COURT OF APPEAL—15, 16, 19, 20 AND 30 NOVEMBER 1979

HOUSE OF LORDS—15, 16, AND 17 DECEMBER 1980 AND 5 FEBRUARY 1981

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# Roome and Denne *v.* Edwards (H.M. Inspector of Taxes)(1)

*Capital gains tax—Trustees of fund appointed out of main settlement under special powers—Whether liable for chargeable gain accruing to trustees of unappointed residue—Finance Act* 1965, *s* 25(11)—*Sch* 10, *para* 12.

C (1) Under a wife's marriage settlement of 1944 she had a life interest, her husband had after her death a protected life interest, and they together had a special power of appointment.

(2) In 1955 by deed the wife and husband appointed, under that power, a fund ("the appointed fund") in favour of one of their daughters; and thereafter the appointed fund and the residue of the 1944 fund ("the main D fund") were separately administered, though until February 1972 the trustees (then R & A) of both funds were identical.

(3) On 7 February 1972 D replaced A as co-trustee (with R) of the appointed fund: at no time was D ever trustee of the main fund.

(4) As part of a tax-avoidance scheme: (*a*) R had valuations made of both funds; (*b*) on 28 February 1972 an order was made under the Variation of E Trusts Act 1958 approving an arrangement altering the trusts on which the main fund was held, and on 15 March 1972 that arrangement was brought into effect; (*c*) on 20 March 1972 all the beneficiaries having interests in the main fund assigned those interests to two Cayman Island companies ("CRI" and "Royal Oak") for cash; (*d*) on 21 March 1972 R and A were replaced as trustees of the main fund by two non-U.K.-residents; (*e*) on 13 April 1972 F CRI assigned its interest in the main fund to Royal Oak so that the latter became absolutely entitled to it as against the non-resident trustees.

The Special Commissioners in principle upheld assessments to capital gains tax raised on R & D alone, in respect of the occasion of charge arising on 13 April 1972, on the basis (i) that both the appointed fund and the main fund were "property comprised in a settlement" within the meaning of s 25(11) G of the Finance Act 1965; (ii) that para 12(1) of Sch 10 to the Act enabled the assessments to be raised against R & D.

The Chancery Division, allowing an appeal by R & D, held that, though (1) both the appointed fund and the main fund were on 13 April 1972 "property comprised in a single settlement", viz., in the marriage settlement of 1944; (2) the trustees to whom, for the purposes of para 12(1) of Sch 10 to the

(1) Reported (Ch D) [1979] 1 WLR 860; [1979] STC 546; 123 SJ 185; (CA) [1980] Ch 425; [1980] 2 WLR 156; [1980] 1 All ER 850; [1980] STC 99; 124 SJ 49; (HL) [1982] AC 279; [1981] 2 WLR 268; [1981] 1 All ER 736; [1981] STC 96; 125 SJ 150.

Act, the chargeable gain then accrued, were the two individual non-resident trustees; so that the wrong pair of trustees had been assessed. The Crown appealed. A

The Court of Appeal, dismissing the appeal (while reversing the Chancery Division on both (1) and (2) above), held that (1) the 1955 appointment resulted in the appointed fund ceasing to be comprised in the same settlement as the main fund: it then became subject, for capital gains tax purposes, to a separate settlement (consisting of two documents—the 1944 marriage settlement and the 1955 appointment), so that s 25(11) did not thereafter apply in relation to the two funds; (2) in a case to which s 25(11) applied, chargeable gains would accrue, under para 12(1) of Sch 10 to the Act, not to the persons in whom the property in question had been vested, but to the "single and continuing body of persons" mentioned in s 25(1) of the Act. The Crown appealed. B C

*Held,* in the House of Lords, unanimously reversing the decision of the Court of Appeal on (1) above while affirming it on (2) above, that the 1955 appointment did not bring into existence a separate settlement. Hence on 13 April 1972 the appointed fund and the main fund were parts of "property comprised in a [single] settlement . . . vested in [different] sets of trustees" within s 25(11) of the Finance Act 1965 and R & D were thus correctly assessed in respect of the chargeable gain then accruing to the trustees of that single settlement. D

*Per curiam:* (i) The question whether a particular set of facts amounts to "a settlement" should be approached by asking what a person, with knowledge of the legal context of the word under established doctrine and applying this knowledge in a practical and commonsense manner to those facts, would conclude. E

(ii) If property subject to an original settlement becomes, on the facts, subject to a separate settlement, there must inevitably be a disposal by the trustees of the former to the trustees of the latter, even though they might be the same person.

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CASE

Stated under the Taxes Management Act 1970, s 56, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 20, 21 and 22 October 1976 and 6 May 1977, John Walford Roome and Thomas Graham Denne (hereinafter called individually "Mr. Roome" and "Mr. Denne" and together called "the Appellants") appealed against an assessment to capital gains tax for the year 1972–73 in the amount of £200,000. G

2. Shortly stated the question for our decision was whether settled property to which a beneficiary became absolutely entitled (within the meaning of s 25(3), Finance Act 1965) as against Cayman Island trustees in whom such property was vested was (within the meaning of s 25(11), Finance Act 1965) comprised in the same settlement as other property which was vested in United Kingdom trustees. H

3. Both Appellants gave evidence before us. At all material times they were partners in Withers (a firm of solicitors). I

A 4. The following documents were proved or admitted before us:

(1) Bundle of documents consisting of 15 various deeds and a Court Order (marked "A").

(2) Facts agreed by the Revenue (marked "B").

(3) Valuation of settled funds (incorporated in para 5(16) below).

(4) Bundle of letters (marked "E").

B (5) Bundle of tax returns and assessments (marked "F").

(6) Bundle of documents and letters put in on behalf of the Respondent (marked "G").

Copies of the above are available for inspection by the Court if required.

5. As a result of the evidence both oral and documentary adduced before us we find the following facts proved or admitted:-

C (1) Samuel le Hunte Lombard-Hobson ("Captain Lombard-Hobson") and Rosemary Everilda Lombard-Hobson, nee Beale-Brown (Mrs. Lombard-Hobson") were married on 25 March 1944. They have two children, both daughters: (i) Jane Robinson ("Mrs Robinson") who was born on 31 October 1948 and married in 1970 and divorced on 18 March 1976; (ii) the Right Honourable Sarah, Countess of Cottenham ("Lady Cottenham") who was D born on 8 September 1951 and married in 1975. Captain Lombard-Hobson was born on 24 February 1913, and Mrs. Lombard-Hobson was born on 9 December 1920.

(2) A marriage settlement dated 24 March 1944 ("the 1944 marriage settlement") which was made in consideration of the marriage of Captain and Mrs. Lombard-Hobson contained dispositions of limited interests to which E Mrs. Lombard-Hobson was entitled under *(inter alia)* a settlement dated 9 February 1916 ("the 1916 marriage settlement") made in consideration of the marriage of Mrs. Lombard-Hobson's parents, Desmond John Edward Beale-Browne ("Brigadier Beale-Browne") and Ethel Alexander Beale-Browne, nee Jowers ("Mrs. Beale-Browne"). Mrs. Beale-Browne died on 14 February 1933 and Brigadier Beale-Browne died on 26 January 1953.

F (3) Under the trusts of the 1916 marriage settlement the trust fund subject to that settlement was (immediately before the execution of the 1944 marriage settlement) held in trust—(*a*) to hold on express protective trusts for Brigadier Beale-Browne during his life an annual sum of £4,000 or one-half of the annual income of the fund, whichever was the greater, and subject thereto (*b*) in trust for the children and remoter issue of the marriage of Brigadier Beale-Browne G and Mrs. Beale-Browne as Brigadier Beal-Browne should by deed or will appoint and subject thereto (*c*) in trust for Mrs. Lombard-Hobson (the only child of Brigadier and Mrs. Beale-Browne) absolutely. At the time of execution of the 1944 marriage settlement the trust fund subject to the 1916 marriage settlement consisted (as appears from the first schedule to the 1944 marriage settlement) of Stock Exchange investments and a 7/18ths share of the H proceeds of sale of the freehold property 8 Gate Street, London W.C.2 ("the Gate Street property"), and the trustees of the 1916 marriage settlement were (as appears from the recitals to the 1944 marriage settlement) Mr. E. A. Manisty and Mr. R. A. P. Pinckney. The power of appointing new trustees of the 1916 marriage settlement was conferred by clause 18 thereof on Brigadier and Mrs. Beale-Browne during their joint lives and on the survivor of I them during his or her life.

(4) At the time of the execution of the 1944 marriage settlement the Gate Street property was held by Mr. C. N. French, Mr. L. W. Bathurst, Mr. E. A. Manisty and Mr. R. A. P. Pinckney as trustees for sale on a statutory trust for sale arising under the transitional provisions of the Law of Property Act 1925. The beneficial ownership of the remaining 11/18ths share of the Gate Street property was divided between a 7/18ths share which belonged at one time to General Cockerill, and was bequeathed by him to Mrs. Lombard-Hobson; and a 2/9ths share which was at some time between 1944 and 1960 acquired for value, and in equal shares, by the holders of the two 7/18ths shares. Thus by 1959 the Gate Street property was beneficially owned as to half by the trustees of the 1944 marriage settlement, and as to half by Mrs. Lombard-Hobson absolutely.

(5) The 1944 marriage settlement was made between Mrs. Lombard-Hobson (under her unmarried name of Beale-Browne) of the first part, Captain Lombard-Hobson (then a Lieutenant in the Royal Navy) of the second part and Mr. H. E. Manisty and Mr. R. A. P. Pinckney as trustees of the third part. The only settlor was Mrs. Lombard-Hobson, and the settled property consisted of (i) Mrs. Lombard-Hobson's limited interest in the trust fund subject to the 1916 marriage settlement, and (ii) another interest to which Mrs. Lombard-Hobson was entitled (and which vested absolutely on her marriage) under another settlement. The beneficial trusts and powers of the 1944 marriage settlement were as follows:—(*a*) Mrs. Lombard-Hobson was entitled to a life interest in the trust fund (clause 3). (*b*) Captain Lombard-Hobson was entitled to a reversionary life interest in the trust fund subject to express protective trusts (clause 3). (*c*) Captain and Mrs. Lombard-Hobson had a joint power of appointment by deed in favour of the children and remoter issue of their marriage, with a similar power conferred on the survivor of them and exercisable by deed or will, and a trust in default of appointment for the children of their marriage who being male should attain the age of twenty-one years or being female should attain that age or marry with the consent of their parents or guardians, and if more than one in equal shares (clause 4), subject to hotchpot in the absence of a direction to the contrary in an appointment (clause 5). (*d*) Mrs.Lombard-Hobson had a power of appointment in favour of a future husband exercisable in the event of her surviving Captain Lombard-Hobson and re-marrying (clause 12), and a power of revocation and new appointment in favour of a future husband and children or remoter issue by a future marriage (clause 13). (*e*) The power of appointing new trustees was vested in Captain and Mrs. Lombard-Hobson and the survivor of them during their joint lives and the life of the survivor.

(6) On 10 December 1948 Major B. M. H. Shand ("Major Shand") was appointed as a new trustee of the 1944 marriage settlement in place of Mr. R. A. P. Pinckney.

(7) By a deed of appointment ("the 1951 deed") dated 5 November 1951 Brigadier Beale-Browne exercised his power of appointment (as survivor of himself and Mrs. Beale- Browne) over two funds forming part of the trust fund subject to the 1916 marriage settlement. These funds (designated as "Sarah's fund" and "Jane's fund") consisted of the investments specified in the first and second schedules to the 1951 appointment. Sarah's fund was appointed in trust primarily for Lady Cottenham if she was living twenty-one years from the death of Brigadier Beale-Browne or should previously attain the age of twenty-five years, and Jane's fund was appointed on a similar primary trust in favour of Mrs. Robinson. The 1951 deed thus had the effect of divesting, to the extent of the interests appointed in Sarah's fund and Jane's fund, the limited interest under the 1916 marriage settlement which Mrs. Lombard-Hobson had assigned by the 1944 marriage settlement.

A (8) By a deed of appointment and release ("the 1955 deed") dated 20 October 1955 and made between Mrs. Lombard-Hobson of the first part, Captain Lombard-Hobson of the second part and Mr. H. E. Manisty and Major Shand of the third part, Captain and Mrs. Lombard-Hobson made an irrevocable appointment of, and Mrs. Lombard-Hobson assigned and surrendered her life interest in, a fund of investments (then worth about B £13,400) specified in the schedule to the 1955 deed. That fund ("the 1955 fund") was appointed on a trust primarily in favour of Mrs. Robinson on her attaining the age of twenty-five years, with a direction that the 1955 fund was not required to be brought into hotchpot. Mrs. Lombard-Hobson's assignment and surrender of her life interest in the 1955 fund was expressed not to be in acceleration of the interests or trusts expectant thereon during the life of C Captain Lombard-Hobson should he survive Mrs. Lombard-Hobson, to the intent that subject only to those expectant interests or trusts (if and when the same should arise) the appointed trusts should (as from the date of the 1955 deed) carry the intermediate income of the 1955 fund and Trustee Act 1925, s 31, should apply accordingly.

(9) The trusts of the 1955 fund and those of the fund representing the D balance of the property settled by the 1944 marriage settlement mentioned in sub-para (*c*) above were in practice administered separately at all times after the execution of the 1955 deed. Separate accounts were kept and separate tax returns made. If, (as sometimes happened), holdings of the same investment were included in both funds, the holding in the 1955 fund was designated "B Account" in its registration.

E (10) Mr. H. E. Manisty died on 25 September 1959. By a deed of appointment ("the 1959 appointment") dated 22 October 1959 Mr. Roome was appointed in his place as a new trustee of the 1944 marriage settlement. Recital (6) of the 1959 appointment recited that the 1955 fund was then represented by the investments and cash specified in the first part of the second schedule to that deed, and that the residue of the property then in possession and subject to the F trusts of the 1944 marriage settlement consisted of the investments specified in the second part of the second schedule and the property described in the third schedule (the latter being a one-half share of the proceeds of sale of the Gate Street property). Upon his appointment Mr. Roome caused the funds specified in the second schedule to be vested in the names of himself and Major Shand. Mr. Roome remained trustee of the 1955 fund at all material times. Recital (8) G to the 1959 appointment recited that Mr. Roome had, by deed of appointment dated 13 October 1959, been appointed as a new trustee of the Gate Street property, to act jointly with Major Shand.

(11) On 9 November 1960 Mrs. Lombard-Hobson, being then absolutely entitled beneficially to one-half of the proceeds of sale of the Gate Street property, assigned that interest to Major Shand and Mr. Roome, the trustees H of the 1944 marriage settlement, in consideration of the sum of £20,000. This transaction was effected by a document described as a conveyance ("the 1960 deed") dated 9 November 1960 and made between Major Shand and Mr. Roome of the first part, Mrs. Lombard-Hobson of the second part and Major Shand and Mr. Roome of the third part. In the 1960 deed Major Shand and Mr. Roome were referred to as trustees of the 1916 marriage settlement, and the I 1960 deed declared that the proceeds of sale of the propety should be held on the trusts of the 1916 marriage settlement. It is however common ground that this declaration was mistaken, since the sum of £20,000 paid to Mrs. Lombard-Hobson came from the capital of the trust fund subject to the 1944 marriage settlement, and it was on the trusts of the 1944 marriage settlement that the Gate Street property came to be held.

(12) By a deed of retirement and appointment ("the 1961 appointment") dated 9 October 1961 and made between Mrs. Lombard-Hobson and Captain Lombard-Hobson of the first part, Major Shand of the second part, Mr. Roome of the third part and Ian Voase Askew ("Mr. Askew") of the fourth part Mr. Askew was appointed as a new trustee of the 1944 marriage settlement in place of Major Shand, and to act jointly with Mr. Roome for all the purposes thereof. At the time of the 1961 appointment the property representing that originally settled by the 1944 marriage settlement consisted of: (*a*) the freehold property Middleham, Ringmer, Sussex, mentioned in the first schedule to the appointment. (This property had been purchased in 1956 by the trustees of the 1944 marriage settlement for occupation by Captain and Mrs. Lombard-Hobson.); (*b*) the Gate Street property, mentioned in the second schedule to the appointment; (*c*) investments specified in the first part of the third schedule to the appointment representing the 1955 fund; (*d*) investments specified in the second part of the third schedule to the appointment.

(13) A further marriage settlement ("the 1970 marriage settlement") was made on the occasion of Mrs. Robinson's marriage to Charles Mark Robinson. This settlement was dated 8 September 1970 and was made between Mrs. Robinson (under her unmarried name of Jane Lombard-Hobson) of the first part, Charles Mark Robinson of the second part, and Mr. Roome, Mrs. Lombard-Hobson and Mr. Askew of the third part. The 1970 marriage settlement recited that Mrs. Robinson was entitled to a number of limited interests in settled property, including (as mentioned in recital (F) of the 1970 marriage settlement) an interest contingent on attaining the age of twenty-five years in the 1955 fund. Recital (G) recited that the 1955 fund consisted of the investments specified in the third schedule to the 1970 marriage settlement (in which it was referred to as "1955 settlement fund") and that Mr. Roome and Mr. Askew were the present trustees of that part of the fund settled by the 1944 marriage settlement which was appointed by the 1955 deed. By the 1970 marriage settlement Mrs. Robinson settled the limited interests to which she was entitled as recited, including her interest in the 1955 fund, on trusts under which she took a life interest, with power for the trustees of the 1970 marriage settlement to raise and pay capital to her, and ulterior trusts in common form in favour of her issue.

(14) By a deed of appointment ("the first 1972 appointment") dated 7 February 1972 and made between Captain Lombard-Hobson and Mrs. Lombard-Hobson of the first part, Mr. Askew of the second part, Mr. Roome of the third part and Mr. Denne of the fourth part, Mr. Denne was appointed to be a trustee in place of Mr. Askew of Jane's fund and Sarah's fund (notwithstanding the provisions of clause 18 of the 1916 marriage settlement) and of the 1955 fund. The investments and cash representing the 1955 fund were transferred into the joint names of Mr. Roome and Mr. Denne.

(15) An order ("the Court Order") was made on 28 February 1972 under the Variation of Trusts Act 1958 in proceedings having the short title and reference to the record, re Beale-Browne Settlement re Variation of Trusts Act 1958 Lombard-Hobson v. Robinson 1972 B.504. The plaintiffs in the proceedings were Captain and Mrs. Lombard-Hobson and the defendants were Mrs. Robinson, Lady Cottenham, Mr. Roome and Mr. Askew. The Court Order approved an arrangement relating to "the trust fund" as defined in para 1(iv) of the arrangement—that is, the funds subject to the 1944 marriage settlement other than the funds appointed by the 1951 deed and the 1955 deed. The effect of the arrangement was to free Captain Lombard-Hobson's reversionary life interest in the trust fund (defined as mentioned above) from the express protective trusts affecting it. The operation of the arrangement was

conditional on the execution of the deed of revocation and appointment and release mentioned in the next paragraph.

(16) In connexion with the proceedings referred to in the foregoing subparagraph Mr. Roome caused the following valuations to be made as at 7 February 1972 (except for the Gate Street property which was valued as at 23 March 1972):–

| | | £ | £ |
|---|---|---|---|
| 1. | Jane's fund<br>Stock Exchange securities | | 6,797 |
| 2. | Sarah's fund<br>Stock Exchange securities | | 35,177 |
| 3. | 1955 fund<br>Stock Exchange securities | | 46,146 |
| 4. | 1944 marriage settlement<br>Stock Exchange securities | 134,787 | |
| | Cash (net proceeds of sale of Middleham) | 57,972 | |
| | Gross value of Gate Street property | 720,000 | |
| | | 912,759 | 912,759. |

(17) The arrangement approved by the Court Order was brought into effect by the execution of a deed of revocation and appointment and release ("the 1972 deed") dated 15 March 1972 and made between Captain Lombard-Hobson of the first part, Mrs. Lombard-Hobson of the second part and Mr. Roome and Mr. Askew of the third part. The effect of the 1972 appointment and release may be summarised as follows: (*a*) An earlier revocable appointment dated 23 March 1970 was revoked (except so far as it related to Jane's fund and Sarah's fund) and the funds comprised in the 1944 marriage settlement (other than Jane's fund, Sarah's fund and the 1955 fund) were appointed in trust for Mrs. Robinson and Lady Cottenham in equal shares absolutely, subject to the prior subsisting life interests. (*b*) Mrs. Lombard-Hobson released the appointed fund from all powers of appointment conferred on her by the 1944 marriage settlement in favour of any future husband of hers or the issue of any future marriage of hers.

(18) The following assignments were made by four assignments dated 20 March 1972 between the parties mentioned below: (*a*) Captain Lombard-Hobson assigned to Royal Oak Investments Ltd. ("Royal Oak") of George Town, Grand Cayman, B.W.I., in consideration of the sum of £25,000 his beneficial interest under the 1944 marriage settlement in the assets specified in the second schedule to the assignment and in all other (if any) the assets subject to the trusts of the said settlement other than the excepted funds comprised in the 1951 deed and the 1955 deed. The fund (which included the Gate Street property) in which his interest was assigned is referred to below as "the assignment fund". (*b*) Mrs. Lombard-Hobson assigned to Royal Oak in consideration of the sum of £375,000 her beneficial interest under the 1944 marriage settlement in the assignment fund. (*c*) Mrs. Robinson assigned to Cayman Reversionary Interest Co. Ltd. ("C.R.I.") of George Town, Grand Cayman, B.W.I., in consideration of the sum of £234,000 her beneficial interest under the 1944 marriage settlement in the assignment fund. (*d*) Lady

Cottenham (by her then name of Sarah Lombard-Hobson) assigned to C.R.I. in consideration of the sum of £234,000 her beneficial interest under the 1944 marriage settlement in the assignment fund. A

(19) By a deed of appointment ("the second 1972 appointment") dated 21 March 1972 and made between Captain Lombard-Hobson and Mrs. Lombard-Hobson of the first part, Mr. Roome and Mr. Askew of the second part and John Goronwy Morgan ("Mr. Morgan") and Keith Pierson Hodson Mackenzie ("Mr. Mackenzie") of the third part. Mr. Morgan and Mr. Mackenzie were appointed as new trustees of the 1944 marriage settlement in place of Mr. Roome and Mr. Askew except as regards the excepted funds—that is, the funds not included in the assignment fund. The investments comprised in the assignment fund were transferred into the joint names of Mr. Morgan and Mr. Mackenzie, and the Gate Street property (the title of which is registered at H.M. Land Registry) was transferred into their names. The freehold property known as Middleham had already been sold and was not included in the assignment fund. After the execution of the second 1972 appointment Mr. Roome ceased to act as trustee as respects any of the funds subject thereto. B C

(20) On 13 April 1972 C.R.I. assigned to Royal Oak its interests in expectancy in the assignment fund. D

(21) The transactions set out in sub-paras (15) to (20) above were carried out in pursuance of a scheme designed to avoid capital gains tax which had been discussed (shortly before the transactions were put in train) between Mr. Roome and a Mr. Lutyens (partner in Messrs Graham & Co., insurance brokers). Mr. Lutyens made the necessary arrangements in the Cayman Islands, including the incorporation of Royal Oak and suggesting Mr. Morgan and Mr. Mackenzie as suitable trustees. E

(22) Mr. Roome, Mr. Denne and Mr. Askew are all resident in the United Kingdom.

6. It was contended on behalf of the Appellants that:—

(1) (*a*) during 1972–73 the Appellants were trustees in respect of the following properties under the following compound settlements: (i) the properties in Jane's fund and Sarah's fund under a combination of the 1916 marriage settlement, the 1951 deed and the 1970 marriage settlement, (ii) the properties in the 1955 fund under a combination of the 1944 marriage settlement, the 1955 deed and the 1970 marriage settlement, and neither of the Appellants was in 1972–73 a trustee in respect of any of the properties in the assignment fund; F G

(2) even before 1972–73 there was no unity between the 1955 fund and the assignment fund, in that since 1955 (*a*) there were different trust properties, (*b*) there was separate administration, (*c*) there were different beneficial interests and (*d*) there were different acts of bounty from which the trusts originated, namely: (i) the 1955 fund—dispositions by Mrs. Lombard-Hobson in 1944 and 1955; (ii) the assignment fund— a disposition by Mrs. Lombard-Hobson in 1944; H

(3) section 25 (1) and (3), Finance Act 1965, focus attention on the settled property and when, on 13 April 1972, the then life tenant Royal Oak became absolutely entitled to the assigned fund it was as against Mr. Morgan and Mr. Mackenzie that it did so— not as against the Appellants; I

A (4) section 25(11), Finance Act 1965, clearly applies to the case where under the Settled Land Act 1925 the trusteeship is divided between tenant for life and Settled Land Act trustees and to the case of a custodian-trustee but there is no justification for stretching the subsection to cover the circumstances of the present case;

(5) the contention advanced on behalf of the Crown is "so demonstrably B illogical and so demonstrably oppressive" that such an intention could not be ascribed to Parliament.

7. It was contended on behalf of the Inspector of Taxes that:–

(1) section 25(11), Finance Act 1965, must be given its plain meaning: for the purposes of the subsection it does not matter how many separate funds or how many separate sets of trustees are initially or subsequently carved out C within, or appointed in respect of, settled property which was originally subject to and remains within a single settlement;

(2) the funds that were vested in Mr. Morgan and Mr. Mackenzie and the 1955 fund were subject to the same settlement, namely the 1944 marriage settlement.

8. The following authorities were cited before us: In re *Ogle's Settled* D *Estates* [1927] 1 Ch 229; *Symons-Jeune* v. *Bunbury* [1927] 1 Ch 344; *Muir* v. *Muir* [1943] AC 468; *Pexton* v. *Bell* 51 TC 457; [1976] 1 WLR 885; *Pilkington* v. *Commissioners of Inland Revenue* 40 TC 416; [1964] AC 612; *Cape Brandy Syndicate* v. *Commissioners of Inland Revenue* 12 TC 358; [1921] 2 KB 403; *Lord Howard de Walden* v. *Commissioners of Inland Revenue* 25 TC 121; [1942] 1 KB 389.

E 9. We the Commissioners who heard the appeal, took time to consider our decision and gave it in writing on 12 November 1976 as follows:

(1) On 13 April 1972 there was a disposal, by virtue of s 25(3), Finance Act 1965, of all the property vested in Messrs. Morgan & Mackenzie as trustees resulting in a capital gain, and this is the occasion of the assessment to tax here in question.

F (2) Paragraph 12 of Sch 10 enacts:

"Capital gains tax chargeable in respect of chargeable gains accruing to the trustees of a settlement . . . may be assessed and charged on and in the name of any one or more of those trustees. . ."

The assessment is made on Messrs. Roome and Denne, who are trustees in whom at the time of the disposal certain other property (which we call the 1955 G fund) is vested; they were on the face of it in no way concerned in the property vested in Morgan and Mackenzie and on the face of it the suggestion that they can be charged to the tax as being two of the trustees of a settlement to whom the gain accrued is surprising, but whether it is correct or not depends upon the true meaning of s 25(11) and its effect in the particular circumstances of this case. Section 25(11) reads:

H "For the purposes of this section, where part of the property comprised in a settlement is vested in one trustee or set of trustees and part in another (and in particular where settled land within the meaning of the Settled Land Act 1925 is vested in the tenant for life and investments representing capital money are vested in the trustees of the settlement),

they shall be treated as together constituting and, in so far as they act separately, as acting on behalf of a single body of trustees." A

The question then is, are the 1955 fund and the Morgan/Mackenzie fund comprised in "a settlement", i.e. in one single settlement, within the meaning and intent of this subsection?

(3) It was contended for the Appellants that the words in parenthesis in subs (11) should be taken as restricting the meaning and effect of the whole subsection. We do not agree. If the subsection had been intended only to apply to certain particular cases it would have enumerated them. It is, in our opinion, a sufficient explanation of the parenthesis that, having regard to the statutory provisions relating to settled land, there might have been some room for doubt as to whether a tenant for life under the Settled Land Act was a trustee, in the ordinary sense, of property comprised in the settlement. B C

(4) The statute does not provide a definition of "settlement". In ordinary parlance the word is taken (we think) to denote the state of affairs that exists when property is held on trust for persons with successive interests, and in the context, that is what, in our judgment, the word means in s 25.

(5) The property comprised in the 1955 fund was (at any rate immediately before 1955) part of the property comprised in the 1944 marriage settlement, and it must remain so unless the 1955 deed removed it therefrom. That deed accomplished two things: (i) Jane's parents exercised a special power of appointment under the 1944 settlement as regards the specified property (i.e. the 1955 fund). This gave Jane a contingent interest, subject to her mother's prior life interest and to a prior contingent interest of her father. It also gave further interests in a certain event to her children. Should the appointed interests fail, subsequent trusts under the 1944 settlement would become effective. Had the deed stopped there, we would have been in no doubt that the 1955 fund continued to be comprised in the 1944 marriage settlement; (ii) simultaneously, Jane's mother released her prior life interest. As a result (subject to the father's prior contingent life interest) the 1955 fund was held on trusts which carried the intermediate income. This was an act of bounty on the part of Jane's mother, but we do not think it caused the 1955 fund to cease to be comprised in the 1944 marriage settlement. Where there is a settlement with trusts involving successive interests, and one interest is released or surrendered so as to accelerate subsequent interests, we would not regard the settlement as being broken and a new and different settlement set up. D E F

(6) These considerations in our judgment point inevitably to the conclusion that the 1955 fund was at all material times a part of the property comprised in the 1944 marriage settlement, of which the property vested in Morgan and Mackenzie formed another part, and that this is a case governed by subs (11). We recognise that the trustees, as a matter of administration, kept the 1955 fund separate, and rendered separate tax returns in respect of it. We also note that the recitals in the various deeds before us do not suggest that the parties thereto had themselves any clear conception of the 1955 fund as being the subject of a separate settlement; for example, in Jane's marriage settlement (dated 8 September 1970, recital G) the then trustees were stated to hold the funds "as the present trustees of that part of the fund settled by the 1944 Settlement which was appointed by the 1955 appointment". G H

(7) It was argued that the Crown's claim in this case is (in the words of Sir John Pennycuick in *Pexton* v. *Bell*[1] [1976] 1 WLR 885, at page 897) "so demonstrably illogical and oppressive that it is difficult to ascribe such an I

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[1] 51 TC 457, at p 484.

A intention to Parliament". As to this, we would only observe that the persons with interests in the 1955 fund take the fund with all its hazards, one of which may be taxation.

(8) We dismiss the appeal in principle, and adjourn the proceedings for the figures to be agreed.

10. The parties were unable to agree figures on the basis of our decision B and the hearing of the appeal was resumed on 6 May 1977. At the resumed hearing it was contended on behalf of the Appellants that their liability to capital gains tax in respect of the assets comprised in the assignment fund was limited in quantum to the amount or value of the assets held by them as trustees of the 1955 fund. It was contended on behalf of the Inspector of Taxes that the Appellant's liability was unlimited. The decision in *Fraser* v. *Murdoch* C (1881) 6 App Cas 855 (which was accepted by both parties to these proceedings to be applicable to England as well as Scotland) was cited before us. We, the Commissioners who heard the appeal, gave our decision orally as follows:

The assessment before us is on J. W. Roome and T. G. Denne as trustees of Captain and Mrs. Lombard-Hobson's marriage settlement and the occasion of charge on which the assessment is based is this:

D By reference to s 25(3), Finance Act 1965, Royal Oak Investments Ltd., the Cayman Islands company, became absolutely entitled (on the lines of our previous decision) as against a single body of trustees of whom Messrs. Roome and Denne are members. This single body of trustees (of whom Messrs. Roome and Denne are two members) are deemed to have disposed of the property in respect of which the capital charge accrued with the result that a chargeable E gain accrued to that single body of trustees. Turning to para 12 of Sch 10, Finance Act 1965, the capital gains tax chargeable in respect of the chargeable gains may be assessed and charged on Messrs. Roome and Denne unless we read the words "chargeable gains accruing to the trustees" as restricting it to the chargeable gains in fact accruing to the trustees on whom the assessment is made as distinct from the chargeable gain which by virtue of s 25(3) and (11) are F deemed to have accrued to them. In the context in which we find para 12 of Sch 10 we think it can only be read in conjunction with all the provisions of s 25 and accordingly, we think that following what seems to us to be the logic of the matter our duty is to determine the full amount of the gain accruing by reason of the disposal which, under s 25(3), the single body of trustees is deemed to have made, and we hold that the assessment under appeal properly charges the G tax thereon to Messrs. Roome and Denne. What happens afterwards in relation to the collection of the tax so charged we have no jurisdiction to determine nor have we the means of judging whether the outcome would involve anything of an illogical or oppressive nature.

That is our decision on this part of the case and we adjourn the hearing for agreement of figures.

H 11. Because of differences of opinion as to the value of the Gate Street property as at 13 April 1972 it will be a very long time before figures can be agreed and proceedings before the Lands Tribunal may be necessary in due course. The Appellants have expressed dissatisfaction with our decision in principle and, with the concurrence of the Inspector of Taxes, requested on 25 October 1977 that a Case should be stated in principle for the opinion of the I High Court. All the parties to these proceedings have undertaken to continue to endeavour to resolve the issue of valuation by agreement and failing such agreement to resolve it by appropriate proceedings before the Lands Tribunal

in due course. The Appellants have also undertaken to set the Case down for hearing with all reasonable despatch after its issue. The Taxes Management Act 1970 contains no express provision which enables a Case to be stated in principle only but the practice of doing so in suitable circumstances received some support from Rowlatt J. in his judgment in *Maclaine* v. *Eccott*(1) 10 TC 481, at page 495. I state and sign this Case accordingly, Mr. R. A. Furtado C.B., with whom I heard these appeals having retired from the Public Service. A B

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

J. G. Lewis { Commissioner for the Special Purposes of the Income Tax Acts

Turnstile House,
94–99 High Holborn,
London WC1V 6LQ
19 July 1978 C

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The case was heard in the Chancery Division before Brightman J. on 12, 13 and 14 February 1979 when judgment was reserved. On 23 February 1979, judgment was given against the Crown with no order as to costs (but liberty to apply). D

*D. C. Potter Q.C.* and *R. Walker* for the taxpayers.

*D. J. Nicholls Q.C.* and *Peter Gibson* for the Crown.

The following cases were cited in argument in addition to those referred to in the judgment:—*Fraser* v. *Murdoch* (1881) 6 App Cas 855; *Berry* v. *Gaukroger* [1903] 2 Ch 116; In re *Latham decd.* [1962] Ch 616; *Potts' Executors* v. *Commissioners of Inland Revenue* 32 TC 211; [1951] AC 443; *Cape Brandy Syndicate* v. *Commissioners of Inland Revenue* 12 TC 358; [1921] 2 KB 403; *Jamieson* v. *Commissioners of Inland Revenue* 41 TC 43; [1964] AC 1445; *Wankie Colliery Co. Ltd.* v. *Commissioners of Inland Revenue* [1922] 2 AC 51; In re *Joynson's Will Trust* [1954] Ch 567; In re *Hetherington's Trusts* (1887) 34 Ch D 211; *Muir* v. *Muir* [1943] AC 468; *Ronald Arthur Vestey* v. *Commissioners of Inland Revenue* TC Leaflet 2678; [1979] Ch 177; [1979] Ch 198. E F

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**Brightman J.**—This is an appeal from a decision of the Special Commissioners upholding an assessment to capital gains tax raised against certain trustees. The Appellant Trustees are not the trustees whose disposition gave rise to the chargeable gain. The disposing trustees are a different set of trustees; namely, two gentlemen resident in the Cayman Islands. The question before the Commissioners was whether settled property to which a beneficiary became absolutely entitled (within the meaning of s 25(3) of the Finance Act 1965) as against the Cayman Islands trustees in whom such property was vested was (within the meaning of s 25(11) of the same Act) comprised in the same settlement as the property vested in the Appellant Trustees. If so, another question arose as to whether the liability of the Appellant Trustees was limited to the assets in their hands or was unlimited. The Special Commissioners decided these questions against the Appellant Trustees. G H

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(1) [1926] AC 424.

A By a marriage settlement made on 24 March 1944 Mrs. Lombard-Hobson settled certain property on trusts for the benefit of herself, her intended husband and the issue of the marriage. Mrs. Lombard-Hobson took a life interest. After her death her husband, Captain Lombard-Hobson, took a protected life interest. After the death of the survivor the capital was directed to be held in trust for their issue as they or the survivor should appoint. In B default of appointment the children of the marriage were to take in equal shares—sons at 21, daughters at 21 or earlier marriage. Mrs. Lombard-Hobson reserved a power of partial revocation and new appointment exercisable in the case of re-marriage. The power to appoint new trustees was vested in Captain and Mrs. Lombard-Hobson and the survivor. There were two children of the marriage: Jane, who was born in 1948, and Sarah, who was born in 1951. They C are now Mrs. Robinson and Lady Cottenham.

On 20 October 1955 Captain and Mrs. Lombard-Hobson executed a deed of appointment and release. The deed related to a fund of investments forming part of the trust fund of the 1944 settlement worth about £13,000. This fund (which I shall call "the 1955 fund") was irrevocably appointed in trust for Jane absolutely contingently on attaining 25; and, subject thereto, in trust absolutely D for her surviving children (if any) in equal shares. By the same deed Mrs. Lombard-Hobson surrendered her life interest. Captain Lombard-Hobson retained his protected reversionary life interest but, subject thereto, the contingent interest of Jane was expressed to carry the intermediate income. The trusts of the 1955 appointment were not exhaustive; they were liable to fail until Mrs. Robinson attained 25, which she did in October 1973. In the event E of failure, the power of appointment and the trust in default of appointment contained in the 1944 marriage settlement would have immediately subsisted. On 8 September 1970 Mrs. Robinson made a marriage settlement. This settlement included her contingent interest in the 1955 fund. As I have said, this interest was temporarily defeasible in the event of the death of her mother survived by her father.

F On 7 February 1972 there was set in train a number of events which have led to the present problem. Immediately before that day the position, so far as relevant, may be summed up as follows. (1) The trustees who held the 1955 fund were two persons whom I shall call "the original trustees". (2) The trusts and powers affecting the 1955 fund were defined by the 1944 marriage settlement, the 1955 appointment and the 1970 marriage settlement. (3) The G original trustees also held the remainder of the assets subject to the 1944 marriage settlement. I will call these assets "the main fund". (4) The main fund consisted of a valuable freehold property called No. 8 Gate Street, Lincoln's Inn Fields, and investments. (5) The main fund was subject only to the 1944 marriage settlement and a revocable appointment made in 1970.

The following events then occurred with a view to avoiding capital gains H tax in respect of the main fund. (1) On 7 February the Appellants became the trustees of the 1955 fund. The orginal trustees remained trustees of the main fund. All were and are United Kingdom residents. (2) On 28 February Captain Lombard-Hobson's protected reversionary life interest in the main fund was converted into an absolute reversionary life interest by an arrangement approved by the High Court under the Variation of Trusts Act 1958, as from I the execution of a deed of revocation, appointment and release, which is the next document to which I shall refer. For the purposes of the arrangement then approved the Gate Street property was valued at £720,000 and the other assets in the main fund at about £192,000. In the evidence in support of the application to the Court, which I have read, the arrangement was put forward

as part of a scheme which would avoid liability to capital gains tax. If it ought properly to have been regarded and had been understood as part of a scheme to avoid recovery of the tax which would later become assessable, it would not have been sanctioned. (3) On 15 March Captain and Mrs. Lombard-Hobson revoked the 1970 appointment of the main fund and appointed it in favour of Mrs. Robinson and Lady Cottenham in equal shares absolutely, subject to the prior subsisting life interests. Mrs. Lombard-Hobson released her power of revocation and new appointment in the event of re-marriage. Thus the main fund became held by the original trustees in trust for Mrs. Lombard-Hobson for life with remainder to Captain Lombard-Hobson for life, with remainder to Mrs. Robinson and Lady Cottenham in equal shares absolutely. (4) On 20 March the two life tenants and the two remaindermen assigned their respective beneficial interests in the main fund to companies incorporated in the Cayman Islands. The assignments by the life tenants were in favour of Royal Oak Investments Ltd. (which I shall call "Royal Oak") for sums of £375,000 and £25,000 respectively. The assignments by the remaindermen were in favour of Cayman Reversionary Interest Co. Ltd. (which I shall call "CRI") in consideration of £234,000 each. The total consideration was therefore £868,000. (5) On 21 March Mr. Morgan and Mr. Mackenzie were appointed trustees of the main fund in place of the original trustees. The new trustees were not and are not United Kingdom residents. They reside in the Cayman Islands and I shall call them "the Cayman Islands trustees". The main fund, including the freehold interest in No. 8 Gate Street, was transferred into their names. (6) On 13 April CRI assigned its reversionary interest in the main fund to Royal Oak, which thereupon became absolutely and beneficially entitled to the main fund.

It is agreed by Counsel for the Appellants that on 13 April 1972 Royal Oak became absolutely entitled to the main fund as against the Cayman Islands trustees, so that under s 25(3) of the Finance Act 1965 the main fund was then deemed to have been disposed of by such trustees and immediately reacquired by them in their capacity as trustees for a consideration equal to the market value thereof. The Inspector of Taxes accordingly made an assessment to capital gains tax for the year 1972–73 in the sum of £60,000, being 30 per cent. of an estimated chargeable gain of £200,000. The assessment was not, however, made on the Cayman Islands trustees, because the Inspector took the view, as I understand the matter, that their residence outside the United Kingdom would prevent the tax being recovered from them. Instead, the Inspector assessed the Appellants, the trustees of the 1955 fund. For the validity of such an assessment the Crown relies on s 25(11) of the Finance Act 1965 and para 12(1) of Sch 10 thereto.

The Appellants object that they were not the trustees of the property to which Royal Oak became absolutely entitled, so that it was never true to say that Royal Oak became absolutely entitled to anything as against them. They submit that it is manifestly unfair and oppressive, both to trustees and to beneficiaries, that one set of trustees should be liable to capital gains tax as the result of a disposition deemed to have been made by another set of trustees over whom the first set of trustees have no control. No doubt it might be unfair in many cases, but not so in this case. The scheme was, on the facts found by the Commissioners, engineered by one of the Appellants in concert with others for the purpose, it was said, of avoiding capital gains tax on the main fund. (I add, in parenthesis, that Counsel appearing before me were not involved.) Furthermore, in the events which happened Royal Oak realised a profit of about £600,000, which it has offered to hand over to the Lombard-Hobson family. So it seems most unlikely that either the trustees or the beneficiaries of

A the 1955 fund would in the circumstances of this case suffer any hardship whatever as a result of an adverse decision. These facts are irrelevant to the legal solution of the problem, but they serve to make plain that the attitude of the Crown is not in the least unfair or oppressive.

I have reservations whether this was a scheme to avoid liability to tax in the ordinary sense. We all know that a taxpayer is entitled so to order his affairs as B to reduce his liability to tax: see *Commissioners of Inland Revenue* v. *Duke of Westminster*(1) [1936] AC 1. Perhaps it should be regarded as a scheme to avoid the recovery of tax if it should become due. If the scheme ultimately achieves its object and is liable to be repeated, the matter is one which in my view merits the attention of Parliament. I desire to emphasise that I level no criticism whatever against the Appellants personally, who acted throughout under the C advice of leading Counsel, on the basis that no liability to tax would arise.

As I have indicated, the claim to tax arises under s 25(3) of the Finance Act 1965 and the claim to assess the trustees of the 1955 fund is based on s 25(1) and (11), read with Sch 10, para 12(1). Section 25(3) reads as follows:

> "On the occasion when a person becomes absolutely entitled to any settled property as against the trustee all the assets forming part of the D settled property to which he becomes so entitled shall be deemed to have been disposed of by the trustee, and immediately reacquired by him in his capacity as a trustee within section 22(5) of this Act, for a consideration equal to their market value."

"Settled property" is defined by s 45 as meaning (subject to an immaterial exception) "any property held in trust other than property to which section E 22(5) . . . applies"; that is to say, other than property held by a bare trustee. It is accepted that the market value of the main fund on 13 April 1972 was such that a chargeable gain arose for the purposes of s 20 in that year of assessment.

The argument that the trustees of the 1955 fund can be assessed to tax on a chargeable gain notionally realised by the trustees of the main fund and is based on the statutory requirements that the trustees of a settlement F shall be treated as a single and continuing body of persons distinct from the individuality of the actual trustees (s 25(1)) and that where there are different sets of trustees under one settlement all are to be treated for the purposes of s 25 as together constituting a single body of trustees (s 25(11)); and on the power given to the Inspector to charge tax on one only of a number of trustees liable therefor (Sch 10, para 12(1)). I will read those provisions. Section 25(1):

> G "In relation to settled property, the trustees of the settlement shall for the purposes of this Part of this Act be treated as being a single and continuing body of persons (distinct from the persons who may from time to time be the trustees), and that body shall be treated as being resident and ordinarily resident in the United Kingdom unless the general administration of the trusts is ordinarily carried on outside the United H Kingdom and the trustees or a majority of them for the time being are not resident or not ordinarily resident in the United Kingdom";

and I need not trouble with the proviso. Section 25(11):

> "For the purposes of this section, where part of the property comprised in a settlement is vested in one trustee or set of trustees and part in another (and in particular where settled land within the meaning of the

(1) 19 TC 409.

Settled Land Act 1925 is vested in the tenant for life and investments representing capital money are vested in the trustees of the settlement), they shall be treated as together constituting and, in so far as they act separately, as acting on behalf of a single body of trustees." A

Schedule 10, para 12(1):

"Capital gains tax chargeable in respect of chargeable gains accruing to the trustees of a settlement or capital gains tax due from the personal representatives of a deceased person may be assessed and charged on and in the name of any one or more of those trustees or personal representatives, but where an assessment is made in pursuance of this sub-paragraph otherwise than on all the trustees or all the personal representatives the persons assessed shall not include a person who is not resident or ordinarily resident in the United Kingdom." B C

Section 25 of the Act is within Part III, which runs from s 19 to s 45. Schedule 10 is introduced into Part III by s 45(12).

The first question argued before me was whether on 13 April 1972 the 1955 fund was subject to the same settlement as the main fund. It was conceded by the Crown that if the trustees of the 1955 fund and the trustees of the main fund were trustees of different settlements, the assessment is erroneous because the trustees of one settlement cannot be assessed to capital gains tax on a chargeable gain accruing to the trustees of another settlement. Section 25(1) is directed to a case where part of the property comprised in one settlement is vested in one set of trustees and another part or the remainder of the property comprised in the same settlement is vested in another set of trustees: obviously not to a situation where one set of trustees holds property comprised in another settlement. It is therefore essential to the Crown's case that the 1955 fund and the main fund should properly be regarded as subject to the same settlement. D E

"Settlement" is not defined by the Act; there is only a definition of "settled property". Although the section often refers to "the trustees of the settlement", such an expression is in my view imprecise though convenient. Trustees of a settlement are more accurately described as trustees of property subject to the trusts of a settlement. So that, if there are two sets of trustees in relation to a particular settlement, both sets of trustees are trustees of the settlement in the sense that one set of trustees comprises the trustees of one fund for the purposes of the settlement and the other set of trustees comprises the trustees of another fund for the purposes of the same settlement. F

It was argued for the Appellants that on 13 April 1972 the 1955 fund was subject to one settlement, namely, a compound settlement constituted by the 1944 marriage settlement, the 1955 appointment and the 1970 marriage settlement; and that the main fund was subject to a different settlement, namely, a compound settlement constituted by the 1944 marriage settlement, the arrangement under the Variation of Trusts Act and the deed of revocation, appointment and release of 15 March 1972. I was referred to In re *Ogle's Settled Estates* [1927] 1 Ch 229. Under a settlement made in 1862 land was settled, after earlier uses, to the use of John Ogle in tail subject to a jointure in favour of his mother. John disentailed and thereafter, prior to 1926, sold off parts of the estate subject to but indemnified against his mother's jointure. In 1926 an application was made to the court by John Ogle for the appointment of Settled Land Act trustees. The question was raised whether such an appointment, if made, would affect the parts of the estate already sold which were still technically subject to the jointure, the purchasers not being parties to the G H I

A summons; or whether each individual parcel of land sold off thereby became subject to a different settlement. The latter was held to be the correct view.

I was also referred to In re *Symons* [1927] 1 Ch 344. In that case the life tenant under a strict settlement was given a special power to appoint to issue. In 1913 he appointed that parts 1 and 2 of the trust estate should be charged with a portion; in 1924 he appointed certain uses in relation to part 1 to take B effect after his death; and by a codicil to his will he similarly appointed uses in relation to parts 2 and 3 of the trust estate. It was held that where land was settled by a will coupled with a subsequent document exercising a special power of appointment under the will, the land was subject to a compound settlement consisting of the will and the document exercising the power; and if the power of appointment has been exercised by two separate documents affecting C different parts of the trust estate, there are two distinct compound settlements.

In my judgment, these decisions do not assist me to decide whether for the purposes of the Finance Act 1965 the 1955 fund and the main fund ought to be treated as subject to different settlements. In re *Ogle's Settled Estates*(1) and In re *Symons* must be read in the context of the Settled Land Act, having particular regard to the definition of "settlement" in s 1(1) and to the reference D to a compound settlement in the proviso thereto. The description in the Settled Land Act of what constitutes a distinct settlement for the purposes of that Act does not necessarily apply in other contexts, fiscal or otherwise, in which settlements have to be considered. For example, suppose that under an instrument of settlement a life tenant with a special power to appoint to issue executes an appointment of half the trust fund to a child contingently on E attaining 25, leaving the other half of the trust fund unappointed. I do not believe that in such a case, apart from a special statutory provision, a separate and distinct settlement comes into existence constituted by the original instrument and the deed of appointment. The true analysis is that there is a single settlement, the trusts of which, affecting different parts of the trust fund, are to be found partly in the original settlement plus the deed of appointment. F Just as in the instant case there is a single settlement, the trusts of which, affecting different parts of the trust fund, were, on 13 April 1972 to be found partly in the 1944 settlement, the 1955 appointment and the 1970 marriage settlement, and partly in the 1944 settlement, the arrangement, the deed of revocation, appointment and release and the assignments of 20 March 1972.

The contrary view would seem to involve the proposition that the pre- G existing settlement in relation to the 1955 fund was partially brought to an end when the appointment of that year was made; and that there was a like partial termination of the pre-existing settlement in relation to the main fund when the 1970 revocable appointment was made, and perhaps also a termination of such new settlement when the arrangement came into operation. In my judgment, the 1944 settlement in relation to both the 1955 fund and the main fund would H continue until such time as the fund was wholly discharged from all the trusts, powers and provisions thereof. This conclusion is consistent with my previous decision in *Hart* v. *Briscoe*(2) [1978] 2 WLR 832, which, I am told, is not under appeal.

If I am right so far, it must follow that under s 25(11) the four trustees, the Appellants and the Cayman Islands trustees, are to be treated for the I purposes of s 25 as together constituting a single body of trustees, and that each set of trustees, for the like purposes, is to be treated as acting on behalf

(1) [1927] 1 Ch 229. (2) 52 TC 53.

of such single body of trustees in so far as they act separately. The liability of trustees for capital gains tax in respect of chargeable gains is regulated by para 12 of Sch 10. Section 25 does not deal with the liability of trustees. It deals principally with occasions on which trustees are deemed to have disposed of property and therefore with occasions on which chargeable gains accrue to trustees. One turns to para 12 to learn who may be assessed and charged with the tax arising by virtue of s 25. Under that paragraph the tax may be "assessed and charged on and in the name of any one or more of those trustees". "Those trustees" means the trustees identified in the first two lines of the paragraph; namely, the trustees to whom the chargeable gain has accrued. The instant case being that of a notional disposition, the question to be answered must be: To whom is the gain deemed to have accrued—to the Cayman Islands trustees as the actual trustees or to them and also to the Appellants as the notional single body of trustees under s 25(1) and (11)? In effect, does one read s 25(11) into the administrative process of assessment and charge which has to be carried out under para 12 of Sch 10?

If the Crown's argument is correct, some surprising results may follow. It is common to find a settlement under which there subsist different settled shares in a trust fund; for example, one share is settled upon trust for the benefit of the elder child of the settlor and his issue, and another share is settled upon similar trusts for the younger child of the settlor and his issue. Not infrequently an appropriation is made to the different shares and a separate set of trustees is appointed for each settled share. It would not, I think, readily occur to one set of trustees that they may be liable for tax on a disposition deemed by s 25 to have been made by the other set of trustees—a disposition of which they may have no knowledge and over which they will probably have no control. I am not certain how a member of the first set of trustees would in practice protect himself against such a fortuitous liability except by demanding, perhaps with the assistance of court proceedings, that all assets of both settled shares are to be held in the joint names of both sets of trustees or their nominees. The problem envisaged could arise not only as a result of the appointment of separate sets of trustees after 1965 but also where separate sets of trustees were already in office when the Finance Act 1965 was passed.

I have no right to strain the wording of a taxing statute in order to avoid an interpretation that I consider unjust or anomalous. I am, however, entitled to see whether a statute is fairly capable of bearing more than one interpretation and, if so, to avoid a literal interpretation if that would produce injustice or absurdity: see *Mangin* v. *Inland Revenue Commissioner* (P.C.) [1971] AC 739, at page 746.

Counsel for the Crown pointed to the use of the expression "the trustee", in the singular, in s 25(3), (4) and (8) to show that the concept of the single and continuing body of trustees is to be introduced into the notional disposition and re-acquisition under subs (3) and (4). He contrasted this with the more usual expression "the trustees of the settlement", in the plural, which one finds in the opening words of s 25 and in the repealed subs (5)(*a*). I do not think, however, that I ought to base so far-reaching a decision as the Crown contends for on so refined an analysis of language. In passing, I note that in subs (9), which is involved with actual assessment, one finds the expression "a person who as against the trustees [in the plural] is absolutely entitled to it". No convincing argument can, I think, be built upon the use of the words "trustee" or "trustees", in the singular or plural, as the case may be. It has been rightly pointed out that tax cannot be assessed on the notional and continuing body of persons introduced by subs (1) and subs (11); it can be assessed only on real

A trustees. Consequently, para 12(1) of Sch 10 to the Act contains no reference to the single and continuing body of persons which s 25(1) requires the trustees of the settlement to be treated as being.

My mind has fluctuated as the argument progressed. In the end the question comes down to the short one which I posed earlier; namely, to what trustees does the chargeable gain accrue for the purposes of assessment and B charge under para 12(1)—the actual trustees against whom Royal Oak became absolutely entitled or the fictitious single and continuing body of persons constituted by subss (1) and (11)? I do not find the answer easy in the light of the wording used by the Act. I have, however, in the end formed the view that the concept of the single and continuing body of persons, distinct from the persons who may from time to time be the trustees, is not to be imported into C the machinery of assessment and collection so as to render accountable for the tax a person who does not hold, and may never hold, or control, and may never have been able to control, the assets deemed by s 25 to have been disposed of and re-acquired. I think that the process of assessment requires one to concentrate on actual trustees, and not on a notional body of trustees.

The third question does not strictly arise; namely, whether, if the Appel-D lants are liable to the tax, their liability is limited to the 1955 fund or, as the Crown submit, is wholly unlimited. I have not been referred to any enactment or decision which supports the proposition that the liability to tax, if it exists, would be limited to the 1955 fund. I see no reason to disagree with the Special Commissioners' decision to that effect.

*Appeal allowed. No order as to costs (but liberty to apply).*

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The Crown's appeal was heard in the Court of Appeal (Buckley, Templeman and Bridge L.JJ.) on 15, 16, 19 and 20 November 1979 when judgment was reserved. On 30 November 1979, judgment was given unanimously against the Crown, with costs.

*D. J. Nicholls Q.C.* and *Peter Gibson* for the Crown.

F *D. C. Potter Q.C.* and *R. Walker* for the taxpayers.

The following cases were cited in argument in addition to those referred to in Templeman L.J.'s judgment:—*Inland Revenue Commissioners* v. *Jamieson* [1964] AC 1466; *Potts' Executors* v. *Commissioners of Inland Revenue* 32 TC 211; [1951] AC 443; *Cape Brandy Syndicate* v. *Commissioners of Inland Revenue* 12 TC 358; [1921] 1 KB 64; *Wankie Colliery Co. Ltd.* v. *Commis-*G *sioners of Inland Revenue* [1921] 3 KB 344; [1922] 2 AC 51; *Symons-Jeune* v. *Bunbury* [1927] 1 Ch 344; *Muir* v. *Muir* [1943] AC 468; *Mangin* v. *Inland Revenue Commissioner* [1971] AC 739; *Wodehouse* v. *Wood* [1913] 2 Ch 576; *Brotherton* v. *Commissioners of Inland Revenue* 52 TC 137; [1978] 1 WLR 610; In re *Penton's Settlements* [1968] 1 WLR 248; *Crowe* v. *Appleby* 51 TC 457; [1976] 1 WLR 885; *Hart* v. *Briscoe* 52 TC 53; [1979] Ch 1; *Rank Xerox Ltd.* v. H *Lane* 53 TC 185; [1979] Ch 113; *Canadian Eagle Oil Co., Ltd.* v. *The King* 27 TC 205; [1946] AC 119; In re *Joynson's Will Trusts* [1954] Ch 567.

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**Buckley L.J.**—I have asked Templeman L.J. to deliver the first judgment in this case.

**Templeman L.J.**—This is a Revenue appeal from a decision of Brightman J., now Brightman L.J. The facts are clearly set out in his judgment reported in [1979] 1 WLR 860([1]), at page 862. The first question which arises is whether the exercise of a special power of appointment created a separate settlement for the purposes of capital gains tax. The answer depends on the provisions and intendment of the capital gains tax legislation and the nature and effect of the appointment.

The Finance Act 1965, which introduced capital gains tax, provided in s 20(4), so far as material:

> "Capital gains tax shall be charged . . . on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting any allowable losses accruing to that person in that year of assessment and, so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable loss accruing to that person in any previous year of assessment . . ."

By ss 19, 22(10) and 23 of the Act every gain accruing on the disposal of assets shall be a chargeable gain and every loss on disposal shall be an allowable loss.

In relation to settlements, where trust assets are vested in trustees in trust for beneficiaries entitled to limited interests in those assets, the persons chargeable to capital gains tax resulting from gains and losses made on the disposition of trust assets must be identified and made liable for the tax. In addition, the annual computation of capital gains tax on the difference between capital gains and allowable losses in respect of trust assets must be separated from the computation of capital gains tax on the difference between chargeable gains and allowable losses made by a beneficiary in the disposition of his own absolute property and from the computation of capital gains tax on the difference between chargeable gains and allowable losses made by a trustee in the disposal of his own personal estate. If under a settlement trust assets held by two trustees in trust for a life tenant and remainderman are sold or otherwise disposed of, then any chargeable gain thus made or allowable loss thus suffered must be brought into account for the purpose of assessing capital gains tax in respect of the settlement; but it would be illogical to allow or compel the life tenant or remainderman or either of the trustees to bring into account gains and losses which are not attributable to trust assets. Finally the burden of the capital gains tax attributable to trust assets must ultimately fall on the capital of the trust assets in such manner that the beneficiaries interested in that capital and no one else bear the burden in proportion to, and in accordance with, their respective interests.

For the purpose of identifying the persons chargeable to capital gains tax resulting from chargeable gains and allowable losses made on the disposal of trust assets, s 25(1) provides: "In relation to settled property, the trustees of the settlement shall . . . be treated as being a single and continuing body of persons (distinct from the persons who may from time to time be the trustees) . . ." Paragraph 12(1) of Sch 10 to the Finance Act 1965 provides that capital gains tax chargeable in respect of chargeable gains accruing to the trustees of a settlement may be assessed and charged on and in the name of any one or more of those trustees.

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([1]) Page 370 *ante*.

A For the purpose of collecting capital gains tax, ss 7, 8 and 12 of the Taxes Management Act 1970 imposes a duty of giving notice and making returns of capital gains and allowable losses on every person who is chargeable to capital gains tax.

For the purpose of separating chargeable gains accruing to trustees and capital gains tax payable in respect of dispositions of trust assets from capital B gains and tax of a beneficiary in respect of his absolute property or of a trustee in respect of his personal assets, para 12(2) of Sch 10 to the Finance Act 1965 provides that chargeable gains accruing to trustees and capital gains tax chargeable on or in the name of the trustees of a settlement shall not be regarded as accruing to or chargeable on any other person, nor shall any trustee be regarded as an individual.

C Thus, so far as settled property is concerned, the trustees make separate annual returns based on chargeable gains and allowable losses arising from the disposition of trust assets and pay any resultant capital gains tax out of the capital of those assets. The burden of tax, being borne by capital, affects and falls equitably on the beneficiaries interested under the settlement according to their respective interests. A life tenant will suffer the loss of income on the D money paid out in tax and the remainderman will suffer the loss of capital. No difficulty arises when one trust fund is held by one set of trustees under trusts declared by one trust instrument in favour of one set of beneficiaries.

In the present case two different trust funds are held by two different sets of trustees upon trusts declared by one principal instrument and several subsidiary trust instruments in favour of two different sets of beneficiaries. By E a marriage settlement dated 24 March 1944 a trust fund was settled on the wife for life, with remainder to the husband during his life on protected trusts, with remainder to the issue of the marriage as the husband and wife should by deed appoint, with remainders over. By an appointment dated 20 October 1955 certain specified assets comprised in the marriage settlement were appointed and released by the husband and the wife and became held upon trust for Jane, F a daughter of the marriage, during the life of the wife; then for the husband on protective trusts during his life (preserving the interest accorded to him by the marriage settlement) and then for Jane, who was seven years old, contingently on her attaining the age of 25 years with remainder to Jane's children. The appointed fund comprised in the 1955 appointment was necessarily segregated from the unappointed main fund which remained held on the original trusts of G the 1944 marriage settlement. This segregation was necessary, firstly because the person for the time being entitled to the income of the appointed fund, namely Jane, was different from the person entitled to the income of the main fund, namely the wife, and secondly because the beneficiaries who became absolutely entitled to the capital of the appointed fund were, or might be, different from those who eventually became entitled to the capital of the main H fund.

That was the position when the Finance Act 1965 came into operation. The marriage settlement trustees held the appointed fund and the main fund. The marriage settlement trustees were the persons accountable for the capital gains tax in respect of the appointed fund and the main fund. But the beneficiaries interested in the appointed fund were different from those interested in the I main fund to a substantial degree. In these circumstances, in order to ensure that the burden of capital gains tax fell equitably on the beneficiaries interested, it became necessary to treat the appointed fund and the main fund for capital gains tax purposes as though they were comprised in two separate settlements.

If the trustees sold an asset comprised in the appointed fund at a profit and sold an asset comprised in the main fund at a loss, the Revenue would suffer if the loss on one fund was set off against the gain on the other fund. Moreover, the beneficiaries interested in the appointed fund would pay less tax and ultimately, if the main fund made a profit in a subsequent year, the beneficiaries interested in the main fund would pay more tax than the tax attributable to the disposition of assets comprised in the appointed fund on the one hand and the disposition of the assets comprised in the main fund on the other hand.

In my judgment, therefore, the 1955 appointment resulted for the purposes of capital gains tax in two settlements, one settlement which affected the appointed fund and consisted of two documents, namely, the 1944 marriage settlement and the 1955 appointment, and the original settlement which affected the main fund and consisted only of the 1944 marriage settlement. Capital gains tax must be calculated and charged separately on the two separate funds comprised in the two different settlements.

In In re *Ogle's Settled Estates* [1927] 1 Ch 229 Romer J. considered the meaning of a settlement for the purposes of the Settled Land Act 1925. Of course that decision, being based on the 1925 Act, does not determine the construction of the 1965 Finance Act dealing with capital gains tax. Nevertheless a settlement for the purposes of capital gains tax is, in my judgment, and adopting the words of Romer J., at page 233, "The state of affairs in relation to certain assets brought about, or deemed to have been brought about by one or more documents . . ."

The trustees of the 1944 settlement in every year from 1965 onwards correctly made two tax returns. The return relating to the appointed fund dealt with income arising from the assets comprised in the appointed fund and held in trust for Jane. That return also disclosed chargeable gains and allowable losses made in the relevant year of assessment by dispositions of the assets comprised in the appointed fund, and the trustees paid capital gains tax out of the appointed fund if the gains exceeded the losses or carried forward a net loss if the losses exceeded gains. The return relating to the main fund dealt with income arising from assets comprised in the main fund and held in trust for the wife. That return also disclosed chargeable gains and allowable losses and resulted in payment out of the main fund of any capital gains tax attributable to dispositions of the assets of the main fund or the carrying forward of any net losses incurred by the main fund. The just claims of the Revenue and the correct attachment of the burden of liability for capital gains tax could only be maintained if the different trusts affecting the appointed fund and the main fund respectively created different settlements.

A deed of settlement which creates different trusts of different properties is one settlement in the eyes of an equity lawyer. The settlement remains one settlement in common parlance if by the exercise of a power of appointment or otherwise the trusts affecting part of a trust fund are altered. If a trust fund is settled on, or appointed to, different beneficiaries in aliquot shares, the trustees of the trust fund may treat the whole trust fund for capital gains tax purposes as one settlement; but that is because capital gains tax payable in respect of any dispositions of any of the assets comprised in the trust fund paid out of any capital of the trust fund will fall proportionally and equitably on the beneficiaries interested in the whole of the trust fund in different shares. But where a settlement originally, or as a result of an appointment, creates different trusts of different properties, then for capital gains tax purposes there are created different states of affairs brought about by one or more documents and

A thus creating two different settlements. Brightman J. held that in the present case there was one single settlement which comprised the appointed fund held on the trusts of the 1944 settlement and the 1955 appointment and the main fund held on the trusts of the 1944 settlement alone. The learned Judge considered that, if there were two settlements for capital gains tax purposes, it must follow that the 1944 settlement was partially brought to an end by the 1955 B appointment. He considered that the 1944 settlement in relation to the appointed fund and the main fund would continue until such time as both funds were wholly discharged from all the trusts, powers and provisions of the 1944 settlement (see page 867 of the report[1]). In my judgment, the 1944 settlement was not brought to an end by the 1955 appointment in relation to the appointed fund, but was altered in certain respects, alterations which were of a kind which C made it necessary for the appointed fund to be treated as comprised in a separate settlement consisting of the 1944 settlement and the 1955 appointment for the purposes of capital gains tax.

Mr. Nicholls, on behalf of the Crown, submitted that if the 1955 appointment created a separate settlement of the appointed fund consisting of the 1944 settlement and the 1955 appointment, then the trustees of that separate D settlement became "absolutely entitled" to the appointed fund as against the trustees of the 1944 settlement within the meaning of s 25(3) of the Finance Act 1965. That subsection provides:

> "On the occasion when a person becomes absolutely entitled to any settled property as against the trustee all the assets forming part of the settled property to which he becomes so entitled shall be deemed to have E been disposed of by the trustee, and immediately reacquired by him in his capacity as a trustee within section 22(5) of this Act, for a consideration equal to their market value."

It follows, Mr. Nicholls submitted, that if the 1955 appointment had been made after 1965 or if any alteration to any settlement takes place by way of an appointment or assignment, or in any other manner so as to create a separate F settlement, then capital gains tax immediately becomes payable as a result of s 25(3). In my judgment the trustees of the 1944 settlement, and the separate trustees subsequently appointed of the appointed fund, did not become absolutely entitled to the appointed fund as against the trustees of the 1944 settlement within s 25(3). Some of the trusts, powers and provisions of the 1944 settlement remained effective. The separate settlement consisted of a state of G affairs to which both the 1944 settlement and the 1955 appointment were relevant.

Whether a separate settlement is created by the exercise of a power of appointment for the purposes of capital gains tax depends on the property comprised in the appointment and the beneficial interests thereby created. If a separate settlement is created by an appointment after 1965, it does not H follow that anyone becomes absolutely entitled to the appointed fund, thus to make capital gains tax payable pursuant to s 25(3) of the Finance Act 1965. That again depends on the circumstances. For example, if a power of appointment merely conferred on a husband a life interest in specified assets if he survived his life tenant wife, the appointment would create a separate settlement for capital gains tax purposes in order that the burden of capital I gains tax attributable to the assets in which the husband did not have an expectant interest should not fall on the assets appointed in his favour, or *vice versa*; but in my judgment no person by that appointment would become

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[1] Page 375 *ante*.

absolutely entitled to the appointed fund as against the trustees of the settlement for the purposes of s 25(3) of the Finance Act 1965. On the other hand, in *Hoare Trustees* v. *Gardner*(1) [1979] Ch 10 trustees in exercise of a power declared trusts which were wholly exhaustive of the property thereby taken out of an existing settlement and settled on entirely new trusts. Brightman J. held that the trustees holding on entirely new trusts became absolutely entitled as against the trustees of the old trusts. In the present case the separate settlement was not exhaustive of the 1944 settlement powers and trusts but consisted of the 1944 settlement as altered by the 1955 appointment.

In the present case it suffices that capital gains tax is a tax on capital and that the burden of the tax must fall equitably on the beneficiaries and only on the beneficiaries interested in the capital assets which produce the gain. It follows that where different beneficiaries are interested in different capital assets, capital gains tax must be assessed, charged and paid as if those capital assets were comprised in different settlements, irrespective of the number or kind of documents involved. In my judgment the appointed fund, by virtue of the 1955 appointment, became for the purposes of the assessment, charge and payment of capital gains tax comprised in a different settlement from the settlement of the main fund when the Finance Act 1965 came into operation and at all times thereafter. In 1972 the trustees of the appointed fund ceased to be the same persons as the trustees of the main fund as a result of the appointment of separate trustees of the appointed fund. Later in 1972 capital gains tax became payable in respect of assets comprised in the main fund. Since the appointed fund and the main fund were, for the reasons I have advanced, comprised in different settlements for the purposes of capital gains tax, it follows that the trustees of the appointed fund are not liable for the capital gains tax payable in respect of the main fund.

The learned Judge reached the same conclusion, but for different reasons. He rejected the argument, which I have accepted, that the appointed fund and the main fund were held on the trusts of separate settlements, but accepted the argument that a trustee of a settlement was only liable for capital gains tax payable as a result of dispositions of property vested in him. The trustees of the appointed fund were therefore not liable for the capital gains tax payable in respect of the main fund, which was vested in different trustees. I find this argument impossible to sustain in view of the provisions of s 25(1) and (11) of and Sch 10, para 12(1), to the 1965 Act. If, contrary to the views I have already expressed, the appointed fund and the main fund remained comprised in one settlement only, then in my judgment the trustees of the appointed fund are trustees in whom part of the property comprised in the settlement is vested and are treated, together with the trustees of the main fund, as the trustees of the settlement, each of whom is liable for capital gains tax on the whole.

Section 25(1) of the Finance Act 1965, to which I have already referred, provides that the trustees of the settlement shall be treated as being a single and continuing body of persons. Section 25(11) provides:

> "For the purposes of this section, where part of the property comprised in a settlement is vested in one trustee or set of trustees and part in another (and in particular where settled land within the meaning of the Settled Land Act 1925 is vested in the tenant for life and investments representing capital money are vested in the trustees of the settlement), they shall be treated as together constituting and, in so far as they act separately, as acting on behalf of a single body of trustees."

(1) 52 TC 53.

A This subsection is plainly not confined to the particular instance given of a strict settlement under the Settled Land Act 1925. Mr. Walker, junior Counsel for the taxpayers, gave several instances in which it would be necessary or desirable for part of the property comprised in one settlement to be vested in one set of trustees and part in another. In my judgment, all the instances he gave would fall within s 25(11) and all the trustees would be treated as B constituting a single body of trustees. Schedule 10, para 12(1), to the Act provides that capital gains tax chargeable in respect of chargeable gains accruing to the trustees of a settlement may be assessed and charged on any one or more of those trustees. The learned Judge was naturally impressed with the unfairness which might result if, for example in the present case, on the hypothesis that the main fund and the appointed fund were comprised in the C same settlement, any one trustee of the appointed fund might be made liable for all the capital gains tax attributable to the main fund despite the fact that the assets of the appointed fund under his control might not be equal in value to the tax assessed. The facts of this case as set out in the judgment of the learned Judge emphasise the fact that possible unfairness by the Revenue to an individual taxpayer can be more than matched by the unfairness of an D individual taxpayer towards the general body of taxpayers. It is very rarely that parts of trust funds become vested in different sets of trustees without the consent or acquiescence of all the trustees. The Revenue are not bound to assess every trustee and I apprehend that they will be slow to do so if through no fault of his own a trustee never obtains control of part of a fund which becomes liable to capital gains tax. But, if a trustee were responsible for part of E the fund being moved beyond his control and beyond the grasp of the Revenue for the lawful recovery of tax, the trustee might well find himself assessed to capital gains tax on the whole of the fund. In the present instance the trustees could not complain about unfairness if the Revenue were able to levy capital gains tax against them on capital gains attributable to the main fund. The trustees participated in the scheme, a perfectly lawful scheme, which was F operated in the present case, and it was open to them to protect themselves by indemnities before doing so. I do not find the harshness of the results, or possible results, so intimidating as to overcome what I believe to be the plain meaning and effect of s 25(1) and (11) of and Sch 10, para 12(1), to the Finance Act 1965.

Mr. Potter, on behalf of the trustee taxpayers, mounted a complicated and G ingenious argument partly based on the fact that sometimes s 25 refers to "the trustees of the settlement", sometimes to "the trustees" and sometimes to "the trustee". The fact remains that the trustees of a settlement constitute a single and continuing body of persons and any one of them is liable for capital gains tax. Mr. Potter also mounted an alternative argument which depended, as I understand it, on the fact that, by s 22(5) of the Act in relation to assets held by H a trustee for another person absolutely entitled as against the trustee, capital gains tax legislation applies as if the acts of the trustee were the acts of the beneficiary. He said that this had happened in the present case and that s 25(3), which imposes tax when a person becomes absolutely entitled to settled property against the trustee, in some way avoided the implications of s 25(1). If I have misunderstood the argument it is not for want of trying and, so far as I I understand it, the argument seems to me to be based on a fallacy. Section 25(3) applies when a person becomes absolutely entitled to any settled property. Capital gains tax thereupon becomes payable by the trustee. Subsequent actions which take place before the trustee actually hands the trust property over to a beneficiary fall within s 22(5).

In the result, whilst disagreeing with the reasons given by the learned J Judge, I concur in his conclusions and would dismiss the appeal.

**Bridge L.J.**—I agree. A

**Buckley L.J.**—I agree that this appeal should be dismissed for the reasons given by Templeman L.J., but, as we are differing from Brightman J. about the reasons which led him to his conclusion, I propose to put my judgment in my own language. The capital gains tax was created and is regulated by Part 3 of the Finance Act 1965, which has been subsequently amended in some respects. The tax is charged upon chargeable gains, less allowable losses, accruing on B actual or notional disposals of property. The person liable is the person to whom the chargeable gain accrues. When that person is the absolute beneficial owner both at law and in equity of the property disposed of, he is the person liable to the tax. If however, although he is the legal owner, he is a mere nominee of, or a bare trustee for, another person who is the absolute beneficial owner, the beneficial owner is the person liable for the tax (s 22(5)). If the C property is held by the legal owner upon any trust other than a bare trust in favour of a beneficial owner absolutely entitled to the property, it is "settled property" as defined in s 45(1). In that case s 25 applies. Section 25(1) provides as follows:

> "In relation to settled property, the trustees of the settlement shall for the purposes of this Part of this Act be treated as being a single and D continuing body of persons (distinct from the persons who may from time to time be the trustees), and that body shall be treated as being resident and ordinarily resident in the United Kingdom unless the general administration of the trusts is ordinarily carried on outside the United Kingdom and the trustees or a majority of them for the time being are not resident or not ordinarily resident in the United Kingdom." E

Then there is a proviso which I do not think I need read. The Act provides no definition of the word "settlement" but in this context it seems to me clearly to mean the trusts which make the property settled property for the purposes of the Act. So one has to investigate what were the trusts of the particular property which has been actually or notionally disposed of and who were the trustees holding that property on those trusts. Section 25(1) confers on those F trustees a quasi corporate capacity as a single and continuing body distinct from the individuals who are the trustees, and fixes the residence of that quasi corporate body for the purposes of the tax. The subsection also has the effect (1) of segregating chargeable gains and allowable losses on trust assets from chargeable gains and allowable losses in respect of disposals of the individual trustees' own property; and (2) of avoiding complications which might arise out G of changes in the trusteeship between a date when an allowable loss was incurred on the disposal of a trust asset and a later date when a chargeable gain has been realised on another asset of the same trust against which the allowable loss should be taken into account. This machinery works straightforwardly if the chargeable gain accrues on a disposal of a piece of settled property which forms part of a corpus of settled property all held by one set of trustees on one H set of trusts. The trustees are liable for the tax and when it is paid they, or those of them who pay the tax, are entitled under the general law to be indemnified out of the capital of the trust fund with the consequence that the incidence of the tax falls upon the beneficiaries under the trusts in accordance with their several interests in the trust funds in the way Templeman L.J. has described.

Complications are liable to arise, however, if the corpus of the settled fund I is not held on one and the same set of trusts. No such complications arise, I think, where *ab initio* two settlements are comprised in one trust instrument, as would be the case where a settlor by one instrument, whether *inter vivos* or by will, settled fund A on trust for X for life with remainders, and fund

A B on trust for Y for life with different remainders. These can be clearly recognised as two distinct settlements, although the trustees may be the same in each case and although administrative provisions may be contained in the trust instrument which are common to both settlements. But where, as in the present case, one fund is initially settled upon trusts which apply to the whole fund but include powers of appointment by the exercise of which at a later date B one part of the fund comes to be held on different trusts from other parts, complications may arise. This would not, I think, be the case so long as the different trusts affect individual shares of the settled corpus. Suppose, for instance, that a fund were held in trust for A for life and subject thereto as to one-fifth of the fund for B for life with remainder to B's issue and as to four-fifths thereof for C for life with remainder to his issue. Unless and until C appropriations were made to the one-fifth share and the four-fifths share, the whole fund must, in my view, be held on one trust, for every beneficiary is interested in an undivided share of every asset of the fund. One could not identify any asset as belonging to the one-fifth share or to the four-fifths share exclusively. But once specified assets are appropriated to a particular share or part of a settled fund, whether by appointment or appropriation, a different D state of affairs exists. If one were to ask upon what trusts a particular trust asset which has been appropriated to the one-fifth share is held, these would manifestly be different trusts from those affecting an asset appropriated to the four-fifths share. As soon as such a state of affairs comes into existence it would, in my view, be a quite accurate use of language to say that the one-fifth share and the four-fifths share were distinct settled properties held on distinct E trusts and so were the subjects of distinct settlements notwithstanding that their distinctness may have arisen from acts or events which have occurred later than the original declaration of trust from which they have a common origin.

In such circumstances, as Templeman L.J. has made clear, common sense and fairness appear to demand that the several parts of the original fund should be treated as distinct for the purposes of the tax. The question is, I F think, whether upon the true interpretation of the Act they are to be regarded as the subject-matters of separate, distinct settlements, or as parts of property comprised in a single settlement. In this connection it is necessary to consider s 25(1) in conjunction with s 25(11) and (12). Section 25(11), which deals with the position where "part of the property comprised in the settlement is vested in one trustee or set of trustees and part in another", read by itself, could G equally well apply to circumstances where the two parts of the settled property were held by different trustees but upon the same beneficial trusts (as would be the case in the particular instance given in the subsection where settled land is vested in the tenant for life and investments of capital moneys of the settlement are held by the trustees of the settlement) and to circumstances where one part of settled property is vested in one set of trustees on certain beneficial trusts and H another part is vested in another set of trustees on different beneficial trusts. The subsection does not, in my opinion, provide a key to the solution of the problem of construction.

Subsection (12) provides as follows:

> "If there is a life interest in a part of the settled property and, where that is a life interest in income, there is no right of recourse to, or to the I income of, the remainder of the settled property, the part of the settled property in which the life interest subsists shall while it subsists be treated for the purposes of subsections (4), (5), (6) and (7) of this section as being settled property under a separate settlement."

Subsections (5), (6) and (7) of s 25 were repealed in 1971, as also were the references in subs (12) to those three subsections. At the same time subs (4) was amended so as to read: A

> "On the termination at any time after 6th April 1965 of a life interest in possession in all or any part of settled property, the whole or a corresponding part of each of the assets forming part of the settled property and not ceasing at that time to be settled property shall be deemed for the purposes of this Part of this Act at that time to be disposed of and immediately reacquired by the trustee for a consideration equal to the whole or a corresponding part of the market value of the asset." B

For the purposes of the construction of the rest of the section, however, I must consider the section as originally enacted.

Subsection (4) in its original form provided (*inter alia*), for reasons which I do not fully understand, that if a life interest in possession of part of settled property terminated, there should be a deemed disposal and reacquisition of "all the assets forming part of the settled property" (which I take to mean all the assets constituting the settled property) except any which then ceased to be settled property. The consequence of this without modification would appear to be that if a life interest in an undivided share of a settled fund or in a part of a settled fund consisting of specific assets terminated, there would be a deemed disposal and reacquisition of the whole settled fund except any part which then ceased to be settled. Subsection (12) appears to me to have been designed, in part at any rate, to avoid this consequence. Subsection (12) is, I think, designed to deal with special cases within subss (4), (5), (6) and (7) and does not, in my opinion, throw light on any other part of s 25. In particular I do not think that it gives rise to an inference that a diversity of contemporaneous income interests under the trusts declared by a trust instrument can only give rise to separate settlements of various parts of the settled property for the limited purposes specified in subs (12). It is, perhaps, worth drawing attention in passing to the fact that subs (4) as amended, with its reference to "a corresponding part of each of the assets forming part of the settled property", seems to have in view a case where the relevant part of the settled property consists of an undivided share. I should not, however, be taken to express any decided opinion about this. C D E F

Subsections (5), (6) and (7) as originally enacted do not seem to me to help to solve the problem under consideration. So one is left with subss (1) and (11). For reasons which I have already given, I get no help from subs (11). In my judgment, the proper approach to the construction of subs (1) is to look at the item of settled property in question, that is to say, the property, the disposal of which has given rise to a chargeable gain, and to enquire what the trusts are which make that property settled property within the meaning of the Act. Those trusts are, in my opinion, the settlement referred to in the subsection. One must then discover who are the trustees of that settlement. They are the persons who are chargeable with any capital gains tax payable in respect of any actual or notional disposal of that asset. G H

On the facts of the present case, when on 13 April 1972 Royal Oak Investments Ltd. became absolutely entitled to the main fund as against the Cayman Island trustees by whom alone that fund was then held, the main fund was the subject matter of a settlement subsisting under the 1944 marriage settlement, the Variation of Trusts Act Order of 28 February 1972 and the appointment of 15 March 1972. That settlement was, in my judgment, a separate and distinct settlement for the purposes of s 25 from the settlement which then existed in I

A respect of the fund then representing the specific assets appointed in favour of Jane by the appointment of 20 October 1955. In my view there were two separate settlements of two distinct funds for the purposes of the section from the commencement of the Finance Act 1965. They were separate settlements because by virtue of the appointment of 20 October 1955 specific assets then became subject to trusts under which the beneficial interests were different B from the beneficial interests which then and thereafter subsisted under the 1944 marriage settlement in respect of the main fund. No part of the property comprised in either of those two settlements was held by one set of trustees while another part of the property comprised in that same settlement was held by another set of trustees. Consequently s 25(11) is not, in my opinion, applicable.

C I agree with Templeman L.J. that the 1944 marriage settlement was not brought to an end by the 1955 appointment, either in respect of the assets comprised in that appointment or at all. As regards the specific assets comprised in the appointment, its effect was that thereafter those assets were held upon the trusts of the 1944 settlement as modified by the appointment. This would not in ordinary parlance bring the 1944 settlement to an end or involve any D notional transfer of the appointed assets from the trustees of the 1944 settlement to themselves as the trustees of another settlement, but it did, in my view, bring about a new state of affairs in which thenceforth it was not true to say that the appointed fund and the main fund were still the subject matters of one and the same settlement for the purposes of the tax. I also agree with Templeman L.J. in thinking that, if, contrary to the view which I have formed, E the 1955 appointed fund and the main fund ought to be treated as parts of property comprised in one settlement, s 25(11) of and Sch 10, para 12(1), to the Act make it impossible to hold that the Cayman Island trustees alone are assessable in respect of the notional disposal of the main fund.

For these reasons, although differing from the learned Judge, I would dismiss this appeal.

F *Appeal dismissed, with costs. Leave to appeal to the House of Lords granted.*

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The Crown's appeal was heard in the House of Lords (Lords Wilberforce, Edmund-Davies, Russell of Killowen, Keith of Kinkel and Roskill) on 15, 16 and 17 December 1980 when judgment was reserved. On 5 February 1981 judg- G ment was given unanimously in favour of the Crown, with costs.

*D. C. Potter Q.C.* and *R. Walker* for the taxpayers.

*D. J. Nicholls Q.C.* and *Peter Gibson* for the Crown.

The following cases were cited in argument in addition to the case referred to in the speech of Lord Wilberforce:—In re *Ogle's Settled Estates* [1927] 1 Ch 229; In re *Joynson's Will Trusts* [1954] Ch 567; *Pexton* v. *Bell* 51 TC 457; H [1976] 1WLR 885; *Hart* v. *Briscoe* 52 TC 53; [1979] Ch 1; *Hoare Trustees* v. *Gardner* 52 TC 53; [1979] Ch 10; *Eilbeck* v. *Rawling* 54 TC 101; [1980] 2 All ER 12; *Mangin* v. *Inland Revenue Commissioner* [1971] AC 739.

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**Lord Wilberforce**—My Lords, this is an appeal by the Crown in a case concerning capital gains tax. The relevant facts appear complicated, but can be simplified to the following essentials. A full statement is to be found in the Case Stated by the Special Commissioners. On 24 March 1944 there was made a marriage settlement on the mariage of Mr. and Mrs. Lombard-Hobson. This was in a usual form, conferring a life interest on the wife followed by a protected life interest for her husband, a special power of appointment exercisable by the spouses jointly, or by the survivor, in favour of issue, and a trust, in default, for children at twenty-one, or if female, on marriage. There were a number of other powers and administrative provisions usual in marriage settlements. There were two daughters of the marriage born in 1948 and 1951. On 20 October 1955 (this event is critical) Mr. and Mrs. Lombard-Hobson exercised their joint power of appointment so that part of the settled property (the "1955 fund") then worth about £13,000 should be held, subject to prior interests, in trust for the elder of the daughters on attaining twenty-five, or if she died under twenty-five for her children. Mrs. Lombard-Hobson also "assigned and surrendered" her life interest to the trustees, but not so as to accelerate Captain Lombard-Hobson's expectant life interest. The trustees were to accumulate the interest of the fund with power to apply all accumulations for the daughter's benefit. Thereafter the trusts of the 1955 fund and of the remainder of the settled property (the "main fund") were administered separately, and separate accounts were kept and tax returns made. The present trustees of the 1955 fund are the respondents, Mr. Roome and Mr. Denne. When Mr. Denne was appointed, in 1972, as a separate trustee of the 1955 fund, together with Mr. Roome, it was stated in the deed of appointment that this was done under s 37(1)(*b*) of the Trustee Act 1925. Mr. Roome and Mr. Denne have at all times been resident in the United Kingdom.

A B C D E

In 1972 some elaborate transactions took place, including an application to the court under the Variation of Trusts Act 1958. Only two are relevant for the present purposes: (i) On 21 March 1972 two persons resident in the Cayman Islands were appointed trustees of the main fund—in place of the existing trustees who were then Mr. Roome and a Mr. Askew and the assets of the main fund were vested in them. So there are now two sets of trustees, the respondents of the 1955 fund, and the Cayman Island trustees of the main fund. (ii) On 13 April 1972 a Cayman Islands company called Royal Oak Investments Ltd. ("Royal Oak") became absolutely entitled to the main fund as against the trustees of the main fund. This brought about a "deemed disposal" for the purposes of the capital gains tax of all the property vested in the trustees of the main fund viz. the Cayman Islands trustees. Among the assets to which Royal Oak became absolutely entitled as against the trustees of the main fund was a valuable property in Lincoln's Inn Fields, London, and it is mainly in respect of this that a claim for capital gains tax is made. The Crown is seeking to make good this claim against the respondents, who are trustees only of the 1955 fund.

F G H

There are two issues for decision: (1) Whether the respondents and the Cayman Islands trustees were on 13 April 1972 trustees of a single settlement for the purposes of the capital gains tax or whether the respondents are trustees of a separate settlement from the settlement of the main fund. (2) Whether if there was a single settlement a chargeable gain arising on the deemed disposal on 13 April 1972 accrued to all the trustees of the single settlement, or only to the Cayman Islands trustees. If the former, the Crown could assess the respondents as residents in the United Kingdom in respect of this gain. If the Crown is to succeed in the appeal, both of the above questions must be answered affirmatively; they were so answered by the Special Commissioners. On appeal to the High Court, Brightman J. answered the first question "yes" but the second question "no". In the Court of Appeal, these answers were

I J

A reversed, so that the respondents succeeded in both courts on different grounds.

There are a number of provisions in the Finance Act 1965 which have had to be examined. I think that those most relevant are the following: I cite them from the original Act of 1965, prior to amendment and consolidation.

> "25.—(1) In relation to settled property, the trustees of the settlement B shall for the purposes of this Part of this Act be treated as being a single and continuing body of persons (distinct from the persons who may from time to time be the trustees), and that body shall be treated as being resident and ordinarily resident in the United Kingdom unless the general administration of the trusts is ordinarily carried on outside the United Kingdom and the trustees or a majority of them for the time being are not C resident or not ordinarily resident in the United Kingdom: . . . (3) On the occasion when a person becomes absolutely entitled to any settled property as against the trustee all the assets forming part of the settled property to which he becomes so entitled shall be deemed to have been disposed of by the trustee, and immediately reacquired by him in his capacity as a trustee within section 22(5) of this Act, for a consideration D equal to their market value. . . . (11) For the purposes of this section, where part of the property comprised in a settlement is vested in one trustee or set of trustees and part in another (and in particular where settled land within the meaning of the Settled Land Act 1925 is vested in the tenant for life and investments representing capital money are vested in the trustees of the settlement), they shall be treated as together E constituting and, in so far as they act separately, as acting on behalf of a single body of trustees."

Schedule 10:

> "12.—(1) Capital gains tax chargeable in respect of chargeable gains accruing to the trustees of a settlement or capital gains tax due from the personal representatives of a deceased person may be assessed and F charged on and in the name of any one or more of those trustees or personal representatives, but where an assessment is made in pursuance of this sub-paragraph otherwise than on all the trustees or all the personal representatives the persons assessed shall not include a person who is not resident or ordinarily resident in the United Kingdom."

*The first question.* The Finance Act 1965 contains no definition of "settle- G ment". As to "settled property" s 45 merely states that the words mean, subject to subs 8 (concerned with unit trusts), any property held in trust other than property to which s 22(5) applies (property held by a nominee). So a "settlement" must be a situation in which property is held in trust. But when is a settlement a separate settlement? There are a number of obvious indicia which may help to show whether a settlement, or a settlement separate from another H settlement, exists. One might expect to find separate and defined property, separate trusts, and separate trustees. One might also expect to find a separate disposition bringing the separate settlement into existence. These indicia may be helpful, but they are not decisive. For example, a single disposition, e.g. a will with a single set of trustees, may create what are clearly separate settle- ments, relating to different properties, in favour of different beneficiaries, and I conversely separate trusts may arise in what is clearly a single settlement, e.g. when the settled property is divided into shares. There are so many possible combinations of fact that even where these indicia or some of them are present, the answer may be doubtful, and may depend upon an appreciation of them as a whole.

Since "settlement" and "trusts" are legal terms, which are also used by businessmen or laymen in a business or practical sense, I think that the question whether a particular set of facts amounts to a settlement should be approached by asking what a person, with knowledge of the legal context of the word under established doctrine and applying this knowledge in a practical and common-sense manner to the facts under examination, would conclude. To take two fairly typical cases. Many settlements contain powers to appoint a part or a proportion of the trust property to beneficiaries: some may also confer power to appoint separate trustees of the property so appointed, or such power may be conferred by law (Trustee Act 1925, s 37). It is established doctrine that the trusts declared by a document exercising a special power of appointment are to be read into the original settlement (*Muir* v. *Muir* [1943] AC 468). If such a power is excercised, whether or not separate trustees are appointed, I do not think that it would be natural for such a person as I have presupposed to say that a separate settlement had been created: still less so if it were found that provisions of the original settlement continued to apply to the appointed fund, or that the appointed fund were liable, in certain events, to fall back into the rest of the settled property. On the other hand, there may be a power to appoint and appropriate a part or portion of the trust property to beneficiaries and to settle it for their benefit. If such a power is exercised, the natural conclusion might be that a separate settlement was created, all the more so if a complete new set of trusts were declared as to the appropriated property, and if it could be said that the trusts of the original settlement ceased to apply to it. There can be many variations on these cases each of which will have to be judged on its facts.

There are indications in the Finance Act 1965 that this general conception is accepted and applied for purposes of capital gains tax and that the mere existence of separate trusts applying to parts of settled property does not of itself give rise to a separate settlement. Section 25(11) contemplates that part of trust property may be vested in one set of trustees and part in another but yet remain "comprised in a settlement", i.e. a single settlement. I can see no reason why this should be confined to a case where each part is held on identical trusts. And s 25(4) and (12) contemplate that a life interest can subsist in a part of the property comprised in a settlement. Subsection (12) then treats that part as settled under a separate settlement but only for the purposes there stated—viz. for the purposes of subss (4)–(7) (these provisions have been later amended but this does not affect the argument). The inference must be that except for these limited purposes settled property held on separate trusts is not necessarily treated as held under separate settlements.

A further argument relates to the consequences which would follow if the mere fact of creating separate trusts over part of settled property were to cause that part to be held under a separate settlement. It would seem inescapable that in such a case there would be a deemed disposal under s 25(3) of that part in favour of the trustees of that part (even though they might be the same persons as the trustees of the original settlement, their personality being irrelevant, under s 25(1)). This would give rise to a multitude of charges to capital gains tax and would in effect paralyse the working of settlements. The Court of Appeal, recognising this difficulty, sought to avoid it by an argument that although for purposes of capital gains tax a new settlement might be created by the exercise of a special power of appointment, there would be no deemed disposal (under s 25(3)) unless the original setlement came to an end—which, as exemplified by the present case, it might not do. But I respectfully think that the second part of this argument refutes the first and that the two cannot live together. If the original settlement survives and continues to apply to the appointed part, it must follow that no separate settlement has been created.

A Mr. Potter Q.C. for the respondents, I think, accepted the argument so far. He did not contend that the mere exercise of a special power of appointment over part of settled property brought about a separate settlement, or, as a consequence, a deemed disposition under s 25(3). He accepted that in so holding the Court of Appeal may have gone too far. What he relied upon was the totality of the transaction which took place on 20 October 1955, when not B only was the special power of appointment jointly exercised by the husband and wife, but the wife assigned and surrendered her life interest in the 1955 fund. This, he said, was—or rather would have been if executed after 1965— a disposition within the provisions of s 25(4) and, consequently or in any event, the creation of a separate trust. As to this contention, it may be agreed that the assignment and surrender of the wife's life interest in the 1955 fund introduces C an additional and relevant element, but it remains necessary to ask, is it decisive on the question whether a separate settlement was then made? This has still to be answered in the light of the tests indicated above. Normally, a mere assignment or release of life interest would not be thought of as creating a separate settlement; so no doubt one must look at the whole of the 1955 transaction. It seems in fact clear how the parties to the settlement of 1944 and D the 1955 appointment viewed the matter. In the first place, although the wife had divested herself of her life interest, it remained in existence for the purpose of enabling the trustees, during her life, to accumulate the income. The husband, moreover, retained his protected life interest in the whole of the 1944 settlement fund—including the 1955 fund. Then, when Mr. Roome was appointed a new trustee on 22 October 1959, he was appointed as trustee of the E 1944 settlement for all the purposes of that settlement, an indication that the trusts of the 1944 settlement included those of the 1955 appointment: the same formula was used on 9 October 1961 when another new trustee was appointed. Again, when on 7 February 1972 separate trustees (the respondents) were appointed to the 1955 fund it was recited in the deed of appointment (recital F) that the 1955 fund was held by the then trustees of the 1944 settlement "upon F the trusts declared concerning the same by the Settlement and by the 1955 Appointment" and the respondents were appointed trustees of the 1944 settlement so far as regarded the appointed (i.e. 1955) fund. So the intention throughout seems clearly to have been to treat the 1955 fund as being held upon the trusts of the 1944 settlement as added to and varied by the 1955 appointment.

G It is true that the appointed fund from 1955 onwards was administered separately from the main trust fund, and that separate accounts were kept of it. The respondents relied strongly on this as indicating distinctness, or separation. They suggested further that to treat the fund as a separately settled fund would fit the framework of the capital gains tax legislation, in that gains and losses of the appointed fund (and also of course of the main fund) could be H charged to that fund and not to any other part of the settled property. This led into what may be called a "purposive" argument to the effect that, if a capital gains tax on trust property is to operate fairly and effectively, it is necessary to treat any part of that property which may be held on distinct trusts as held under a separate settlement. The concept of "settlement" in the legislation, was, Mr.Potter suggested, merely a device for breaking up trusts into units, or I packets, which will bear their own taxes on their gains, less losses. This argument was in substance accepted by the Court of Appeal. Now this might be a sensible prescription for a legislature minded to set up a capital gains tax. But it is not what the Act, on a reasonable construction (however purposefully orientated) has done. It has taken a simpler course: it has attached the liability to pay capital gains tax to the trustees of settlements, not to funds held on J distinct trusts, and (in this in contrast to estate duty legislation) has not

concerned itself with questions of incidence of the tax between beneficiaries or funds within a settlement. I therefore cannot follow the Court of Appeal in this part of the argument. For the reasons I have given, in agreement with the judge, I reach the conclusion that the respondents and the Cayman Islands trustees were trustees of a single settlement. A

*The second issue.* This has to be approached on the basis that, as decided upon the first, there was a single settlement. It can be stated as follows: did the gain arising on the deemed disposal which took place on 13 April 1972 accrue to the Cayman Islands trustees as the actual trustees by whom the deemed disposal was made, or to the Cayman Islands trustees and the respondents, treated as a notional single body of trustees. If the latter, since the majority were not resident or ordinarily resident outside the United Kingdom, an assessment could be made upon any one or more of the trustees subject to the qualification that it could not be made on persons (viz. the Cayman Islands trustees) who are not resident or ordinarily resident in the United Kingdom (Finance Act 1965, Sch 10, para 12). Thus it could be made on the respondents. The critical statutory provisions for this purpose are s 25(1) and (11) and Sch 10, para 12(1) of the 1965 Act—which I have already reproduced. B C

I have found greater difficulty on this point than I believe is felt by some of your Lordships. The dilemma is well expressed in the judgment of Brightman J. Like the learned Judge I do not find it easy to relate the liability and assessment provisions in Sch 10, para 12(1) to those contained in s 25, and it does not seem to me at all clear that s 25(1), which introduces the concept of a single and continuing body of persons, is concerned with more than questions of residence, and segregation of trustees as a body from the component individuals. The result of the Crown's argument— that one set of trustees may be charged to the tax in respect of the transactions of another set over which they have no control—does not appear attractive in principle, however little practical hardship may arise in some cases and indeed in the present case. However, I have to agree that the linguistic argument is a strong one in favour of the Crown. Section 25(11) cannot be read as limited to a case where property (vested in two sets of trustees) is held on identical trusts: the particular case given in parenthesis might be such a case, but subs (11) clearly extends beyond it. If so, it seems to produce the result, in this case, that the United Kingdom trustees and the Cayman Islands trustees are treated as a single body of trustees, a concept which has already been introduced in subs (1). Then it is necessary, for the purpose of establishing liability to apply Sch 10, para 12(1). Again it seems difficult to read the words "accruing to the trustees of a settlement" otherwise than in the light of the situation produced by s 25(1) and (11) as analysed above. D E F G

Since the Court of Appeal and your Lordships regard it as clear that the analysis summarised above is correct and inescapable, I am not prepared to dissent from the conclusion that the Crown succeeds on this issue also. The appeal must therefore be allowed. H

**Lord Edmund-Davies**—My Lords, I have had the advantage of reading in draft from the speech prepared by my noble and learned friend, Lord Wilberforce. Like my Lord, I have found question 2 substantially more difficult to deal with than question 1, but I am nevertheless in respectful agreement with the manner in which both questions have been answered by him. I accordingly concur in allowing the appeal. I

A **Lord Russell of Killowen**—My Lords, I have had the advantage of reading in advance the speech prepared by my noble and learned friend, Lord Wilberforce. I agree with his view that both the points which arise for decision in this appeal fall to be decided in favour of the Crown, and on the second of those points without the hesitation felt by my noble and learned friend. Accordingly I too would allow this appeal.

B **Lord Keith of Kinkel**—My Lords, I agree with the speech of my noble and learned friend Lord Wilberforce, which I have had the advantage of reading in draft and to which I cannot usefully add. Accordingly I too would allow the appeal.

**Lord Roskill**—My Lords, in this appeal your Lordships' House has to consider the efficacy of a scheme evolved for the purpose of avoiding liability C for capital gains tax. There has been a remarkable difference of opinion in the courts below which have had to consider this problem. There were, it was common ground, two questions which had both to be answered in favour of the Inspector of Taxes before this appeal could succeed. The Special Commissioners decided both questions in favour of the Inland Revenue. Brightman J. decided the first in favour of the Crown but the second in favour of the D taxpayer. He therefore allowed the taxpayer's appeal. On the Crown's appeal to the Court of Appeal (Buckley, Bridge and Templeman L.JJ.) the learned Lords Justices dismissed the appeal but for the opposite reasons given by Brightman J., deciding the first question against the Crown but the second in their favour. Leave to appeal to your Lordships House was given by the Court of Appeal.

E My Lords, the relevant facts are so clearly stated in the judgment by Brightman J. in [1979] 1 WLR 860 at pages 862–4([1]) that no useful purpose will be served by further repetition of them. The first question is whether in 1955 a separate settlement was created when the special power of appointment was exercised. The answer, to my mind, must depend upon the true construction of the 1955 deed itself. This deed is declared to be supplemental to the 1944 F marriage settlement and to be made pursuant to the powers thereby conferred. The trusts of the 1955 appointment were not exhaustive. They could fail and would have failed if Mrs. Robinson (as Jane became) were not to survive until she were 25 years of age. The husband expressly retained his protected reversionary life interest. I venture to think that if in 1955 anyone had been asked if the 1955 appointment constituted a separate settlement the answer G must have been in the negative. Of course, at that time no one contemplated the imposition of capital gains tax. That was introduced ten years later by the Finance Act 1965. That Act contains no relevant definition of settlement and like Brightman J. I do not find authorities upon what have been held to be separate settlements for the purposes of the other statutes of assistance in determining whether a particular document or particular documents do or do H not create a separate settlement for the purposes of s 25 of the 1965 Act. Mr. Nicholls Q.C. for the Crown pressed upon your Lordships, as part of his argument, a number of anomalies which would arise if the view taken by the learned Lords Justices be correct. Though they thought otherwise, I see no escape from the conclusion that if the 1955 appointment created a separate settlement it involved a notional transfer of the relevant assets in the 1944 I settlement to the new trustees and that there then would be a disposal from the

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([1]) Pages 370–2 *ante*.

old trustees to the new for the purposes of s 25(3). With profound respect to the contrary view of Templeman L.J. ([1980] 2 WLR 156 at page 164([1])) I think the new trustees upon this hypothesis would become absolutely entitled to the assets thus taken out of the 1944 settlement. Furthermore, on the view taken by the Court of Appeal I venture to ask, as did Mr. Nicholls, how the acquisition cost to the new trustees is to be calculated? My Lords, on this part of the case I find the reasoning of Brightman J., page 867 of his judgment([2]), compelling and I would respectfully adopt it as my own. I think the right conclusion is that the main fund as it was called and the 1955 fund remain comprised in a single settlement at all times from 24 March 1944 until 13 April 1972 upon which date it was agreed that Royal Oak became absolutely entitled to the main fund as against the Cayman Island trustees. It follows that on that last-mentioned date there was a deemed disposal by those trustees. I would, therefore, answer the first question in favour of the appellant.

I now turn to consider the second question upon which the Court of Appeal agreed with the appellant but Brightman J. had taken the contrary view. The Crown sought to make the respondents, the trustees of the 1955 fund, liable to the relevant capital gains tax payable on this deemed disposal. One argument advanced on behalf of the respondents was that it was clearly wrong and unjust to impose upon one set of trustees liability for tax as a result of a disposal by another set of trustees over whom the former set had no control. At first sight this may seem strange. But the critical question is not whether the result is strange, or even unjust—in the present case I detected no relevant injustice whatever for in truth this was all part of the same scheme for avoiding capital gains tax—but upon what the relevant provisions of the Finance Act 1965 provide should happen in such a contingency as this.

My Lords, the first thing to observe is that s 25(1) provides for the creation of a new and "single and continuing body of persons (distinct from the persons who may from time to time be the trustees)" as the trustees of the settlement which is, of course, in the light of my conclusion on the first question the single settlement already referred to. Further s 25(1) provides that that single and continuing body is to be treated as resident and ordinarily resident in the United Kingdom subject to certain exceptions not presently relevant. There were, of course, at the material date two separate sets of trustees but because of s 25(1) those two sets are to be treated as a single and continuing body. Further, by reason of s 25(11) each set of trustees is to be treated as having acted on behalf of that single and continuing body which is ordinarily resident. With all respect to the argument of Mr. Potter Q.C. I find myself unable to construe s 25(11) as applying only to a case where there is a unity of beneficial interests. The language used seems to be deliberately wide and plain in its scope. That single and continuing body is treated as being resident and ordinarily resident in the United Kingdom and in my view must be so treated as at 13 April 1972.

Paragraph 12(1) of Sch 10 to the 1965 Act imposes liability for capital gains tax on the trustees. The paragraph charges their tax on any one or more of those trustees. In other words, each is and all are liable, subject to the safeguard that where the assessment is not made on all the trustees those trustees not resident or ordinarily resident in the United Kingdom cannot lawfully be assessed.

I think this was the view taken by Templeman L.J. at page 165([3]) of his judgment when he expressed disagreement with the conclusion of Brightman J.

([1]) Page 381 *ante*. ([2]) Page 375 *ante*. ([3]) Page 382 *ante*.

A on this issue saying "I find this argument impossible to sustain in view of the provisions of s 25(1) and (11) and Sch 10, para 12(1) to the 1965 Act". In common with the learned Lord Justice, I am of the view that the respondents were at the material time trustees in whom part of the property comprised in the settlement was vested and because of those statutory provisions ought to be treated with the trustees of the main fund as trustees of the settlement each of B whom is liable for capital gains tax on the whole.

Your Lordships were strongly pressed with the submission that this conclusion would, or at any rate might, jeopardize trustees such as the respondents who had no legal control over the assets which was the subject of the deemed disposal. Your Lordships were assured that in the present case the respondents were properly and adequately protected by the beneficiaries in C relation to any liability which might fall upon them. My Lords, the short answer to this powerfully urged plea is surely this. Persons, whether professional men or not, who accept appointment as trustees of settlements such as these, are clearly at risk under the 1965 Act and have only themselves to blame if they accept the obligations of trustees in these circumstances without ensuring that they are sufficiently and effectively protected whether by their beneficiaries or D otherwise for fiscal or other liabilities which may fall upon them personally as a result of the obligations which they had felt able to assume. In the result I have reached the same conclusion as did the Special Commissioners. Accordingly I would allow the Crown's appeal and restore the Special Commissioners' determination.

*Appeal allowed, with costs.*

E [Solicitors:—Withers; Solicitor of Inland Revenue.]