionments "'as is provided for by section thirty-two of the Finance Act, 1927, or "'could have been so apportioned if the body corporate were incorporated "'in any part of the United Kingdom, so much of the income of the body "'corporate for that year or period as is equal to the amount which has "'been or could have been so apportioned to the trustees of or a benefi-"'ciary under the settlement'.[1]"

I entirely agree with the passage just quoted and, with all respect to those who have thought otherwise, I feel no doubt that the phrase "the "body corporate" bears the same meaning on the two occasions on which it occurs, and that on each occasion the phrase refers back to the body corporate mentioned in the first line of the Sub-section.

This was undoubtedly so in Section 41 (4) (*a*) (ii) before Section 13 (3) of the Act of 1939 was passed. Counsel for the Crown endeavoured to persuade your Lordships that the phrase "the body corporate" where it first appears does not now refer back to the body corporate mentioned in the first line of the Sub-section, but has some such meaning as "any appro-"priate or relevant body corporate." They are constrained to admit, however, that the phrase "the body corporate" where it last occurs does refer back to the body corporate mentioned in the first line of the Sub-section. My Lords, I can find no good reason why this phrase should now bear two different meanings when it occurs twice, in rapid succession, in one and the same Sub-section. There is nothing in Section 13(3) of the Act of 1939 which justifies this wholly artificial construction of Section 41 (4) (*a*) (ii) of the Act of 1938, and I can find no other reason which compels your Lordships to depart so far from the ordinary and well-founded rules of construction. As has been pointed out, even if the Crown's contention is rejected, Section 13 (3) of the Act of 1939 substantially widens the scope of Section 41 (4) (*a*) (ii) of the Act of 1938.

I now proceed to apply the latter Sub-section, in the modified form set out by Cohen, L.J., to the case of Finance & Trusts. The income of that body corporate has not been apportioned in the manner mentioned in the modified Sub-section, but it could have been so apportioned if that body corporate were incorporated in the United Kingdom. This fact would have helped the Crown if Dufferin had been incorporated in the United Kingdom, because income of Finance & Trusts could have been apportioned to Dufferin and then (by means of a sub-apportionment) to the trustees of the 1934 settlement; but as Dufferin was not in fact incorporated in the United Kingdom there can be no sub-apportionment of any income apportioned to it. Thus, no income of Finance & Trusts can be appor-

[1] Page 358 *ante*.

(Lord Morton of Henryton.)

tioned to the trustees of the 1934 settlement by means of an original apportionment because they are not shareholders in Finance & Trusts, and no income of Finance & Trusts can be apportioned to the trustees by means of a sub-apportionment of income apportioned to Dufferin, because Dufferin was not incorporated in the United Kingdom.

As the same reasoning admittedly applies to the income of the other foreign companies in question, I am of opinion that Atkinson, J., and the Special Commissioners arrived at the right conclusion, that this appeal should be allowed, and that the Respondents should pay the Appellant's costs here and below.

Lord Porter.—My Lords, I beg to move that the report from the Appellate Committee be agreed to.

Questions put:

That the report from the Appellate Committee be agreed to.

The Contents have it.

That the Order appealed from be reversed.

The Contents have it.

That the judgment of Atkinson, J., be restored, and that the Respondents do pay to the Appellant his costs here and in the Court of Appeal.

The Contents have it.

[Solicitors:— Wiley & Powles; Solicitor of Inland Revenue.]

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