HIGH COURT OF JUSTICE (CHANCERY DIVISION)—**No. 1**—27, 28 AND 29 JUNE AND 29 JULY 1977. **No. 2**—12, 13 AND 14 APRIL AND 26 MAY 1978

HOUSE OF LORDS—**Nos. 1 & 2**—23, 24, 25, 26 AND 30 JULY AND 22 NOVEMBER 1979

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Ronald Arthur Vestey and Others *v*. Commissioners of Inland Revenue(1)

Income tax—Avoidance of tax—Transfer of assets—Income payable to trustees of settlement resident abroad—Income accumulated and invested—
C *Income from such investments also accumulated and invested in two funds—Investments including shares in wholly-owned overseas companies—Capital sums paid out of each fund to discretionary beneficiaries (other than the transferors) ordinarily resident in the U.K.—Capital sum paid to mother of infant beneficiary—Whether infant "received" or "entitled to receive" such capital sum—Whether each of such beneficiaries had "power to enjoy" income of*
D (a) *the trustees,* (b) *the overseas companies—Whether such income deemed to be income of each of such beneficiaries in years prior to, including, and subsequent to, year of receipt—Power of Board of Inland Revenue to apportion such income between selected beneficiaries—Income Tax Act* 1952, *s* 412 (1), (2), (4), (5) & (6)*—Finance Act* 1969, *s* 33*—Inland Revenue Regulation Act* 1890, *s* 1*—Taxes Management Act* 1970, *s* 1.

E In 1942 two U.K. residents settled substantial property on trustees resident abroad. The effect of the settlement and of powers exercised thereunder included the following: (1) rent under a lease of the property was accumulated and invested in (*a*) securities both in the U.K. and abroad, (*b*) incorporating, and subscribing for all the shares in two Bermudan companies, (*c*) purchasing, in 1944, "the Jersey company" (which had been incorporated in
F 1922 by others) to form a capital fund ("the rental fund"); (2) the income from the rental fund was divided into two moieties ("Edmund's fund" and "Samuel's fund") each having a manager ("Ronald" and "S.M." respectively); (3) the income from each moiety was by the direction of its manager accumulated, added to the moiety and reinvested; (4) at the discretion, and by direction of Ronald, capital sums out of Edmund's fund were paid to Edmund (1962–63 and
G 1966–67), to Margaret and Jane (1966–67) and, with S.M.'s consent, to Ronald himself (1962–63 and 1964–65), aggregating £1,485,000 (14 other similar discretionary beneficiaries received nothing); (5) at the discretion, and by direction, of S.M. capital sums out of Samuel's fund were in 1962–63 paid to Samuel and to Mark's mother for Mark—Mark being then an infant—aggregating £1,123,000 (12 other similar discretionary beneficiaries received
H nothing).

Assessments to income tax and surtax for 1963–64 to 1966–67 being raised against Ronald, Edmund, Margaret's husband, Jane's husband, Samuel and

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(1) Reported (Ch D) **(No. 1)** [1979] Ch 177; [1978] 2 WLR 136; [1977] 3 All ER 1073; [1977] STC 414; 121 SJ 730; **(No. 2)** [1979] Ch 198; [1978] 3 WLR 693; [1979] 2 All ER 225; [1978] STC 567; 122 SJ 746; (HL) **(Nos. 1 & 2)** [1980] AC 1148; [1979] 3 WLR 915; [1979] 3 All ER 976; [1980] STC 10; 123 SJ 826.

501626 A

Mark under the provisions of subss (1) & (2) (in the alternative) of s 412, Income Tax Act 1952—there being no claim by anyone to the protection of subs (3)—the Special Commissioners, without ruling on subs (1), held that subs (2) applied and upheld assessments which attributed the aggregate income of the trustees and of the three overseas companies to the Appellants in each year in which any was resident in the U.K., in the proportion which each individual's aggregate capital receipts bore to the aggregate receipts of them all.

On appeals by Ronald, Edmund, Samuel, Mark and the husbands of Margaret and Jane, the Chancery Division, allowing the appeals and remitting the cases to the Special Commissioners for them to rule on the applicability of subs (1), to receive further evidence in the case of Mark, and adjust the assessments accordingly, *held* that (i) s 412 was not confined (*a*) to taxpayers who themselves made (or caused to be made) transfers of assets abroad (*Congreve* v. *Commissioners of Inland Revenue* 30 TC 163 and *Bambridge* v. *Commissioners of Inland Revenue* 36 TC 313; [1955] 1 WLR 1329 followed) or (*b*) to taxpayers who were themselves attempting to avoid tax; (ii) the phrase "accumulations of income" in subs (4) was wide enough to include all sub-accumulations of income; (iii) the word "persons" in the preamble was apt to include "trustees"; (iv) Parliament must have intended s 412(2) to operate so as to attribute income of the trustees, etc., to an individual (*a*) only in the year in which he actually received a capital sum, and (*b*) only to the extent that what he received comprised income of the trustees, etc.; (v) the Court was, on the authority of a *dictum* of Lord Loreburn in *Drummond* v. *Collins* 6 TC 525, at page 538; [1915] AC 1011, entitled to amend subs (2) by inserting in it eight words to give effect to such presumed intention; (vi) there was no evidence that Mark (being an infant when the trustees paid a capital sum to his mother) either "received" or "was entitled to receive" anything prior to his majority: In re *Somech* [1957] Ch 165 applied; (vii) the income of the Jersey company could not in any event be included in the income sought to be attributed to any beneficiary by the Crown under subs (2).

Prior to the hearing by the Special Commissioners of further argument on the remission, the parties agreed that Mark had in fact received part of his sum in 1962–63 and became entitled to the balance on attaining his majority in 1963–64: the figures for the assessments on all six Appellants, consequential on the above-mentioned decision of Walton J., were agreed accordingly. However—after such further hearing—the Special Commissioners duly stated Supplemental Cases to the following effect: (I) each beneficiary was held to have had rights by virtue of which he or she had power to enjoy the income of the trustees and of the three companies under subs (5) (*d*); (II) each of the assessments previously determined by the Special Commissioners under subs (2) was accordingly restored, on the ground that each was supported by subs (1); (III) further appeals by each taxpayer against income tax and surtax assessments for the year 1968–69 (this being the first year for which s 33 of the Finance Act 1969 had effect for purposes of surtax) were listed and in principle dismissed.

On further appeals by the taxpayers, further *held*, in the Chancery Division, allowing all the appeals (including the appeals for 1968–69) that: (viii) prior to actual payment to him or her no beneficiary had any "right" to any money; hence none had any right to anything which could bring subs (1) into play; (ix) "income" in subs (5) did not comprise accumulations of income which had become capitalised: so that even after the Finance Act 1969, s 33, removed the provision as to "rights" from subs (1), that subsection was not brought into

A play by the receipt by any beneficiary of a capital sum; (x) in any event none of the beneficiaries could be said to have "power to enjoy" the income of any of the three overseas companies, as distinct from the dividends received from those companies by the trustees; *per curiam*: (xi) if an individual receives any of the income of trustees of assets transferred abroad and within s 412(1), the whole of so much of the trustees' income as has arisen as a result of the transfer B and associated operations is deemed to be his: *Lord Howard de Walden* v. *Commissioners of Inland Revenue* 25 TC 121; [1942] 1 KB 389 explained and followed; (xii) the Board's claims to be entitled (*a*) to select which of a number of beneficiaries technically within subs (1) they would assess, (*b*) to apportion the trustees' income between those selected, could not be justified under s 1 of the Inland Revenue Regulation Act 1890 or s 1 of the Taxes Management Act C 1970.

Held, in the House of Lords, dismissing ["leap-frog"] appeals by the Crown and allowing cross-appeals by the taxpayers: as to (i), reversing Walton J. and overruling *Congreve* v. *Commissioners of Inland Revenue* 30 TC 163 and *Bambridge* v. *Commissioners of Inland Revenue* 36 TC 313, that s 412 only applied to an individual who either personally made, "or maybe was associated D with", a transfer of assets abroad; as to (iv) & (v), reversing Walton J., that s 412(2)—being clear beyond doubt in its terms—could not be emended as he suggested; as to (viii), affirming Walton J., that none of the beneficiaries, being simply members of a discretionary class, had any "rights by virtue of which they had power to enjoy" income of the foreign-resident trustees or companies: so that, prior to the amendment to s 412(1) by the Finance Act 1969, s 33, s 412(1) E would in no event have applied to them.

Per Lord Wilberforce (Lords Salmon and Keith concurring): While the Commissioners cannot, in the absence of clear power, tax any given income more than once, and may use administrative common sense (e.g. in refraining from spending a large sum in order to collect a lesser sum), they have no general administrative discretion as to the execution of the Taxes Acts: when F Parliament imposes a tax, they must assess and levy it.

Per Viscount Dilhorne (Lord Keith concurring): (*a*) approving Walton J. on point (ii) above—the receipts of capital sums were "associated operations" within the meaning of s 412(4); (*b*) disapproving Walton J. on point (ix) above—after the amendment to s 412(1) by s 33 of the Finance Act 1969 the beneficiaries would (if the House had not reversed *Congreve* v. *Commissioners* G *of Inland Revenue* and *Bambridge* v. *Commissioners of Inland Revenue*) have had power to enjoy the income in question, when receiving capital sums, by virtue of having power to enjoy it under paras (*c*) and (*d*) of s 412(5); (*c*) the actual result in *Congreve* v. *Commissioners of Inland Revenue* could be upheld on the alternative ground stated by Cohen L.J. (30 TC, at page 197), viz., that the transfer of assets abroad had been procured by the individual assessed; (*d*) H there was nothing in s 412(2) which gave it retroactive effect; no assessment could therefore be raised on an individual for a year prior to that in which he (or his spouse) received or became entitled to receive a capital sum.

CASE

Stated under the Taxes Management Act 1970 section 56 by the Commissioners I for the special purposes of the Income Tax Acts for the opinion of the High Court of Justice.

501626 A2

1. At a Meeting of the Commissioners for the special purposes of the Income Tax Acts held on 14, 15, 16, 17, 18, 21 and 22 January 1974 and 25 March 1975 Ronald Arthur Vestey (hereinafter called "the Appellant") appealed against the following assessments to income tax and surtax:— A

1963/64	income tax £140,000	surtax	£140,000
1964/65	„ „ „	„	£28,500
1965/66	„ „ „	„	£20,000
1966/67	„ „ „	„	£140,000.

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2. Shortly stated the question for our decision was whether the Appellant had incurred liability to tax under section 412 of the Income Tax Act 1952 in respect of certain capital payments made to him by the Trustees of a Settlement dated 25 March 1942.

3. Mr. Edward Brown, Chartered Accountant, gave evidence before us. C

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

(1) A Lease dated 29 December 1921 made between (1) Sir William Vestey and Sir Edmund Hoyle Vestey and (2) The Union Cold Storage Co. Ltd.

(2) A Settlement dated 30 December 1921 made between (1) Sir William Vestey and Sir Edmund Hoyle Vestey (2) Trustees. D

(3) Settlement dated 25 March 1942 made between (1) Sir Edmund Hoyle Vestey and Lord Vestey (2) Trustees (3) Ulster Bank Limited.

(4) Lease dated 26 March 1942 made between (1) Trustees and (2) Union Cold Storage Co. Ltd.

(5) Deed dated 2 November 1962 (extending Prescribed Term to 1 January 1984) made by the Appellant and Edward Brown. E

(6) Settlement dated 3 January 1963 made between (1) the Appellant and Lord Vestey (2) Trustees (3) Ulster Bank Limited.

(7) Lease dated 10 April 1963 made between (1) Trustees and (2) The Union International Co. Limited.

(8) Direction to Trustees by W H Vestey dated 30 August 1942.

(9) Direction to Trustees by R A Vestey (the Appellant) dated 14 September 1942. F

(10) Deed of Revocable Direction by W H Vestey (as Samuel's Manager) dated 19 October 1942.

(11) Deed of Revocable Designation by W H Vestey (as Samuel's Manager) dated 24 October 1942.

(12) Deed of Revocable Direction by R A Vestey (the Appellant) (as Edmund's Manager) dated 19 October 1953. G

(13) Appointments of New or Additional Trustees of 1942 Settlement:—

(a) 17 September 1958—Mark Stephen Drabble

(b) 13 June 1967—Henri Marion

(c) 6 December 1967—Claude Thurel

(d) 27 November 1970—Peter Alan Beak H

(e) 20 January 1971—Ronald Charles Grove.

A (14) Deeds of Direction to Trustees of 1942 Settlement:—

(a) 9 July 1962 by Edward Brown

(b) 29 October 1962 by the Appellant and Edward Brown

(c) 1 January 1963 by the Appellant

(d) 1 January 1963 by Edward Brown

(e) 1 January 1963 by Edward Brown

B (f) 18 November 1964 by the Appellant and Edward Brown

(g) 2 May 1966 by the Appellant

(h) 2 May 1966 by the Appellant

(i) 18 November 1966 by the Appellant.

(15) Directions by Trustees of 1942 Settlement—to Union International Company Limited, regarding payment of rent under leases of 26 March 1942 C and 10 April 1963:—

(a) dated 27 July 1950

(b) dated 30 June 1967

(c) dated 12 December 1967;

(16) to R A Vestey dated 30 June 1967.

(17) The family tree of the Vestey family.

D (18) A Schedule showing the individuals assessed, the year of assessment, the amounts of the assessments and whether to income tax or surtax or both.

(19) Correspondence between the parties.

(20) & (21) Specimen cash sheets prepared under the supervision of Mr. Edward Brown.

(22) Correspondence between Mr. Edward Brown and the Treasury.

E (23) to (26) Accounts of the Trustees of the 1942 Settlement to 31 March 1964, 1965, 1966 and 1967.

(27) Accounts of Frederick Leyland & Co. Ltd. for 1971.

(28) „ „ Commercial Insurance Corpn Ltd. for 1965.

(29) „ „ Commercial Investment Co. Ltd. for 1966.

(30) „ „ Salient Shipping Company (Bermuda) Ltd. for 1966.

F (31) Accounts of New Holding & Finance Co. Ltd. for the years 1963–1966.

(32) Correspondence between the Surtax Office and Mr. Edward Brown about the computation of income of the Appellant and others for section 412.

(33) Correspondence between the Surtax Office and Mr. Edward Brown about New Holding & Finance Company Limited.

G Copies of such of the above as are not annexed hereto as Exhibits 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:—

(1) By a lease dated 29 December 1921 (hereinafter referred to as "the

1921 Lease") made between Sir William Vestey and Sir Edmund Hoyle Vestey the Lessors of the first part and the Union Cold Storage Co. Ltd. the Lessees of the second part and Trustees of the third part, the Lessors as beneficial owners granted to the Lessees a lease of the hereditaments and premises referred to in the first, second and third Schedules thereto to hold the same for the term of twenty-one years from 10 April 1921 at an annual rent of £960,000 payable, subject to abatement in certain circumstances, to the Trustees. The properties comprised in the first Schedule were owned by the Lessors, those in the second Schedule were properties which the Lessors were beneficially entitled but were held by nominees, and those in the third Schedule were held by companies which the Lessors controlled. The properties mentioned in these three schedules included ranches, cattle-breeding properties and freezing works throughout the world. The Lease is printed in *Union Cold Storage Co., Ltd.* v. *Adamson* 16 TC 293 at page 309 *et seq*.

(2) By a Settlement dated 30 December 1921 (hereinafter referred to as "the 1921 Settlement") made between the said Sir William Vestey and Sir Edmund Hoyle Vestey as Settlors of the one part and the above mentioned Trustees of the other part, the Settlors settled the rent of £960,000 payable to the Trustees under the 1921 Lease for the benefit of their respective descendants. The circumstances attending the execution of the 1921 Settlement are set out in the case of *Lord Vestey's Executors and Vestey* v. *Commissioners of Inland Revenue* 31 TC 1 in the Stated Case. The 1921 Settlement which, as appears from its terms, was executed outside the United Kingdom had determined in 1942 and the property comprised therein had been distributed on or shortly before 25 March 1942.

(3) By a Settlement dated 25 March 1942 (hereinafter referred to as "the 1942 Settlement") made between Sir Edmund Hoyle Vestey and Lord Vestey as Settlors of the one part and James Flynn and Reginald Beak as Trustees of the second part and Ulster Bank Ltd. of the third part, the Settlors settled the property described in the Schedule thereto. The material parts of the Settlement are as follows:

"1. In this Deed the following expressions have the following meanings respectively:—(a) 'The Trustees' means the parties hereto of the second part and their successors in title as trustees or trustee for the time being of this Deed. (b) 'The Company' means the said Ulster Bank Limited. (c) 'The Joint Managers' means Ronald Arthur Vestey (the elder now surviving son of Sir Edmund Vestey) and the Honourable William Howarth Vestey (the son of Lord Vestey) together during their joint lives and the survivor of them during his life after the death of either of them and after the death of both of them such person or persons (whether individual or corporate) as they jointly by any deed or deeds revocable or irrevocable or as the survivor of them in like manner or by Will or Codicil shall designate for this purpose (and so that they or the survivor of them may make and authorise delegation and sub-delegation in any manner and to any extent of the exercise of this power of designation whether before or after the death of such survivor but due regard being had to the law concerning remoteness) or in default of and subject to any such designation Edmund's Manager and Samuel's Manager hereinafter defined. (d) 'Edmund's Manager' means the said Ronald Arthur Vestey during his life and after his death such person or persons (whether individual or corporate) as he shall by any deed or deeds revocable or irrevocable or by Will or Codicil designate for this purpose (and so that he may make and authorise delegation and sub-delegation in any manner and

A to any extent of the exercise of this power of designation whether before or after his own death but due regard being had to the law concerning remoteness) or in default of and subject to any such designation his personal representatives. (e) 'Samuel's Manager' means the said William Howarth Vestey during his life and after his death such person or persons (whether individual or corporate) as he shall by any deed or deeds B revocable or irrevocable or by Will or Codicil designate for this purpose (and so that he may make and authorise delegation and sub-delegation in any manner and to any extent of the exercise of this power of designation whether before or after his own death but due regard being had to the law concerning remoteness) or in default of and subject to any such designation his personal representatives. (f) 'The Trust Property' means C the capital property rights and interests assured or covenanted to be assured by Clause 2 hereof and all moneys investments and property at any time representing the same or added to the Trust Property as capital by way of further Settlement or otherwise. (g) 'The Specified Period' means the period from the date of this Deed until whichever of the three following dates or events shall first occur namely (i) the 1st day of January D 2030 (ii) the expiration of 20 years after the death of the survivor of the issue actually born before the date of this Deed of the late Right Honourable William Baron Vestey and Sir Edmund Vestey and His late Majesty King Edward VII respectively and (iii) the failure by death of all the issue (whether present or future) of Sir Edmund Vestey and the said William Baron Vestey respectively except Lord Vestey himself and so that E all his issue shall for the purposes of this Deed be deemed to have definitely failed by death if and when no issue of his shall be living (and notwithstanding that he may be still alive) and similarly with regard to Sir Edmund Vestey and his issue. (h) 'The Prescribed Term' means the term from the date of this Deed until the 1st day of January 1963 or the earlier end of the Specified Period or until such if any date either before or after the said F 1st day of January 1963 (but not after the 1st day of January 1984 or the end of the Specified Period) as the Joint Managers while not less than two in number or (if and while the Joint Managers shall be a single person) as Edmund's Manager and Samuel's Manager together shall appoint by any deed or deeds executed in each case during the continuance of the Prescribed Term as then existing and so that the Prescribed Term may be G thus repeatedly extended by successive deeds or ended by deed at any time.

2. The Settlors together as Settlors in respect of all the property in this clause hereinafter mentioned except that marked * in the margin of the Schedule hereto And Lord Vestey alone as Settlor in respect of such excepted property Hereby Grant to the Trustees All the property which H is shortly specified or referred to in the Schedule hereto (and which consists of or includes lands buildings and premises in various parts of the World outside Great Britain and Ireland) And all the rights and interests whatsoever of the Settlors or either of them to or in or in respect of the said property and the income thereof To Hold the said property rights and interests unto the Trustees absolutely Subject as to such parts of the I said property as are affected thereby to the existing Lease (for 21 years from the 10th day of April 1921) to the Union Cold Storage Company Limited dated the 29th day of December 1921 (and made between The Right Honourable William Baron Vestey then Sir William Vestey Baronet and since deceased and Sir Edmund Vestey of the first part the said Union

Cold Storage Company Limited of the second part and Charles Auguste Kennerley Hall James Meeres Drabble and Kenneth Stirling of the third part) as such Lease has been modified by certain supplemental deeds in respect of substituted property But without the benefit of any rent reserved or made payable by the said Lease or any of the said supplemental deeds And the covenants implied by the use of the words 'as Settlors' and 'as Settlor' in this clause shall operate as covenants for or in respect of all relevant assurances acts matters and things whatsoever (including the exercise of any rights or powers) within the competence or control of the Settlors and Lord Vestey respectively (or their respective successors in title) And the Joint Managers in their discretion may at any time require the Trustees to enforce the said covenants or any of them at the expense of the Trust Property or the income thereof.

3. The Trustees shall henceforth hold the Trust Property and the income thereof Upon The Trusts and with and subject to the powers and provisions following that is to say: (i) During the Prescribed Term the Trustees shall receive in due course the income of the Trust Property and shall invest such income in manner hereinafter mentioned so as to form a capital fund (hereinafter called 'the Rental Fund'). (ii) From and after the end of the Prescribed Term the Trustees shall divide the Rental Fund or treat it as divided into two moieties and shall hold such moieties upon the trusts and with and subject to the powers and provisions hereinafter contained concerning the same respectively And one or the first of the said moieties (with all investments and property for the time being representing such first moiety and with all additions thereto made at any time under Clause 4 hereof or otherwise) is hereinafter called 'Edmund's Fund' and the other or second of the said moieties (with all investments and property for the time being representing such second moiety and with all additions thereto made at any time under Clause 6 hereof or otherwise) is hereunder called 'Samuel's Fund'. (iii) Until the end of the Prescribed Term the Trustees shall divide the income (as and when received) of the Rental Fund or treat it as divided into two moieties and shall hold one or the first moiety of such income upon the trusts and with and subject to the powers and provisions (including the power of accumulation) which would for the time being be applicable hereunder to the income of Edmund's Fund if already in possession under sub-clause (ii) of this clause and shall hold the other or second moiety of such income upon the trusts and with and subject to the powers and provisions (including the power of accumulation) which would for the time being be applicable hereunder to the income of Samuel's Fund if already in possession under sub-clause (ii) of this clause. (iv) Subject to the foregoing trusts the Trustee shall hold the Trust Property and the income thereof In Trust for the said Ronald Arthur Vestey and William Howarth Vestey absolutely in equal shares.

4. (A) The Trustees shall invest or keep invested Edmund's Fund in manner hereinafter mentioned and shall if and whenever so directed in writing from time to time by Edmund's Manager accumulate for such period or periods within the Specified Period as may be prescribed by direction as aforesaid the whole or any part or parts of the income (not actually distributed before the relevant direction) of Edmund's Fund by investing the same and (if and so far as so directed) the resulting income thereof in manner hereinafter mentioned and all accumulations of income so made shall be added to and form part of the capital of Edmund's Fund. (B) Subject to the last foregoing power of accumulation and to the provisions hereinafter contained the Trustees during the Specified Period

A shall hold the income of Edmund's Fund Upon Trust for all or any one or more of the following persons for the time being living (within the Specified Period) that is to say the said Ronald Arthur Vestey and his issue or (if and while no issue of his shall be living) the issue of Sir Edmund Vestey in such amounts or shares at or for such times or periods and in such manner in all respects as Edmund's Manager shall from time to time in
B writing direct (except that no such direction given by any person or persons other than the said Ronald Arthur Vestey himself shall without formal renewal affect any income accruing more than five years after its date and that while Edmund's Manager shall be a single individual this power of direction shall be exercisable in favour or for the benefit of himself not by Edmund's Manager alone but only by him jointly with Samuel's Manager
C or with the Trustees) And in default of and subject to any such direction Upon Trust for the issue for the time being living of the said Ronald Arthur Vestey in equal shares per stirpes (while more than one) during the respective lives of such issue within the Specified Period or in the event of and after the failure by death of the said Ronald Arthur Vestey and all his issue (whether present or future) then Upon Trust for the issue for the time
D being living of Sir Edmund Vestey in equal shares per stirpes (while more than one) during the respective lives of such issue within the Specified Period But so that in the case of each such person (in this Clause 4 hereinafter called 'the Beneficiary') including the said Ronald Arthur Vestey and each one of all the said issue the income concerned shall be paid to him or her only if and so long as no act or event (other than the
E execution or exercise of any trust or power contained in this Deed) shall at any time have been done or happened whereby the said income or any part thereof if belonging absolutely to the Beneficiary would have become vested in or payable to or charged in favour of some other person or persons (whether individual or corporate) and in the event of and from and after any such act or event the Trustees during the remainder of the life of
F the Beneficiary (within the Specified Period) shall pay or apply the income concerned unto or in any manner for the benefit of all or any one or more of the following persons for the time being in existence namely the Beneficiary and any wife or husband and issue of the Beneficiary and the other issue of Sir Edmund Vestey at such times in such shares (if more than one) in such manner and upon any such terms and conditions as Edmund's
G Manager shall from time to time in writing direct or in default of and subject to any such direction as the Trustees in their discretion shall from time to time think proper and with full powers for Edmund's Manager to direct and the Trustees to make payment of any such income to any person or persons (whether individual or corporate) to be applied for any purpose hereby authorised without being bound to see to the actual application
H thereof and also for Edmund's Manager or the Trustees to delegate to any person or persons (whether individual or corporate) the execution or exercise of any of the foregoing trusts or powers of this sub-clause Provided Always that while Edmund's Manager shall be a single individual this power of direction shall be exercisable in favour or for the benefit of himself or any wife of his not by Edmund's Manager alone but only by him
I jointly with Samuel's Manager or with the Trustees themselves. (C) From and after the end of the Specified Period (if ending otherwise than by the death of a descendant of Sir Edmund Vestey) and subject to the provisions hereinafter contained the Trustees shall hold Edmund's Fund and the income thereof In Trust for the person or persons to whom as the beneficiary or beneficiaries the income of Edmund's Fund shall or but for
J any such act or event as aforesaid (or any accumulation or appointment

under sub-clause (A) or (E) of this clause) would immediately before such end have been payable under sub-clause (B) of this clause (or any such direction or directions as first referred to in that sub-clause) and if more than one in the shares in which such income shall or would then have been so payable to them. A

Provided Always that: (D) Edmund's Manager may at any time or times within the Specified Period direct the Trustees to appropriate or realise or raise any part or parts of the capital of Edmund's Fund and to pay the same to or apply the same for the benefit of the said Ronald Arthur Vestey or any one or more of his issue for the time being living or in the event of and after the failure by death of the said Ronald Arthur Vestey and all his issue (whether present or future) then any one or more of the issue for the time being living of Sir Edmund Vestey in such shares (if more than one) and in such manner as Edmund's Manager shall think proper and discharged from all the trusts powers and provisions of this Deed (And the Trustees shall give effect to any such direction accordingly) But while Edmund's Manager shall be a single individual this power of direction shall be exercisable in favour or for the benefit of himself not by Edmund's Manager alone but only by him jointly with Samuel's Manager or with the Trustees themselves. (E) Edmund's Manager may at any time or times within the Specified Period by any deed or deeds revocable or irrevocable appoint in the case of each or any person being issue of Sir Edmund Vestey that after the death of such person within the Specified Period any part not exceeding £3,000 per annum (free from death duties and expenses) and not exceeding in any event one half of the income which under sub-clause (B) of this clause would for the time being be payable to such person if he or she were still living (and if no such act or event as is mentioned in that sub-clause had been done or happened) shall be paid to any surviving wife or husband of such person (if cohabiting with such person at his or her death) during the life within the Specified Period of such wife or husband after the death of such person or during any less period but only if and so long as such wife or husband shall not have re-married and no act or event (other than the execution or exercise of any trust or power contained in this Deed) shall at any time have been done or happened whereby the income concerned or any part thereof if belonging absolutely to such wife or husband would have become vested in or payable to or charged in favour of some other person or persons (whether individual or corporate). (F) During the Specified Period (but subject to the power given by sub-clause (D) of this clause) the Trustees shall keep Edmund's Fund as an undivided whole without any division of the capital thereof into shares and shall from time to time divide and pay or apply hereunder the actual income for the time being thereof And all death duties whatsoever which shall during the Specified Period become payable in respect of any part or parts of or interest or interests in Edmund's Fund or the income thereof shall be raised and paid out of the capital of Edmund's Fund (as an undivided whole) in exoneration of the persons and the particular shares of Edmund's Fund or of the income thereof who or which but for this provision would or might have been liable for such duties respectively And all expenses whatsoever which shall during the Specified Period become payable in respect of any part or parts of or interest or interests in Edmund's Fund or the income thereof shall from time to time be by the Trustees allocated to and raised and paid out of the capital or income of Edmund's Fund or any particular share or shares of the said income (or partly in one way and partly in another) in such proportions and manner as the Trustees may think proper in the circumstances.

A (G) Any accumulations of income or of any part or share of income of Edmund's Fund which may within the Specified Period be made under this Deed or any relevant statutory power (and whether during any minority or otherwise) shall forthwith be added to and shall thenceforth form part of the capital of Edmund's Fund (as an undivided whole) for all purposes and shall not be applicable as income at any subsequent time. (H) If at any time B before the end of the Specified Period any act or event (other than the execution or exercise of any trust or power contained in this Deed) shall have been done or happened whereby the whole or any part of the prospective share or interest (after such end) under this Clause 4 of any person in the capital and/or income of Edmund's Fund if belonging absolutely to such person would have become vested in or payable to or C charged in favour of some other person or persons (whether individual or corporate) then such person shall forfeit the whole of the said share or interest (both capital and income) and such share or interest shall devolve under this Clause 4 (or under Clause 5 hereof) from and after the end of the Specified Period in the same manner as if such person had died two months before such end but without prejudice to the interests of his or her D issue (whether born before or after such forfeiture) and subject to the next following provision. (J) Edmund's Manager in his discretion may at any time or times before the end of the Specified Period by deed annul any such forfeiture as aforesaid and restore the forfeited share or interest to the person forfeiting the same either wholly or partially and upon such (if any) terms and conditions whatsoever as he shall think proper but so that E every restored share or interest shall again become subject to the foregoing provision for forfeiture And Edmund's Manager may exercise this power repeatedly with regard to successive forfeiture of the same share or interest But while Edmund's Manager shall be a single individual this power shall be exercisable in favour or for the benefit of himself not by Edmund's Manager alone but only by him jointly with Samuel's Manager F or with the Trustees themselves.

5. If at any time during the Specified Period no issue of Sir Edmund Vestey shall be living or if at the end of the Specified Period some issue of his shall be living but none of them shall become entitled to Edmund's Fund under Clause 4 hereof then (subject to the foregoing powers and provisions and the provisions hereinafter contained) Edmund's Fund and G the income thereof shall be added to and held upon with and subject to the same trusts powers and provisions as Samuel's Fund and the income thereof respectively and in the event of the failure or determination of such trusts powers and provisions (and subject thereto) shall be held In Trust for the said Ronald Arthur Vestey absolutely.

6. (A) The Trustees shall invest or keep invested Samuel's Fund in H manner hereinafter mentioned and shall if and whenever so directed in writing from time to time by Samuel's Manager accumulate for such period or periods within the Specified Period as may be prescribed by direction as aforesaid the whole or any part or parts of the income (not actually distributed before the relevant direction) of Samuel's Fund by investing the same and (if and so far as so directed) the resulting income thereof in I manner hereinafter mentioned and all accumulations of income so made shall be added to and form part of the capital of Samuel's Fund. (B) Subject to the last foregoing power of accumulation and to the provisions hereinafter contained the Trustees during the Specified Period shall hold the income of Samuel's Fund Upon Trust for all or any one or more of the

following persons for the time being living (within the Specified Period) that is to say the issue of Lord Vestey or (if and while no issue of his shall be living) the issue of the said William Baron Vestey (the father of Lord Vestey) except Lord Vestey himself in such amounts or shares at or for such times or periods and in such manner in all respects as Samuel's Manager shall from time to time in writing direct (except that no such direction given by any person or persons other than the said William Howarth Vestey himself shall without formal renewal affect any income accruing more than five years after its date and that while Samuel's Manager shall be a single individual this power of direction shall be exercisable in favour or for the benefit of himself not by Samuel's Manager alone but only by him jointly with Edmund's Manager or with the Trustees) And in default of and subject to any such direction Upon Trust for the issue for the time being living of Lord Vestey in equal shares per stirpes (while more than one) during the respective lives of such issue within the Specified Period or in the event of and after the failure by death of all the issue of Lord Vestey (whether present or future) then Upon Trust for the issue for the time being living of the said William Baron Vestey (except Lord Vestey himself) in equal shares per stirpes (while more than one) during the respective lives of such issue within the Specified Period But so that in the case of each such person (in this Clause 6 hereinafter called 'the Beneficiary') including each one of all the said issue the income concerned shall be paid to him or her only if and so long as no act or event (other than the execution or exercise of any trust or power contained in this Deed) shall at any time have been done or happened whereby the said income or any part thereof if belonging absolutely to the Beneficiary would have become vested in or payable to or charged in favour of some other person or persons (whether individual or corporate) and in the event of and from and after any such act or event the Trustees during the remainder of the life of the Beneficiary (within the Specified Period) shall pay or apply the income concerned unto or in any manner for the benefit of all or any one or more of the following persons for the time being in existence namely the Beneficiary and any wife or husband and issue of the Beneficiary and the other issue of the said William Baron Vestey (except Lord Vestey himself) at such times and in such shares (if more than one) in such manner and upon any such terms and conditions as Samuel's Manager shall from time to time in writing direct or in default of and subject to any such direction as the Trustees in their discretion shall from time to time think proper and with full powers for Samuel's Manager to direct and the Trustees to make payment of any such income to any person or persons (whether individual or corporate) to be applied for any purpose hereby authorised without being bound to see to the actual application thereof and also for Samuel's Manager or the Trustees to delegate to any person or persons (whether individual or corporate) the execution or exercise of any of the foregoing trusts or powers of this sub-clause Provided Always that while Samuel's Manager shall be a single individual this power of direction shall be exercisable in favour or for the benefit of himself or any wife of his not by Samuel's Manager alone but only by him jointly with Edmund's Manager or with the Trustees themselves. (C) From and after the end of the Specified Period (if ending otherwise than by the death of a descendant of the said William Baron Vestey) and subject to the provisions hereinafter contained the Trustees shall hold Samuel's Fund and the income thereof In Trust for the person or persons to whom as the beneficiary or beneficiaries the income of Samuel's Fund shall or but for any such act or event as aforesaid (or any accumulation or appointment under sub-clause (A) or (E) of this clause) would immediately before such

A end have been payable under sub-clause (B) of this clause (or any such direction or directions as first referred to in that sub-clause) and if more than one in the shares in which such income shall or would then have been so payable to them.

Provided Always that: (D) Samuel's Manager may at any time or times within the Specified Period direct the Trustees to appropriate or B realise or raise any part or parts of the capital of Samuel's Fund and to pay the same to or apply the same for the benefit of any one or more of the issue for the time being living of Lord Vestey or (if and while no issue of his shall be living) the issue of the said William Baron Vestey (except Lord Vestey himself) in such shares (if more than one) and in such manner as Samuel's Manager shall think proper and discharged from all the trusts powers and C provisions of this Deed (And the Trustees shall give effect to any such direction accordingly) But while Samuel's Manager shall be a single individual this power of direction shall be exercisable in favour or for the benefit of himself not by Samuel's Manager alone but only by him jointly with Edmund's Manager or with the Trustees themselves. (E) Samuel's Manager may at any time or times within the Specified Period by any deed D or deeds revocable or irrevocable appoint in the case of each or any person being issue of Lord Vestey or (if and while no issue of his shall be living) being issue of the said William Baron Vestey except Lord Vestey himself that after the death of such person within the Specified Period any part not exceeding £3,000 per annum (free from death duties and expenses) and not exceeding in any event one half of the income which under sub-clause E (B) of this clause would for the time being be payable to such person if he or she were still living (and if no such act or event as is mentioned in that sub-clause had been done or happened) shall be paid to any surviving wife or husband of such person (if cohabiting with such person at his or her death) during the life within the Specified Period of such wife or husband after the death of such person or during any less period but only if and so F long as such wife or husband shall not have remarried and no act or event (other than the execution or exercise of any trust or power contained in this Deed) shall at any time have been done or happened whereby the income concerned or any part thereof if belonging absolutely to such wife or husband would have become vested in or payable to or charged in favour of some other person or persons (whether individual or corporate). G (F) During the Specified Period (but subject to the power given by sub-clause (D) of this clause) the Trustees shall keep Samuel's Fund as an undivided whole without any division of the capital thereof into shares and shall from time to time divide and pay or apply hereunder the actual income for the time being thereof And all death duties whatsoever which shall during the Specified Period become payable in respect of any part or H parts of or interest or interests in Samuel's Fund or the income thereof shall be raised and paid out of the capital of Samuel's Fund (as an undivided whole) in exoneration of the persons and the particular shares of Samuel's Fund or of the income thereof who or which but for this provision would or might have been liable for such duties respectively And all expenses whatsoever which shall during the Specified Period I become payable in respect of any part or parts of or interest or interests in Samuel's Fund or the income thereof shall from time to time be by the Trustees allocated to and raised and paid out of the capital or income of Samuel's Fund or any particular share or shares of the said income (or partly in one way and partly in another) in such proportions and manner as the Trustees may think proper in the circumstances. (G) Any accumula-

tions of income or of any part or share of income of Samuel's Fund which may within the Specified Period be made under this Deed or any relevant statutory powers (and whether during any minority or otherwise) shall forthwith be added to and shall thenceforth form part of the capital of Samuel's Fund (as an undivided whole) for all purposes and shall not be applicable as income at any subsequent time. (H) If at any time before the end of the Specified Period any act or event (other than the execution or exercise of any trust or power contained in this Deed) shall have been done or happened whereby the whole or any part of the prospective shares or interest (after such end) under this Clause 6 of any person in the capital and/or income of Samuel's Fund if belonging absolutely to such person would have become vested in or payable to or charged in favour of some other person or persons (whether individual or corporate) then such person shall forfeit the whole of the said share or interest (both capital and income) and such share or interest shall devolve under this Clause 6 (or under Clause 7 hereof) from and after the end of the Specified Period in the same manner as if such person had died two months before such end but without prejudice to the interests of his or her issue (whether born before or after such forfeiture) and subject to the next following provision. (J) Samuel's Manager in his discretion may at any time or times before the end of the Specified Period by deed annul any such forfeiture as aforesaid and restore the forfeited share or interest to the person forfeiting the same either wholly or partially and upon such (if any) terms and conditions whatsoever as he shall think proper but so that every restored share or interest shall again become subject to the foregoing provision for forfeiture And Samuel's Manager may exercise this power repeatedly with regard to successive forfeitures of the same share or interest But while Samuel's Manager shall be a single individual this power shall be exercisable in favour or for the benefit of himself not by Samuel's Manager alone but only by him jointly with Edmund's Manager or with the Trustees themselves.

7. If at any time during the Specified Period no issue of the said William Baron Vestey (except Lord Vestey himself if still in existence) shall be living or if at the end of the Specified Period some issue of the said William Baron Vestey (except as aforesaid) shall be living but none of them shall become entitled to Samuel's Fund under Clause 6 hereof then (subject to the foregoing powers and provisions and the provisions hereinafter contained) Samuel's Fund and the income thereof shall be added to and held upon with and subject to the same trusts powers and provisions as Edmund's Fund and the income thereof respectively and in the event of the failure or determination of such trusts powers and provisions (and subject thereto) shall be held In Trust for the said William Howarth Vestey absolutely.

8. The Trustees may at any time or times within the Specified Period sell exchange let manage deal with or dispose of all or any of the Trust Property in any manner and upon any terms or conditions whatsoever and with all the powers in that behalf of an absolute beneficial owner and shall invest in manner hereinafter mentioned all capital money arising therefrom (and they may in particular in or by any lease or other disposition reserve or give any powers whatsoever to the Joint Managers or to any persons or person being issue of Sir Edmund Vestey and Lord Vestey or of either of them) Provided Always that no sale exchange letting or disposition shall be made by the Trustees under this clause without the written direction of the Joint Managers And in any such matter the

A Trustees shall be bound to act on the written direction of the Joint Managers except that they shall not be bound to incur any personal liability without full protection and indemnity.

9. (i) Subject to the provisions in this clause hereinafter contained any money liable to be invested under this Deed may be invested by the Trustees in any investments whatsoever including the purchase of any B rights interests or property whatsoever and wheresoever in the World whether movable or immovable and including the lending or deposit of money with or without any personal or other security and upon any terms or conditions whatsoever as freely as if the Trustees were absolutely and beneficially entitled to the money concerned (and they shall have the like unrestricted power of changing investments from time to time) and C they shall not be liable for any loss which may happen at any time in connection with any investment or change of investment. (ii) This power of investment shall include the purchase acquisition or effecting of any reversionary or deferred property or rights of any description or any life or life endowment or sinking fund or term or other policy or policies of assurance of whatsoever nature at or subject to any premium or D premiums whether single or periodic and with or subject to any options rights benefits conditions or provisions whatsoever And the Trustees shall have full power to pay out of the income or capital of the trust fund or funds concerned (as they in their discretion may think proper) all sums payable from time to time for premiums or otherwise for the effecting or maintenance of any such policy or for the exercise or enjoyment of any E option right or benefit thereunder. (iii) Section 10 of the Conveyancing Act 1911 (or corresponding provisions in the case of immovable property situate elsewhere than in Northern Ireland) shall apply to any hereditaments or immovable property to be purchased by the Trustees under this Deed And they shall have in respect of such hereditaments or property all the powers of disposition leasing management repair building development F equipment furnishing and improvement (and all other powers) of an absolute beneficial owner and may in that behalf make any outlay out of the income or capital of the trust fund or funds concerned And with regard to any chattels to be purchased by the Trustees the benefit of the use and enjoyment thereof shall be treated as income of the trust fund or funds concerned And the Trustees shall not be liable for any loss or damage G which may happen thereto at any time or from any cause whatsoever but may in their discretion from time to time take at the expense of the income or capital of the trust fund or funds concerned any steps which they may think proper for the insurance repair protection renewal or custody of such chattels or any of them or otherwise in relation thereto.

Provided Always that: (a) No loan or deposit of money shall be made H hereunder at any time to or with either of the Settlors or any wife or widow of either of them or to or with any person (whether individual or corporate) then being a trustee of this Deed on being the only person directing the investment concerned. (b) During the Prescribed Term no investment or change of investment shall be made in respect of any part of the Trust Property or the income thereof or the Rental Fund without the I written direction of the Joint Managers. (c) No investment or change of investment shall be made at any time in respect of Edmund's Fund or any part thereof without the written direction of Edmund's Manager and no investment or change of investment shall be made at any time in respect of Samuel's Fund or any part thereof without the written direction of

Samuel's Manager But Edmund's Manager as to Edmund's Fund or Samuel's Manager as to Samuel's Fund may at any time or times by deed wholly or for any specified time or times release and extinguish or suspend this power of direction in respect of Edmund's Fund or Samuel's Fund (as the case may be) or any part or parts thereof and leave the investment and change of investment thereof to be decided accordingly by the Trustees in their sole discretion. (d) The Trustees shall be bound to act on the written direction under sub-clause (b) or (c) of this clause of the Joint Managers or Edmund's Manager or Samuel's Manager (as the case may be) for any investment or change of investment of the money or property concerned Except that they shall not be bound to make or accept any investment involving personal liability. (e) Any property rights or interests whatsoever liable to be sold disposed of purchased or obtained by the Trustees under this Deed may be acquired at any time by or from any of the Trustees or the Joint Managers or Edmund's Manager or Samuel's Manager at such price on such terms and in such manner in each case as the directing persons or person (or the Trustees themselves if no direction is needed or if the person thus dealing with them is himself the only person to direct) shall prescribe or approve But so that there shall always be at least one person to prescribe or approve as aforesaid other than the persons or person thus dealing with the Trustees.

10. [Gives the Joint Managers power to appoint New Trustees and makes other provisions relating to such appointments.]

11. Strict accounts of the trust premises both capital and income and of all dealings therewith shall be kept and shall be audited at least once in every year by a professional accountant or professional accountants to be appointed from time to time by the Joint Managers during the Prescribed Term or after the end thereof by Edmund's Manager in respect of Edmund's Fund and by Samuel's Manager in respect of Samuel's Fund And the expenses of such accounts and audits shall be paid out of the income of the trust premises concerned.

12. This Deed shall be construed and operate according to the law of Northern Ireland in all respects and so that (subject to the express provisions hereof) all relevant Statutes including in particular the Conveyancing Act 1881 and the Trustee Act 1893 shall apply to this Deed and the trusts hereof Provided Always that the grant or grants made by Clause 2 hereof and the powers and provisions hereinbefore contained concerning the property rights and interests granted by that clause and the income of such premises shall operate as far as necessary according to the laws of the respective places in which such premises are situate.

13. The word Managers or Manager used herein does not import any reference to or agency for or control by the Settlors or either of them. And each of the Settlors (and any wife or widow of each of them) is wholly excluded from all benefits rights and powers under this Deed.

14. Lastly Provided Always that Edmund's Manager and Samuel's Manager jointly may in their discretion at any time or times within the Specified Period by deed revoke in respect of the whole or any part or parts of the trust premises (then subject to the trusts hereof) all the trusts powers and provisions hereinbefore contained and transfer in respect of the property concerned all or any of such trusts powers and provisions to and constitute the same (with any desired modifications) as trusts powers and

A provisions operating in respect of such property in and according to the law of any country or place in the World But this power shall be exercisable only as a power of revocation and transfer combined (and not by way of mere revocation) and shall not be exercised so as to give to the Settlors or either of them (or any wife or widow of either of them) or to enable them or either of them (or any wife or widow of either of them) to take by B resulting trust or otherwise howsoever any property benefit right power or control whatsoever."

(4) It was common ground for the purposes of the appeals that the laws of Northern Ireland (according to which the 1942 Settlement was directed to be construed) are in all relevant respects similar to the laws of England.

(5) The 1942 Settlement was of property which the accounts refer to as C Trust Property. The Settlement then created a Rental Fund which consisted of income arising from the Trust Property. Edmund's Fund and Samuel's Fund are the one half shares of the income of the Rental Fund, the names corresponding to the two branches of the Vestey family concerned in the appeals. William, first Baronet and first Baron, who died in 1940, was succeeded by Samuel, second Baron, who was one of the Settlors of the 1942 D Settlement. Samuel died in 1954; his son, William Howarth, predeceased him leaving two sons, Samuel George Armstrong, the third Baron, and the Honourable Mark William Vestey. The other branch, so far as relevant, consisted of Edmund Hoyle Vestey, first Baronet (the other Settlor of the 1942 Settlement) one of his sons, Ronald Arthur Vestey (the Appellant) and the Appellant's children, Edmund Hoyle Vestey, Mrs. Jane Baddeley and Mrs. E Margaret Payne.

(6) By a Lease dated 26 March 1942 (hereinafter referred to as "the 1942 Lease") Messrs. Flynn and Beak leased the property comprised in the 1942 Settlement to the Union Cold Storage Co. Ltd. for a term of 21 years from 10 April 1942 in continuation or extension of the demises made by the 1921 Lease. The 1942 Lease was expressed to be supplemental to the 1921 Lease and F the property was demised to the Lessee at the same rent and on the same terms and conditions as were reserved and made payable and contained in and in the same manner as if all the operative parts of the 1921 Lease were therein repeated and made applicable accordingly with the substitution throughout of the Schedule thereto for the Schedules to the 1921 Lease and of the term thereby granted for that granted by the 1921 Lease and of the Lessors for the G lessors of the 1921 Lease. The 1942 Lease provided as follows:

"1. The rent reserved or made payable by this Lease shall be paid and belong to the Lessors. 2. The powers to determine this lease by notice and to withdraw from this demise any part or parts of the demised premises which powers would but for this provision have been exercisable by the Lessors shall not be exercised by them at any time hereinafter or by any H other person or persons before the 1st day of January 1950 but such powers shall be owned and may be exercised on or after that day (by the prescribed previous notice) by the following persons jointly that is to say (a) by Ronald Arthur Vestey (the elder now surviving son of the said Sir Edmund Hoyle Vestey) and the Honourable William Howarth Vestey (the son of the Right Honourable Samuel Baron Vestey) during their joint lives or (b) I after the death of either of them by the survivor of them (during his life) and the nominee or nominees (hereinafter defined) of the other of them or (c) after the death of both of them by the respective nominees (hereinafter defined) of both of them And in the case of each of them his nominee or

nominees for the purposes of this clause shall be such person or persons (whether individual or corporate) as he or any delegate or delegates of his shall from time to time by any deed or deeds revocable or irrevocable or by Will or Codicil designate in that behalf (with full power for him to delegate in any manner and to any extent this power of designation whether before or after his own death) and in default of and subject to any such designation then his personal representative or representatives shall be his nominee or nominees hereunder. 3. The Lessees shall not have power to determine this Lease by notice before the 1st day of January 1950. 4. The Lessors and the Lessees may at any time or times by agreement substitute other hereditaments and premises for any of those hereby demised either with or without any alteration of the rent hereby made payable. 5. The expressions 'the Lessors' and 'the Lessees' hereinbefore used include their respective successors in title wherever the context so admits."

(7) In 1963 the 1942 Lease came to an end and a new lease was executed on 10 April 1963. The Lessors were the then Trustees of the 1942 Settlement (Messrs. Flynn Beak and Drabble) of the one part and the Union International Co. Ltd. (formerly Union Cold Storage Co. Ltd.) Lessees of the other part. This Lease was expressed to be supplemental to the 1921 Lease and the 1942 Lease and the Lessors granted to the Lessees the hereditaments and premises referred to in the Schedule thereto (expressed to comprise the hereditaments and premises held by the Lessees under the 1942 Lease subject to certain deeds of withdrawal and substitution and certain other property) for the term of 21 years from 10 April 1963 at the same rent and upon the same terms and conditions as were contained in the 1921 Lease.

(8) By a Settlement dated 3 January 1963 ("the 1963 Settlement") the Appellant and Lord Vestey as Settlors of the first part and Messrs. Flynn Beak and Drabble as Trustees of the second part and Ulster Bank Ltd. of the third part, Settlors settled their respective interests in the property expectant on the determination of the prescribed term under the 1942 Settlement (1 January 1984) on the trusts therein mentioned. Those trusts were similar to the trusts contained in the 1942 Settlement. A copy of the 1963 Settlement is annexed hereto (exhibit 6([1])).

(9) The original Trustees of the 1942 Settlement, James Flynn and Reginald Stephens Beak, were resident and ordinarily resident in Uruguay and in the Argentine respectively. Additional trustees of the 1942 Settlement, none of whom were or are resident in the United Kingdom, were appointed by the Appellant—Mark Stephen Drabble on 17 September 1958, Henri Marion on 13 June 1967, Claude Thurel on 6 December 1967, Peter Alan Beak on 27 November 1970, Ronald Charles Grove on 20 January 1971. All the trustees of the 1942 and 1963 Settlements (except Mr. Marion) were employees of companies of the Vestey group. The Trustees meet infrequently, usually in Paris. The Appellant and Mr. Edward Brown meet the individuals acting as Trustees from time to time. The Trust securities were retained by the Ulster Bank Ltd. in Belfast, Northern Ireland.

(10) By a direction in writing of the Trustees dated 27 July 1950 the rent payable by the Lessee of the 1942 Lease was paid to the Ulster Bank Ltd. in Belfast and there placed to the credit of an account in the name of the Appellant called the "F & B account" maintained by him by authority of and

([1]) Not included in the present print.

A on account of the Trustees. By further directions in writing dated 30 June 1967 and 12 December 1967 the Trustees for the time being authorised further payments of rent to be paid to the said Bank but to the credit of the account of the then Trustees. Copies of the three directions referred to in this paragraph are hereunto annexed (exhibits 15(*a*), 15(*b*) and 15(*c*)([1])).

(11) By directions in writing given on 30 August 1942 by William Howarth B Vestey as Samuel's Manager under clause 6(A) of the 1942 Settlement and on 14 September 1942 by the Appellant as Edmund's Manager under Clause 4(A) thereof, the Trustees were directed to accumulate the whole of the income of Samuel's and Edmund's funds respectively by investing the same and the resulting income thereof, until otherwise directed. Copies of the directions are annexed hereto (exhibits 8 and 9([1])).

C (12) The Joint Manager referred to in Clause 1(c) of the 1942 Settlement was at all material times the Appellant who was also Edmund's Manager as defined by Clause 1(d) of the Settlement. After the death of William Howarth Vestey in 1944 Samuel's Manager was Mr. Edward Brown until 19 March 1966 and thereafter Lord Vestey. The "Prescribed Term" as defined by Clause 1(h) of the 1942 Settlement by virtue of a Deed of Direction made on 2 November D 1962 by the Appellant and Mr. Edward Brown was extended to 1 January 1984.

(13) The rent payable under the 1942 Lease was paid quarterly to the Ulster Bank as described above and was accumulated and invested. The investments of the Rental Fund were ultimately to be divided into Edmund's Fund and Samuel's Fund on the expiration of the Prescribed Term on 1 January 1984 but for convenience separate accounts were kept of Edmund's Moiety and E Samuel's Moiety. The Trustees' accounts accordingly showed the division of the funds and invested income under the following heads: *The Trust Property Fund* consisting of the freehold and leasehold properties plant and machinery comprised in the 1942 Lease valued at £18 million on 1 April 1942 (with adjustments for sales and purchases) together with other property and investments representing assets of the 1942 Settlement. *The Rental Fund* F consisting of the accumulation of the rent payable under the 1942 Lease. *The Rental Fund Investments* consisting of the proceeds of investment of the Rental Fund. *Edmund's Fund* consisting of a moiety of the income produced by the investments of the Rental Fund. *Samuel's Fund* consisting of the other moiety of the income produced by the investments of the Rental Fund. The Trustees also prepared Income and Expenditure accounts which recorded the rents G received and also the investment income from the above-mentioned funds. The Trustees' Accounts were audited by a Certified Public Accountant in Uruguay and were kept in Uruguay. They were produced to us pursuant to a Notice to the Appellant issued by the Commissioners of Inland Revenue in the exercise of their powers under section 481 of the Taxes Act 1970, the validity of which we upheld in earlier proceedings under section 98 of the Taxes Management H Act 1970.

(14) The Trustees of the 1942 Settlement owned directly, or through nominees, all the shares in the following companies (hereinafter called "the offshore companies"): (i) Commercial Insurance Corporation Limited was incorporated in 1922 and its share capital was purchased by the Trustees in 1944. It is a company managed and controlled in Jersey and carries on the I business of fire, fidelity and marine insurance. It has a wholly-owned subsidiary

([1]) Not included in the present print.

company, New Holding & Finance Company Limited. (ii) The Commercial Investment Company Limited is a company incorporated and managed and controlled in Bermuda. Its business consists of holding investments of a general character. (iii) The Salient Shipping Company (Bermuda) Limited is a company incorporated and managed and controlled in Bermuda. It carries on the business of a ship-owning and charter company and also has investments valued at over £3,000,000 in 1966. No capital allowances had ever been obtained in respect of expenditure on the acquisition of ships. Its ships are mainly chartered to the Blue Star Line which is a company in the Vestey group.

(15) New Holding & Finance Company Limited (hereafter referred to as "NHF") is a company incorporated and managed and controlled in England. It carries on business of property investment. The Appellant and Mr. Edmund Hoyle Vestey are two of its Directors. All its share capital is owned by Commercial Insurance Corporation to whom it paid substantial dividends. For the years 1963–64 and 1965–66 the Commissioners of Inland Revenue issued directions and apportionments to NHF under section 245 of the Income Tax Act 1952 directing that its actual income (other than estate and trading income) should be deemed to be the income of its members (i.e., of the Commercial Insurance Corporation). NHF appealed against the directions and apportionments. We heard the appeals of NHF together with the present appeals on the footing that if the said directions and apportionments were correct they operated to swell the income of the Commercial Insurance Corporation which (according to the Crown's contention) was deemed to be income of the Appellant. We have stated a separate Case on NHF's appeals but for convenience of the Court we have annexed hereto the accounts of NHF (exhibit 31[1]).

(16) Mr. Edward Brown is a Chartered Accountant employed by Union International Company Limited since 1931. He is a Director of Western United Investment Company Limited which acted as nominee for the Trustees of the 1942 Settlement who owned all the issued ordinary shares thereof except four management shares. He is also a director of Frederick Leyland & Company Limited which is the principal company of a group of shipping and other companies in the Vestey group. Mr. Brown acted as financial adviser to the Vestey family and, in particular, dealt with investment of the funds of the 1942 Settlement in consultation with the Appellant. During the period—1944 to 1966—when he acted as Samuel's Manager he was responsible for the investment of Samuel's Fund, usually maintaining common policy with the Appellant as regards investment, advised as necessary by stockbrokers. The moneys received by the Trustees of the 1942 Settlement were paid to the Ulster Bank Limited and credited to an account in the name of the Appellant called the "F & B account". The bank statements were sent to Mr. Brown, usually monthly. He prepared a memorandum for his own use analysing the account into the heads mentioned in paragraph 5.(13) above and then sent the statements to the Trustees. Investments were selected and purchased with the surplus cash. Mr. Brown drew up a direction to the Trustees which he signed as Samuel's Manager and in due course sent it to the Trustees. The Appellant signed a cheque in payment drawn on the "F & B account". A certificate or other document of title was delivered to Mr. Brown who lodged it with the Ulster Bank Ltd. together with a declaration of trust signed on behalf of Western United Investment Company Limited, and addressed to the Trustees,

(1) Not included in the present print.

A confirming that the security was held as nominee for the Trustees. The Appellant signed directions as Edmund's Manager; otherwise Edmund's Fund was dealt with in like manner.

(17) For the purposes of the Exchange Control Act 1947 transactions by the Trustees of the 1942 Settlement were treated by HM Treasury until June 1971 as transactions by persons resident in the United Kingdom. After June B 1971 transactions by the Trustees were treated as transactions by persons resident outside the Scheduled Territories.

(18) The following appointments from capital were made under the powers contained in Clauses 4(D) and 6(D) of the 1942 Settlement:

	Appointer	*Appointee*	*Date*	*Amount* £
C	The Appellant as	The Appellant	29 October 1962	215,000
	Edmund's Manager with the consent of Samuel's Manager under clause 4(D).	,,	18 November 1964	150,000
D	The Appellant as	Edmund Hoyle Vestey	1 January 1963	700,000
	Edmund's Manager	,,	18 November 1966	220,000
	,,	Margaret Payne, the wife of James	2 May 1966	100,000
E		Gladstone Payne		
	,,	Jane McLean Baddeley, the wife of John Richard Baddeley	2 May 1966	100,000
	Edward Brown as	Lord Vestey (the	9 July 1962	123,000
F	Samuel's Manager under clause 6(D)	third Baron)	1 January 1963	800,000
	,,	The Hon. Mark William Vestey	1 January 1963	200,000
G		Total Appointments		2,608,000

The above mentioned sums were paid in cash and the proceeds were invested by the recipients otherwise than in companies in the Vestey family group.

6. We were referred to the following authorities:—*Union Cold Storage Co., Ltd.* v. *Adamson* 16 TC 293; *Vestey* v. *Commissioners of Inland Revenue* 31 TC 1; [1949] 1 All ER 1108; *Mangin* v. *Inland Revenue Commissioner* H [1971] AC 739; *Peate* v. *Commissioner of Taxation* [1967] AC 308; *Drummond* v. *Collins* 6 TC 525; [1915] AC 1011; *Gartside* v. *Inland Revenue Commissioners* [1968] AC 553; *Lord Howard de Walden* v. *Commissioners of Inland Revenue* 25 TC 121; [1942] 1 KB 389; *Congreve* v. *Commissioners of Inland Revenue* 30 TC 163; [1948] 1 All ER 948; *Bambridge* v. *Commissioners of Inland Revenue* 36 TC 313; [1955] 3 All ER 812; *Duke of Marlborough* v. I *Attorney-General* [1945] 1 Ch 78; *Williams* v. *Singer* 7 TC 387; [1921] 1 AC 65; *Reid's Trustees* v. *Commissioners of Inland Revenue* 14 TC 512; 1929 SC 439;

In re *Gulbenkian's Settlements* [1970] AC 508; *Keiner* v. *Keiner* 34 TC 346; [1952] 1 All ER 643; *Bullock* v. *Unit Construction Co., Ltd.* 38 TC 712; [1960] AC 351; *Kelly* v. *Rogers* 19 TC 692; [1935] 2 KB 446; *Attorney-General* v. *Heywood* (1887) 19 QBD 326; *Attorney-General* v. *Farrell* [1931] 1 KB 81; *McPhail* v. *Doulton* TC Leaflet 2361; [1971] AC 424; *Brown* v. *Commissioners of Inland Revenue* 42 TC 42; [1965] AC 244; *Aplin* v. *White* 49 TC 93; [1973] 2 All ER 637; *Stokes* v. *Bennett* 34 TC 337; [1953] Ch 566; *Lee* v. *Commissioners of Inland Revenue* 24 TC 207.

7. It was contended on behalf of the Appellant:

(a) In order that he might be charged to tax under section 412, the Appellant must be possessed of rights in the relevant year of assessment. Such rights must be proprietary rights and carry the power to enjoy income of a non-resident person.

(b) A right which is a fiduciary right cannot confer the power to enjoy income within the meaning of section 412. The Appellant's "rights", if any, were fiduciary and conferred no rights by virtue of which he had power to enjoy income within section 412.

(c) The Appellant was the object of a discretionary trust and, as such, he had no rights within the meaning of section 412.

(d) A joint right is fiduciary in character. The Appellant had a joint right which was, accordingly, not a right possessed by him within the meaning of section 412.

(e) Subsection (2) of section 412 applies only to the year in which a capital sum is received.

(f) The extent of attribution of income of a non-resident to a resident is the same under subsection (2) as under subsection (1), namely, income of the non-resident which the resident person has power to enjoy by virtue of his rights.

(g) No beneficiary under the 1942 Settlement had power to enjoy income of the Rental Fund. Their rights were limited to their respective interests in Samuel's Fund and Edmund's Fund, as the case may be.

(h) The Appellant was possessed of no rights until a sum was appointed to him. His power of enjoyment could not extend beyond the sum actually appointed to him.

(i) Section 412 applies only in the case of an individual who being ordinarily resident in the United Kingdom, himself transfers assets abroad.

(j) The transfer of assets situate outside the United Kingdom to Trustees who are also outside the United Kingdom is not within the scope of section 412.

(k) Where income is payable to persons in a fiduciary capacity, personal residence or domicile is irrelevant, and they must be treated for the purposes of section 412 as being resident and domiciled in the jurisdiction which constitutes the proper law of the Settlement. Section 412 did not apply to the 1942 Settlement because its locality was within the United Kingdom, namely Northern Ireland, whose law was the proper law of the 1942 Settlement.

8. It was contended on behalf of the Respondents:

(a) The 1942 Settlement and the 1942 Lease were transfers of assets, by

A virtue or in consequence whereof income became payable to the Trustees who were persons not resident in the United Kingdom.

(b) The accumulation and investment of rent and income, and the acquisition of share capital of the "off-shore" companies constituted "associated operations" within section 412(4). Further, or alternatively, the 1942 Lease was an "associated operation" in relation to the 1942 Settlement.

B (c) Under the terms of the 1942 Settlement the Appellant and the other beneficiaries acquired the following "legal rights", *stricto sensu*, against the trustees: (i) the right to receive accounts and obtain information as to the trust property; (ii) the right to be considered fairly in accordance with the wishes of the Settlor as expressed in the settlement; (iii) the right, upon receipt of money from the Trustees, to retain such money by virtue of those rights.

C (d) Accordingly, for each year during which he had an interest under the 1942 Settlement and was ordinarily resident in the United Kingdom, a beneficiary had rights by virtue of which he had power to enjoy income of the 1942 Settlement, and section 412(1) applied.

(e) As regards the "power to enjoy" income—(i) On each occasion when the Trustees received any income, income was in fact so dealt with by them and D by the Appellant, as Edmund's Manager, that it enured for his benefit within section 412(5)(a). (ii) The receipt of income by the Trustees increased the value of the Appellant's legal rights mentioned in sub-paragraph (c) above and section 412(5)(b) applied. (iii) Each payment to a beneficiary constituted a benefit received within section 412(5)(c). (iv) Each beneficiary might, in the event of the exercise by the managers of their powers, whether jointly or E severally, become entitled to the beneficial enjoyment of income within section 412(5)(d). (v) The Appellant, as Edward's Manager, was able to control the application of income within section 412(5)(e).

(f) The income which the beneficiary had power to enjoy was not, according to the terms of section 412(1) limited in point of time and included all the income received by the Trustees and the "off-shore" companies (together with F sums deemed to be income by virtue of Chapter III of Part IX and short-term gains).

(g) Alternatively and cumulatively, when a beneficiary received a capital sum such receipt was connected with the transfer of assets or associated operations. Section 412(2) applied, and he became chargeable in respect of any income which had become payable to the Trustees.

G (h) The income deemed to be income of an individual by section 412(2) was the same as that mentioned in (f) above; but the Crown would not seek to charge individual beneficiaries, in the aggregate for any year, tax on a sum in excess of the income received, or deemed to have been received, by the Trustees in such year.

(i) Account should be taken of the substantial result and effect of the H transactions in question.

9. We the Commissioners who heard the appeal took time to consider our decision and gave it in writing on 20 March 1974 as follows:

"1. The first question we have to decide is whether the preamble to section 412 applies. By the 1942 Settlement, the Settlors, Sir Edmund Vestey and Lord Vestey, transferred the property specified in the Schedule thereto to the

Trustees thereof, who were resident outside the United Kingdom. By the Lease of 26 March 1942, the Trustees leased the property to the Union Cold Storage Company Limited at the basic rent of £960,000. The Lease specifies that the rent "shall be paid and belong to" the Trustees. A

2. The 1942 Lease is expressed to be supplemental (*inter alia*) to the 1921 Lease. The property settled by the 1942 Settlement broadly comprised the property subject to the 1921 Lease. We find that the 1942 Settlement and the 1942 Lease formed part of a single arrangement whereby income, i.e. the rent, became payable to persons resident out of the United Kingdom. B

3. By a further lease of 10 April 1963 the original Trustees (Messrs. Flynn and Beak) and the new Trustee, Mr. Drabble, who was also resident outside the United Kingdom, leased the property comprised in the 1942 Lease (subject to withdrawals and substitutions) to the same Lessee. This Lease was expressed to be supplemental to the 1942 Lease and is, in our view, a continuation of the 1942 arrangement. C

4. The provisions of the preamble to section 412 are accordingly satisfied subject to the Appellant's alternative contention that the Trustees could only receive the income in a representative capacity which was in the locality of which the proper law of the Settlement applied. D

5. We will assume that the proper law of the Settlement was the law of Northern Ireland. We do not think that this is material to the preamble to section 412. For the preamble to be satisfied income has to become payable to persons resident out of the United Kingdom no matter what the locality of the Settlement or arrangement may be. We note that neither in *Vestey* v. *Commissioners of Inland Revenue* 31 TC 1 nor in any of the tax cases cited to us was this argument relied upon. E

6. Subsection (3) of section 412 was not relied upon by the Appellant and we next consider the effect of subsection (2). By directions dated 29 October 1962 and 18 November 1964 the Appellant in his capacity as "Edmund's Manager" (as defined by clause 1(d) of the 1942 settlement) jointly with "Samuel's Manager" (as defined by clause 1(e)) directed the Trustees to pay to him the sums of £215,000 and £150,000 respectively, which directions the Trustees duly complied with. Were these two sums "capital sums" within the meaning of section 412(2)? F

7. In section 412(2) "capital sum" means: ". . . (b) any other sum paid or payable otherwise than as income, being a sum which is not paid or payable for full consideration in money or money's worth." By clause 3(i) of the 1942 Settlement the Trustees were directed to invest the income of the Trust Property so as to form a capital fund. Edmund's Fund was a moiety of the capital fund. All the income of the capital fund was, on the evidence before us, capitalised and the respective sums of £215,000 and £150,000 were raised and paid out of the capitalisations. Accordingly, we think that the two payments made to the Appellant were capital sums within subsection (2). G H

8. The next question is whether the two payments were "in any way connected with the transfer or any associated operation". The transfer in question was the transfer of the settled property by the Settlors to the Trustees who accumulated the income thereof. By subsection (4) of section 412 "an associated operation" means in relation to any transfer "an operation of

A any kind effected by any person in relation to any of the assets transferred . . . or to the income arising from any such assets". The creation of the rent, the investment of the rental income and accumulation of income therefrom constitute, in our view, "associated operations" within the meaning of subsection (4). The connection between the capital sums received by the Appellant and the transfer and associated operations was provided by the exercise of the B directions pursuant to clause 4(D) of the Settlement. That clause provided the link between the Appellant's interest under the 1942 Settlement and the settled property and the income thereof. Accordingly in so far as it is a question of fact, we find, and in so far as it is a question of law, we hold, that subsection (2) applies as regards the two sums paid to the Appellant.

9. The next question for consideration is whether, if subsection (2) applies, C the individual is chargeable only to the extent of the capital sum received by him. In *Lord Howard de Walden* v. *Commissioners of Inland Revenue* 25 TC 121, which was a case decided on subsection (1) of section 412, Lord Greene M.R. said that the extent of the attribution of income depended on the meaning of the words "any income" in subsection (1); and the Court held that the charge under section 412(1) was not limited to the income which the taxpayer was, in D fact, entitled or able to receive under subsection (1).

10. In our view the same result must follow in relation to subsection (2). The consequence of the receipt of a capital sum is that "any income" which "has become the income of a person resident . . . out of the United Kingdom" is deemed to be income of the individual concerned. If the initial conditions of subsection (2) are satisfied, as we have held they are, we can find nothing in E the language of section 412, either as enacted or in its original form as an amendment introduced by the Finance Act 1938, to limit the income of the non-resident which is by virtue of subsection (2) to be attributed to the individual concerned.

11. The income which is deemed to be the Appellant's income is "any income which, by virtue or in consequence of the transfer, either alone or in F conjunction with associated operations" has become income of the Trustees. The actual income of the Trustees consisted of—(i) the rent reserved by the 1942 and 1963 Leases; (ii) income from the Rental Fund; (iii) income of the Rental Fund Investments; (iv) income of Samuel's Fund; (v) income of Edmund's Fund. The Trustees owned all the share capital of certain off-shore companies, which they acquired out of accumulated income. The acquisition of G such share-holdings constituted, in our view, associated operations, and the income of such companies falls to be included in the Trustees' income for the purposes of section 412(2). By section 16(8) and Schedule X of the Finance Act 1962, short term capital gains are also to be treated as income of the Trustees for the purposes of section 412.

12. On behalf of the Appellant it was contended that income of the H Trustees which was deemed to be his should be limited to Edmund's Fund in which alone he had any interest. By clause 7 of the 1942 Settlement Samuel's Fund may be added to and held upon the same trusts as Edmund's Fund if there should be no person entitled to Samuel's Fund. This cross-limitation appears to us to negative the Appellant's contention. Apart from this, it is, we think, not permissible to quantify or restrict the extent of the attribution of the income I by reference to the extent of beneficial interests therein. We accordingly hold that all the income mentioned in paragraph 11 above is deemed to be the Appellant's income by section 412(2).

13. There next arises the question whether such income includes income of the Trustees for a year earlier than the year in which the individual receives a capital sum. There is no reference in section 412(2) to the income for any particular year or period. The express reference in subsection (8)(d) to the apportioned income of a company "for any year" suggests to us that in subsection (2) the unqualified reference to "any income" points to a wider construction. The opening words of subsection (2) "whether before or after any such transfer" point to a span of time which may exceed a year, as do the words "may at any time accrue" in subsection (6). We also bear in mind that the capital sum may be derived from the accumulated income of many years. Our conclusion on the matter is that the income of the non-resident is not restricted to income of the year in which the capital sum is paid.

14. Having regard to the terms of our decision above-stated we do not find it necessary to decide whether the Appellant is also chargeable under subsection (1) of section 412.

We dismiss the appeal and adjourn it for agreement of figures."

10. Figures were not agreed between the parties and on 25 March 1975 we held a further meeting to decide the principles on which the figures were to be computed. The dispute concerned the income of the "off-shore companies" which was to be attributed to the Appellant. Mr. Edward Brown again gave evidence before us and further documents were proved or admitted. Our findings with respect to Mr. Brown's evidence are for ease of reference included in paragraph 5 above. The further documents are numbered 31, 32 and 33 in paragraph 4 above.

11. It was contended on behalf of the Appellant:

(a) The profits of a trade carried on by the off-shore companies should be computed on the principles applicable to Case I of Schedule D.

(b) Those principles involved the like reliefs and allowances (including capital allowances) as if the off-shore company had carried on a trade in the United Kingdom.

(c) As so computed the profits of the basis period formed the measure of income to be attributed to the Appellant.

(d) So far as the off-shore companies were investment companies, management expenses were deductible in computing their income.

12. It was contended on behalf of the Respondents:

(a) The income of the off-shore trading companies attributable to the Appellant by virtue of section 412 was the actual income of those companies for the years of assessment.

(b) The income of off-shore investment companies likewise attributable to the Appellant was the actual income of those companies without the deduction of expenses of management.

13. We gave our decision in writing on 30 April 1975 as follows:—

"The persons whose income is deemed to be the Appellant's income, include companies which are (a) investment companies and (b) trading companies. As regards (a) it was decided in the case of *Lord Chetwode* v. *Commissioners of Inland Revenue* 51 TC 647; [1975] 1 WLR 34 that such a company's income falls to be computed without deduction for management

A expenses. We think that the same principle should be applied in the present case. As regards (b) the only practical method of computing the income of the non-resident trading company which is deemed to be the Appellant's income, is by computing it according to United Kingdom income tax principles. Since the introduction of taxes on income and profits there have been three conventional ways of measuring the income or profits for a particular year:—(i) B the average of the profits of the three preceding years; (ii) the profits of the preceding year; (iii) the actual profits for the year. If the preceding year basis—i.e. (ii)—were to be applied in measuring the income, one would have expected a reference to Cases I to V of Schedule D (which apply the preceding year basis) rather than Case VI (which applies the current year basis). Section 413(1) provides that tax shall be charged under Case VI of Schedule D and we can only C infer that tax shall accordingly be charged on profits computed on the current year basis.

We uphold the Crown's method of computing the Appellant's income and leave the figures to be agreed."

14. Figures were agreed between the parties and on 17 June 1975 we adjusted the assessments accordingly.

D 15. The Appellant immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and on 19 June 1975 required us to state a case for the opinion of the High Court pursuant to the Taxes Management Act 1970 section 56 which Case we have stated and do sign accordingly.

16. The question of law for the opinion of the Court is whether on the facts E found by us the Appellant has incurred liability to tax under section 412 of the Income Tax Act 1952, and, if so, whether the liability was correctly computed in accordance with the principles stated by us.

J. B. Hodgson
B. James
{Commissioners of the Special Purposes of the Income Tax Acts.

Turnstile House
F 94–99 High Holborn
London WC1V 6LQ

14 April 1976

E. H. Vestey v. *CIR*; *M. W. Vestey* v. *CIR*; *J. G. Payne* v. *CIR*; *J. R. Baddeley* v. *CIR* and *S. G. Armstrong, Third Baron Vestey* v. *CIR*. The Cases stated in these appeals were in all material respects identical to the above G Case.

The Cases were heard in the Chancery Division before Walton J. on 27, 28 and 29 June 1977 when judgment was reserved. On 29 July 1977 judgment was given against the Crown, with costs.

D. C. Potter Q.C. and *J. Holroyd Pearce* for the taxpayers.

H *The Solicitor-General (Peter Archer Q.C.), Michael Nolan Q.C., Brian Davenport* and *Peter Gibson* for the Crown.

The following cases were cited in argument in addition to those referred to in the judgment:—*Lord Herbert* v. *Commissioners of Inland Revenue* 25 TC 93; [1943] KB 288; *Lord Chetwode* v. *Commissioners of Inland Revenue* 51 TC 647; [1977] 1 WLR 248; *Mangin* v. *Inland Revenue Commissioner* [1971] AC 739; *Commissioners of Inland Revenue* v. *Luke* 40 TC 630; [1963] AC 557; *Perry* v. *Astor* 19 TC 255; [1935] AC 398; *Colquhoun* v. *Brooks* 2 TC 490; 14 App Cas 493; *Western Bank Ltd.* v. *Schindler* [1977] Ch 1; In re *Lockwood dec'd.* [1958] Ch 231; *Morelle Ltd.* v. *Wakeling* [1955] 2 QB 379; *Herdman* v. *Commissioners of Inland Revenue* 45 TC 394; [1969] 1 WLR 323; *Reid's Trustees* v. *Commissioners of Inland Revenue* 14 TC 512; 1929 SC 439; *Kelly* v. *Rogers* 19 TC 692; [1935] 2 KB 446.

No. 1

Walton J.—This case raises, yet once again, troublesome questions of construction under what is now s 478 of the Income and Corporation Taxes Act 1970, but which was at all relevant times s 412 of the Income Tax Act 1952 and to which I will refer as such. That section reads as follows:

> "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows:—(1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of this Act. (2) Where, whether before or after any such transfer, such an individual receives or is entitled to receive any capital sum the payment whereof is in any way connected with the transfer or any associated operation, any income, which by virtue or in consequence of the transfer, either alone or in conjunction with associated operations, has become the income of a person resident or domiciled out of the United Kingdom shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be the income of that individual for all the purposes of this Act. In this subsection, 'capital sum' means—(*a*) any sum paid or payable by way of loan or repayment of a loan; and (*b*) any other sum paid or payable otherwise than as income, being a sum which is not paid or payable for full consideration in money or money's worth. (3) Subsections (1) and (2) of this section shall not apply if the individual shows in writing or otherwise to the satisfaction of the Special Commissioners either—(*a*) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected; or (*b*) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation. (4) For the purposes of this section, 'an associated operation' means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred

A or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets. (5) An individual shall, for the purposes of this section, be deemed to have power to enjoy income of a person resident or domiciled out of the United Kingdom if—(*a*) the income is in fact so B dealt with by any person as to be calculated, at some point of time, and whether in the form of income or not, to enure for the benefit of the individual; or (*b*) the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit; or (*c*) the individual receives or is entitled to receive, at any time, any benefit provided or to be provided out of that income or out of moneys which are C or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income; or (*d*) the individual has power, by means of the exercise of any power of appointment or power of revocation or otherwise, to obtain for himself, whether with or without the consent of any other person, the beneficial enjoyment of the income, or D may, in the event of the exercise of any power vested in any other person, become entitled to the beneficial enjoyment of the income; or (*e*) the individual is able in any manner whatsoever, and whether directly or indirectly, to control the application of the income. (6) In determining whether an individual has power to enjoy income within the meaning of this section, regard shall be had to the substantial result and effect of the E transfer and any associated operations, and all benefits which may at any time accrue to the individual as a result of the transfer and any associated operations shall be taken into account irrespective of the nature or form of the benefits. (7) For the purposes of this section, any body corporate incorporated outside the United Kingdom shall be treated as if it were resident out of the United Kingdom whether it is so resident or not. (8) For F the purposes of this section—(*a*) a reference to an individual shall be deemed to include the wife or husband of the individual; (*b*) 'assets' includes property or rights of any kind, and 'transfer', in relation to rights, includes the creation of those rights; (*c*) 'benefit' includes a payment of any kind; (*d*) references to income of a person resident or domiciled out of the United Kingdom shall, where the amount of the income of a company for G any year or period has been apportioned under Chapter III of Part IX of this Act, include references to so much of the income of the company for that year or period as is equal to the amount so apportioned to that person; (*e*) references to assets representing any assets, income or accumulations of income include references to shares in or obligations of any company to which, or obligations of any other person to whom, those assets, that H income or those accumulations are or have been transferred."

I shall, of course, have to consider the facts in some little detail hereafter, but the main question which arises on this appeal is what, on the true construction of this section, is the position where discretionary beneficiaries under a settlement of assets so transferred as described in the preamble to the section, a settlement not made by them, receive capital sums by way of I appointment pursuant to powers conferred by such settlement. Is the effect, as contended by the Crown, that, no matter how small the sum so appointed may be, it entails liability on the person to whom it is so appointed to be assessed to tax in respect of the whole of the income of the settlement, and that not only in respect of the year in which the appointment is made but for ever thereafter—at any rate, so long as the settlement still exists, and possibly

longer; namely, until death brings a merciful release from the clutches of the section and the Revenue? And that not only this appointee but each and every appointee is similarly so liable, so that in strict theory (whatever may be done by way of administrative action by the Crown) the Crown is entitled to as many times the tax on the income as there have been distinct appointees, year by year, subject only to the merciful releases in the case of any individual to which I have already referred? Or, on the other hand, is liability limited; and, if so, how and by what provision of the section?

It will at once be seen that the precise problems with which this appeal is concerned arise under subs (2) of the section, and they do not appear to have been previously considered by any Court. I commence with certain matters which I think are clear, or which I, sitting in a Court of first instance, am bound to take as being clear. First, in the construction of this section the preamble forms part of it and must be taken into account accordingly: see *per* Cohen L.J., at page 196, and Lord Simonds, at page 204, in *Congreve* v. *Commissioners of Inland Revenue* 30 TC 163. Secondly, the words "such an individual" in subss (1) and (2) only mean an individual ordinarily resident in the United Kingdom (as indicated by the preamble) and are not restricted to the person originally transferring the assets. Whatever might be said as to the true nature of the *ratio decidendi* in the case of *Congreve* in the House of Lords, this was the opinion expressed by their Lordships; and in the case of *Bambridge* v. *Commissioners of Inland Revenue*[1] 36 TC 313, this was the subject-matter of actual decision by the Court of Appeal. In these circumstances, although much attracted by an argument by Mr. Potter on behalf of the taxpayer to the effect that the true intent of the section was to confine liability to the transferor himself, especially in view of the provisions of subs (8)(*a*), which, *pace* some extraordinarily ingenious suggestions by Counsel for the Crown, do not otherwise make good sense, I think I am bound by the *Bambridge* case in this regard and I shall simply follow it. It should be recorded that Mr. Potter expressly challenged the decision in both of these cases, so that he may be able to address his arguments later to a tribunal which, unlike this Court, could if it chose give effect to them. Thirdly, this whole section is a penal section, intended to punish individuals who have the temerity to avoid, or attempt to avoid, tax in the manner struck at by the section. This clearly appears from the speech of Lord Greene M.R., in *Lord Howard de Walden* v. *Commissioners of Inland Revenue*[2] 25 TC 121, at page 134. Thus, for example, as appears from that case itself, the receipt or accrual of the income to the "person resident or domiciled out of the United Kingdom" may increase the value of assets held by the individual in question only to the most minimal extent, and he may yet, by virtue of subs (5), be deemed to have power to enjoy the whole of the income, which thus becomes his income for the purposes of subs (1).

It should be pointed out, I think, that the "crime" in respect of which this penalty is exacted is a very odd one. So far as the section is concerned, the possessor of assets may freely give them to persons residing outside the United Kingdom for no consideration, and no consequences whatsoever follow, however much this country's overall balance of payments may be harmed. It is only when some benefit accrues to a United Kingdom resident that the penalties are incurred; that is to say, when this country's overall balance of payments is benefited. It therefore appears in the eyes of the Inland Revenue to be a "crime" to obtain a tax advantage for oneself or for one's nominee, but no "crime" at all to damage this country's international monetary position. I, for one, find this scale of values a difficult one to appreciate. It is also

(1) [1955] 1 WLR 1329. (2) [1942] 1 KB 389.

A convenient at this point to note that, as a pure matter of fact, the income of the foreign recipient in this case was brought back into the United Kingdom—Northern Ireland—by the foreign residents. But it was never taxed there when it was so brought back; and, although such return is a curious fact, I do not think that at the end of the day it affects anything I have to decide.

Now one can appreciate the scope and nature of a penal section in direct B connection with the person who procured the transfer of the assets which grounds liability under this section: that is the case of Lord Howard de Walden himself. It requires only a slight stretch of the imagination to appreciate its scope in relation to any single person who succeeds to that position, and this was the case in *Bambridge* v. *Commissioners of Inland Revenue*(1). It is, however, dificult to appreciate the logic of a section being penal when the C penalties are imposed, if the Crown are right in the present case, not upon persons who had any direct hand in the transfer, or persons who succeeded to the positions of persons who had such a direct hand, but persons who might not even have been born at the date of the transfer and accompanying settlement. One can see that, as an extreme measure, the intendment of the section might require the complete confiscation of all benefits such persons received. We are D nowadays so accustomed to confiscation of the top slice of income (such top rate being 98 per cent.) and of the top slice of capital (at the rate of 75 per cent.) that such rates no longer strike us as being the penalty on hard work and thrift that they really are. But if the provisions of subs (3) are taken *au pied de la lettre,* if any individual ordinarily resident in the United Kingdom receives by way of appointment under a discretionary power contained in a settlement of E assets which have been subject to such a transfer as is mentioned in the preamble to the section, then the whole of the income which by reason of the transfer has become the income of a person resident or domiciled out of the United Kingdom is to be deemed his income—and, according to the Crown, without limit of time. It equally follows that, if there are in fact a number of such appointments to different persons, the income is deemed to be the income F of each one: so that the Crown is, at the end of the day, entitled to multiple tax, the multiplier being the number of different appointments made. No wonder the Solicitor-General was moved to say that the provisions of the section contain a trap for all beneficiaries thereunder and that they ought at once to disclaim all interest. And this is odd because, if the trustees of the settlement merely paid the sums by way of income and not capital, no penal results G whatever would apparently befall the innocent beneficiaries: see the definition of "capital sum" at the end of subs (2).

I refuse to believe that Parliament can ever have intended such an unjust solution to the problem of preventing the transfer of assets abroad with a view to avoiding tax, no matter how pressing the problem. I take the general approach which I ought to adopt from the speech of Lord Loreburn L.C. in H *Drummond* v. *Collins*(2) [1915] AC 1011, at page 1017:

> ". . . Courts of Law have cut down or even contradicted the language of the Legislature when on a full view of the Act, considering its scheme and its machinery and the manifest purpose of it, they have thought that a particular case or class of cases was not intended to fall within the taxing clause relied upon by the Crown."

I Here I think that overkill is one thing, but overkill on the lines and to the extent suggested by the wording of the section can never have been intended. The

(1) 36 TC 313. (2) 6 TC 525, at p 538.

difficulty, of course, lies in suggesting a suitable emendation of the words of the subsection to give effect to what Parliament must have intended; namely, that the capital sums should, to some or a complete extent, be treated as income. I was for a long time attracted by a suggestion of Mr. Potter, who appeared for the Appellants in this case, that a suitable emendation would be to add the word "those" in subs (2) before the words "associated operations" where they secondly occur, thus confining the income to that dealt with in the associated operation whereunder the beneficiary took his interest—the appointment. If this emendation had the result contended for by Mr. Potter, then one would have to go back to the appointment, see what amount of income of the assets transferred was therein dealt with, and that would be the amount of income deemed to be the income of the appointee.

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On consideration, I do not think that the suggested emendation would, in fact, have that result, because it is not "in conjunction with those associated operations"—i.e., the appointment—that the income has become the income of the trustees. The trustees have the income by virtue of the transfer (and possibly, in other cases, by virtue of associated operations) but never by virtue of the precise associated operation (the appointment) under which the appointee takes his benefits. I therefore think that a rather bolder emendation is called for, and I would suggest the addition of some such words as "to the extent to which it comprises" before the words "any income" and the word "it" after "United Kingdom". I am fully conscious that I am cutting down the language of the subsection: I think I have the authority of Lord Loreburn for so doing.

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There are some minor points of construction which arise. The preamble brings the section into operation where income becomes payable to persons resident or domiciled out of the United Kingdom. Mr. Potter sought to maintain that where, as is the fact of the present case, and will doubtless frequently be the case, the persons in question are trustees, it appears wholly arbitrary that liability should depend upon their particular residences, which may very well change, and that one ought to fix upon some more constant feature of the trust, which would obviously, he submitted, be the proper law; and, if that were to be sought in the present case, it would be found to be that of Northern Ireland, and hence not out of the United Kingdom. I found these submissions unconvincing. It appears to me that there can be no sufficient reason for not taking those words in the preamble, at any rate, at their full face value, and on their natural and ordinary meaning they include trustees. Indeed, the framers of the section must have been well aware that in most cases they would be dealing with trusts, and this is in numerous places actually demonstrated in the language used. Purely by way of example, subs (5)(*d*), dealing with powers of appointment, must be dealing with trusts of some kind.

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Mr. Potter had a further point on subs (2) which I must notice. He called attention to the words "any income which . . . has become the income of a person resident or domiciled out of the United Kingdom", and submitted that this limited the assessment of the person who had received the capital sum to income received by the trustee prior to the date of receipt of the capital sum. I am not entirely certain that, if read in this way, the words would not produce just as great an injustice as the Crown's interpretation produces, for then, as I see it, it would mean that the capital beneficiary could be assessed retrospectively (admittedly only for a period of six years) on the trust income. I think, however, that the more natural meaning is that those words merely indicate the income of the trustees, the current income, but which "has

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A become" theirs by reason of the transfer and associated operations. As was pointed out on behalf of the Crown, since a capital sum is envisaged by the section as possibly having been received before any transfer takes place, Mr. Potter's construction would ensure that in such circumstances no tax was payable at all, which certainly cannot have been intended.

Mr. Potter also had a point on subs (4), which contains the definition of B "associated operation". He says that, as regards income, that deals with the income arising from the transferred assets and to income arising from such assets; but does not extend to the income of such income, or the income of such income of such income, and so on down the chain of accumulation. Having regard to the somewhat unusual provisions of the settlement here actually in question, if this submission were correct it would follow that the appointments C to the various beneficiaries which have actually taken place would not be "associated operations", as they have all been in relation to the income arising from accumulated income. I see no reason, however, for giving subs (4) such a restricted meaning. I think the question all turns upon the meaning of the word "accumulations", which is, I think, wide enough to carry the implication of sub-accumulations of income, the "sub" being raised to any power consistent D with the facts. Mr. Potter said that "accumulations" was put in the plural because "accumulation", in the singular, may denote either the act of accumulating or the accumulated fund, whereas the plural contains only one meaning, but I cannot accept that. The phrase here in question is "assets representing . . . the accumulations", and if a single accumulation and no sub-accumulation was intended, the singular could have been used with not the E slightest risk of any misconstruction.

Having thus dealt with the difficult problems of construction which arise in this case, I turn to the facts. I have before me six effective appeals from decisions of the Special Commissioners. A seventh appeal is listed, that of New Holding & Finance Co. Ltd., but this appeal has been abandoned, and in any event it raised a wholly different point. Save for one special point in relation to F the appeal of Mark William Vestey, which I must consider separately, the appeals all raise the same points as they arise out of similar facts, and I shall take the facts as they are found by the Special Commissioners in the case of Ronald Arthur Vestey.

> "5(3) By a settlement dated 25 March 1942 (hereinafter referred to as 'the 1942 settlement') made between Sir Edmund Hoyle Vestey and Lord G Vestey as settlors of the one part and James Flynn and Reginald Beak as trustees of the second part and Ulster Bank Ltd. of the third part, the settlors settled the property described in the schedule thereto. The material parts of the settlement are as follows: '1. In this deed the following expressions have the following meanings respectively:—(a) "The Trustees" means the parties hereto of the second part and their H successors in title as trustees or trustee for the time being of this Deed. (b) "The Company" means the said Ulster Bank Limited. (c) "The Joint Managers" means Ronald Arthur Vestey (the elder now surviving son of Sir Edmund Vestey) and the Honourable William Howarth Vestey (the son of Lord Vestey) together during their joint lives and the survivor of them during his life after the death of either of them and after the death of I both of them such person or persons (whether individual or corporate) as they jointly by any deed or deeds revocable or irrevocable or as the survivor of them in like manner or by Will or Codicil shall designate for this purpose (and so that they or the survivor of them may make and authorise

delegation and sub-delegation in any manner and to any extent of the A exercise of this power of designation whether before or after the death of such survivor but due regard being had to the law concerning remoteness) or in default of and subject to any such designation Edmund's Manager and Samuel's Manager hereinafter defined. (d) "Edmund's Manager" means the said Ronald Arthur Vestey during his life and after his death such person or persons (whether individual or corporate) as he shall by any B deed or deeds revocable or irrevocable or by Will or Codicil designate for this purpose (and so that he may make and authorise delegation and sub-delegation in any manner and to any extent of the exercise of this power of designation whether before or after his own death but due regard being had to the law concerning remoteness) or in default of and subject to any such designation his personal representatives. (e) "Samuel's C Manager" means the said William Howarth Vestey during his life and after his death such person or persons (whether individual or corporate) as he shall by any deed or deeds revocable or irrevocable or by Will or Codicil designate for this purpose (and so that he may make and authorise delegation and sub-delegation in any manner and to any extent of the exercise of this power of designation whether before or after his own death D but due regard being had to the law concerning remoteness) or in default of and subject to any such designation his personal representatives. (f) "The Trust Property" means the capital property rights and interests assured or covenanted to be assured by Clause 2 hereof and all moneys investments and property at any time representing the same or added to the Trust Property as capital by way of further Settlement or otherwise. E (g) "The Specified Period" means the period from the date of this Deed until whichever of the three following dates or events shall first occur namely (i) the 1st day of January 2030 (ii) the expiration of 20 years after the death of the survivor of the issue actually born before the date of this Deed of the late Right Honourable William Baron Vestey and Sir Edmund Vestey and His late Majesty King Edward VII respectively and F (iii) the failure by death of all the issue (whether present or future) of Sir Edmund Vestey and the said William Baron Vestey respectively except Lord Vestey himself and so that all his issue shall for the purposes of this Deed be deemed to have definitely failed by death if and when no issue of his shall be living (and notwithstanding that he may be still alive) and similarly with regard to Sir Edmund Vestey and his issue. (h) "The G Prescribed Term" means the term from the date of this Deed until the 1st day of January 1963 or the earlier end of the Specified Period or until such if any date either before or after the said 1st day of January 1963 (but not after the 1st day of January 1984 or the end of the Specified Period) as the Joint Managers while not less than two in number or (if and while the Joint Managers shall be a single person) as Edmund's Manager and Samuel's H Manager together shall appoint by any deed or deeds executed in each case during the continuance of the Prescribed Term as then existing and so that the Prescribed Term may be thus repeatedly extended by successive deeds or ended by deed at any time.

2. The Settlors together as Settlors in respect of all the property in this clause hereinafter mentioned except that marked'" with a star "'in the I margin of the Schedule hereto And Lord Vestey alone as Settlor in respect of such excepted property'",

in short, convey the property to the trustees.

"'3. The Trustees shall henceforth hold the Trust Property and the income thereof Upon The Trusts and with and subject to the powers and

A provisions following that is to say: (i) During the Prescribed Term the Trustees shall receive in due course the income of the Trust Property and shall invest such income in manner hereinafter mentioned so as to form a capital fund (hereinafter called "the Rental Fund"). (ii) From and after the end of the Prescribed Term the Trustees shall divide the Rental Fund or treat it as divided into two moieties and shall hold such moieties upon the B trusts and with and subject to the powers and provisions hereinafter contained concerning the same respectively. And one or the first of the said moieties' "

and what represents it is called "Edmund's Fund", and the other and what represents it is called "Samuel's Fund".

" '(iii) Until the end of the Prescribed Term the Trustees shall divide the C income (as and when received) of the Rental Fund or treat it as divided into two moieties and shall hold one or the first moiety of such income upon the trusts and with and subject to the powers and provisions (including the power of accumulation) which would for the time being be applicable hereunder to the income of Edmund's Fund if already in possession' " and the other " 'to the income of Samuel's Fund if already in D possession . . . (iv) Subject to the foregoing trusts the Trustee shall hold the Trust Property and the income thereof In Trust for the said Ronald Arthur Vestey and William Howarth Vestey absolutely in equal shares.

4. (A) The Trustees shall invest or keep invested Edmund's Fund in manner hereinafter mentioned and shall if and whenever so directed in writing from time to time by Edmund's Manager accumulate for such E period or periods within the Specified Period as may be prescribed by direction as aforesaid the whole or any part or parts of the income (not actually distributed before the relevant direction) of Edmund's Fund by investing the same and (if and so far as so directed) the resulting income thereof in manner hereinafter mentioned and all accumulations of income so made shall be added to and form part of the capital of Edmund's Fund. F (B) Subject to the last foregoing power of accumulation and to the provisions hereinafter contained the Trustees during the Specified Period shall hold the income of Edmund's Fund Upon Trust for all or any one or more of the following persons for the time being living (within the Specified Period) that is to say the said Ronald Arthur Vestey and his issue or (if and while no issue of his shall be living) the issue of Sir Edmund G Vestey in such amounts or shares at or for such times or periods and in such manner in all respects as Edmund's Manager shall from time to time in writing direct' ",

and then there is an exception to that which I do not think I need read. Then:

" 'And in default of and subject to any such direction Upon Trust for the issue for the time being living of the said Ronald Arthur Vestey in equal H shares per stirpes (while more than one) during the respective lives of such issue within the Specified Period or in the event of and after the failure by death of the said Ronald Arthur Vestey and all his issue (whether present or future) then Upon Trust for the issue for the time being living of Sir Edmund Vestey in equal shares per stirpes (while more than one) during the respective lives of such issue within the Specified Period But so that I in the case of each such person (in this Clause 4 hereinafter called "the Beneficiary") including the said Ronald Arthur Vestey and each one of all the said issue the income concerned shall be paid to him or her only if and

so long as no act or event (other than the execution or exercise of any trust or power contained in this Deed) shall'" A

cause a forfeiture, and then there are provisions as to what happens from that.

"'(C) From and after the end of the Specified Period (if ending otherwise than by the death of a descendant of Sir Edmund Vestey) and subject to the provisions hereinafter contained the Trustees shall hold Edmund's Fund and the income thereof In Trust for the person or persons B to whom as the beneficiary or beneficiaries the income of Edmund's Fund shall or but for any'" forfeiture "'would immediately before such end have been payable under sub-clause (B) of this clause (or any such direction or directions as first referred to in that sub-clause) and if more than one in the shares in which such income shall or would then have been so payable to them.'" C

Then there is a proviso:

"'(D) Edmund's Manager may at any time or times within the Specified Period direct the Trustees to appropriate or realise or raise any part or parts of the capital of Edmund's Fund and to pay the same to or apply the same for the benefit of the said Ronald Arthur Vestey or any one or more of his issue for the time being living or in the event of and after D the failure by death of the said Ronald Arthur Vestey and all his issue (whether present or future) then any one or more of the issue for the time being living of Sir Edmund Vestey in such shares (if more than one) and in such manner as Edmund's Manager shall think proper and discharged from all the trusts powers and provisions of this Deed (And the Trustees shall give effect to any such direction accordingly) But while Edmund's E Manager shall be a single individual'" there is a restriction. "'(E) Edmund's Manager may at any time or times within the Specified Period by any deed or deeds revocable or irrevocable appoint in the case of each or any person being issue of Sir Edmund Vestey that after the death of such person within the Specified Period any part not exceeding £3,000 per annum (free from death duties and expenses) and not exceeding in any F event one half of the income which under sub-clause (B) of this clause would for the time being be payable to such person if he or she were still living (and if no such act or event as is mentioned in that sub-clause had been done or happened) shall be paid to any surviving wife or husband of such person (if cohabiting with such person at his or her death) during the life within the Specified Period of such wife or husband'", and then there G is a restriction on that. "'(F) During the Specified Period (but subject to the power given by sub-clause (D) of this clause) the Trustees shall keep Edmund's Fund as an undivided whole'",

and I do not think I need read any more of that.

"'(G) Any accumulations of income or of any part or share of income of Edmund's Fund which may within the Specified Period be made under H this Deed or any relevant statutory power (and whether during any minority or otherwise) shall forthwith be added to and shall thenceforth form part of the capital of Edmund's Fund (as an undivided whole) for all purposes and shall not be applicable as income at any subsequent time.'"

Then there is another proviso, with a further proviso on that, which I need not read, those dealing with the question of forfeiture. Clause 5: I

"'If at any time during the Specified Period no issue of Sir Edmund Vestey shall be living or if at the end of the Specified Period some issue of

A his shall be living but none of them shall become entitled to Edmund's Fund under Clause 4 hereof then (subject to the foregoing powers and provisions and the provisions hereinafter contained) Edmund's Fund and the income thereof shall be added to and held upon with and subject to the same trusts powers and provisions as Samuel's Fund and the income thereof respectively and in the event of the failure or determination of such B trusts powers and provisions (and subject thereto) shall be held In Trust for the said Ronald Arthur Vestey absolutely.'"

Then there are similar provisions in clause 6 dealing with Samuel's fund; and clause 7 is the mirror image of clause 5 depending on "at any time during the Specified Period no issue of the said William Baron Vestey (except Lord Vestey himself if still in existence)" being living. Then, clause 8 contains powers of C management; and clause 9 contains powers of investment, which I do not think matter. Clause 11 provides:

"'Strict accounts of the trust premises both capital and income and of all dealings therewith shall be kept and shall be audited at least once in every year by a professional accountant or professional accountants to be appointed from time to time by the Joint Managers during the Prescribed D Term or after the end thereof by Edmund's Manager in respect of Edmund's Fund and by Samuel's Manager in respect of Samuel's Fund . . .'"

Clause 12, to which I have already directly referred:

"'This Deed shall be construed and operate according to the law of Northern Ireland in all respects and so that (subject to the express E provisions hereof) all relevant Statutes including in particular the Conveyancing Act 1881 and the Trustee Act 1893 shall apply to this Deed and the trusts hereof'";

and I do not think there is anything more in that which I need read. It of course follows from the provisions of clause 12 that the proper law of the 1942 settlement was Northern Irish and in all relevant respects (save that the F Thelluson Act does not apply) such law is similar to that of England and Wales.

"5 (5) The 1942 settlement was of property which the accounts refer to as trust property. The settlement then created a rental fund which consisted of income arising from the trust property. Edmund's fund and Samuel's fund are the one half shares of the income of the rental fund, the G names corresponding to the two branches of the Vestey family concerned in the appeals. William, first Baronet and first Baron, who died in 1940, was succeeded by Samuel, second Baron, who was one of the settlors of the 1942 settlement. Samuel died in 1954; his son, William Howarth, predeceased him leaving two sons, Samuel George Armstrong, the third Baron, and the Honourable Mark William Vestey. The other branch, so H far as relevant, consisted of Edmund Hoyle Vestey, first Baronet (the other settlor of the 1942 settlement) one of his sons, Ronald Arthur Vestey (the Appellant) and the Appellant's children, Edmund Hoyle Vestey, Mrs. Jane Baddeley and Mrs. Margaret Payne. (6) By a lease dated 26 March 1942 (hereinafter referred to as 'the 1942 lease') Messrs. Flynn and Beak leased the property comprised in the 1942 settlement to the I Union Cold Storage Co. Ltd. for a term of 21 years from 10 April 1942 in continuation or extension of" an earlier demise made in 1921. "The 1942 lease was expressed to be supplemental to the 1921 lease and the property

was demised to the lessee at the same rent and on the same terms and conditions as were reserved and made payable and contained in and in the same manner as if all the operative parts of the 1921 lease were therein repeated and made applicable accordingly with the substitution throughout of the schedule thereto for the schedules to the 1921 lease and of the term thereby granted for that granted by the 1921 lease and of the lessors for the lessors of the 1921 lease. The 1942 lease provided",

first of all, that the rent should be payable to the lessors; secondly, that the powers to determine the lease by notice and to withdraw any part or parts of the demised premises should be exercisable by the new lessors; thirdly, that "The Lessees shall not have power to determine this lease by notice before the 1st day of January 1950"; and, fourthly, that "The Lessors and the Lessees may at any time or times by agreement substitute other hereditaments and premises for any of those hereby demised either with or without any alteration of the rent hereby made payable."

"(7) In 1963 the 1942 lease came to an end and a new lease was executed on 10 April 1963. The lessors were the then trustees of the 1942 settlement (Messrs. Flynn, Beak and Drabble) of the one part and the Union International Co. Ltd. (formerly Union Cold Storage Co. Ltd.) lessees of the other part. This lease was expressed to be supplemental to the 1921 lease and the 1942 lease and the lessors granted to the lessees the hereditaments and premises referred to in the schedule thereto (expressed to comprise the hereditaments and premises held by the lessees under the 1942 lease subject to certain deeds of withdrawal and substitution and certain other property) for the term of 21 years from 10 April 1963 at the same rent and upon the same terms and conditions as were contained in the 1921 lease. (8) By a settlement dated 3 January 1963 ('the 1963 settlement') the Appellant and Lord Vestey as settlors of the first part and Messrs. Flynn, Beak and Drabble as trustees of the second part and Ulster Bank Ltd. of the third part, settlors settled their respective interests in the property expectant on the determination of the prescribed term under the 1942 settlement"—that is to say, 1 January 1984—"on the trusts therein mentioned. Those trusts were similar to the trusts contained in the 1942 settlement. (9) The original trustees of the 1942 settlement, James Flynn and Reginald Stephens Beak, were resident and ordinarily resident in Uruguay and in the Argentine respectively. Additional trustees of the 1942 settlement, none of whom were or are resident in the United Kingdom, were appointed" from time to time. "All the trustees of the 1942 and 1963 settlements" except one "were employees of companies of the Vestey group. The trustees meet infrequently, usually in Paris. The Appellant and Mr. Edward Brown met the individuals acting as trustees from time to time. The trust securities were retained by the Ulster Bank Ltd. in Belfast, Northern Ireland. (10) By a direction in writing of the trustees dated 27 July 1950 the rent payable by the lessee of the 1942 lease was paid to the Ulster Bank Ltd. in Belfast and there placed to the credit of an account in the name of the Appellant called the 'F & B account' maintained by him by authority of and on account of the trustees. By further directions in writing dated 30 June 1967 and 12 December 1967 the trustees for the time being authorised further payments of rent to be paid to the said bank but to the credit of the account of the then trustees . . . (11) By directions in writing given on 30 August 1942 by William Howarth Vestey as Samuel's manager under clause 6(A) of the 1942 settlement and on 14 September 1942 by the Appellant as Edmund's manager under clause 4(A) thereof, the trustees were directed to accumulate the whole of the income of Samuel's and Edmund's funds respectively by investing the

A same and the resulting income thereof, until otherwise directed . . . (12) The joint manager referred to in clause 1(c) of the 1942 settlement was at all material times the Appellant who was also Edmund's manager as defined by clause 1(d) of the settlement. After the death of William Howarth Vestey in 1944 Samuel's manager was Mr. Edward Brown until 19 March 1966 and thereafter Lord Vestey. The 'prescribed term' B as defined by clause 1(h) of the 1942 settlement by virtue of a deed of direction made on 2 November 1962 by the Appellant and Mr. Edward Brown was extended to 1 January 1984. (13) The rent payable under the 1942 lease was paid quarterly to the Ulster Bank . . . and was accumulated and invested. The investments of the rental fund were ultimately to be divided into Edmund's fund and Samuel's fund on the C expiration of the prescribed term on 1 January 1984 but for convenience separate accounts were kept of Edmund's moiety and Samuel's moiety. The trustees' accounts accordingly showed the division of the funds and invested income under the following heads: *The trust property fund* consisting of the freehold and leasehold properties, plant and machinery comprised in the 1942 lease valued at £18,000,000 on 1 April 1942 (with D adjustments for sales and purchases) together with other property and investments representing assets of the 1942 settlement. *The rental fund* consisting of the accumulation of the rent payable under the 1942 lease. *The rental fund investments* consisting of the proceeds of investment of the rental fund. *Edmund's fund* consisting of a moiety of the income produced by the investments of the rental fund. *Samuel's fund* consisting of the E other moiety . . . The trustees also prepared income and expenditure accounts which recorded the rents received and also the investment income from the above mentioned funds. The trustees' accounts were audited by a certified public accountant in Uruguay and were kept in Uruguay . . . (14) The trustees of the 1942 settlement owned directly, or through nominees, all the shares in the following companies (hereinafter F called 'the offshore companies'): (i) Commercial Insurance Corporation Ltd. was incorporated in 1922 and its share capital was purchased by the trustees in 1944. . . . It has a wholly-owned subsidiary company, New Holding & Finance Co. Ltd. (ii) The Commercial Investment Co. Ltd. is a company incorporated and managed and controlled in Bermuda. . . . (iii) The Salient Shipping Co. (Bermuda) Ltd. is a company incorporated G and managed and controlled in Bermuda. . . . (15) New Holding & Finance Co. Ltd. (hereafter referred to as 'NHF') is a company incorporated and managed and controlled in England. . . . All its share capital is owned by Commercial Insurance Corporation to whom it paid substantial dividends. For the years 1963–64 and 1965–66 the Commissioners of Inland Revenue issued directions and apportionments to NHF under H s. 245 of the Income Tax Act 1952 directing that its actual income (other than estate and trading income) should be deemed to be the income of its members", that is, of the Commercial Insurance Corporation. "NHF appealed against the directions and apportionments."

The Special Commissioners heard the appeals of NHF together with the other appeals in front of them

I "on the footing that if the said directions and apportionments were correct they operated to swell the income of the Commercial Insurance Corporation which (according to the Crown's contention) was deemed to be income of the Appellant. . . . (18) The following appointments from capital were made under the powers contained in clauses 4(D) and 6(D) of the 1942 settlement: Appointor—The Appellant as Edmund's manager

with the consent of Samuel's manager under clause 4(D); Appointee—The Appellant" himself; A

and there were two appointments, on 29 October 1962, amount £215,000 and, on 18 November 1964, amount £150,000. Then: "Appointor—The Appellant as Edmund's manager", and there are a number of appointments—Edmund Hoyle Vestey, two: on 1 January 1963, £700,000; on 18 November 1966, £220,000; Margaret Payne, the wife of James Gladstone Payne, on 2 May 1966, B £100,000; Jane McLean Baddeley, the wife of John Richard Baddeley, on 2 May 1966, £100,000. Then: "Appointor—Edward Brown as Samuel's manager under clause 6(D)", three appointments. There were two in favour of Lord Vestey (the third Baron): on 9 July 1962, £123,000, and on 1 January 1963, £800,000. Then: "Appointee—The Hon. Mark William Vestey", on 1 January 1963, £200,000. C

Consequent upon these appointments, the Crown has raised assessments on the recipients, or on the recipient's spouse where the recipient was a woman, in the year of receipt in question and subsequent years. The Crown has, however, restricted the quantum of such assessments so that in no year does it seek to assess the recipients overall with income in excess of that actually received in that year by the trustees. This is, of course, on the Crown's D argument, a purely voluntary act on its part, but an act of considerable magnitude, seeing that it claims it is strictly entitled to exact tax on the whole income no less than six times over. The magnitude of this concession is, of course, in itself a tacit acknowledgment that the section can never have been intended to work in the manner the Crown claims that it does.

On these facts, Mr. Potter, for the Appellants, submitted the following E points: I. Section 412 applied only where the taxpayer assessed himself made the transfer or caused it to be made. II. If this was not accepted owing to the decisions in the *Congreve*(1) and *Bambridge*(2) cases, then those cases should be distinguished, as they were not dealing with cases where (i) there was multiple liability, and (ii) the Crown was claiming a discretionary right to ascertain which of the taxpayers were liable and for what proportion F of the income. III. The capital sums in question having originated from accumulations of income of accumulations, the appointment was not, within subs (4), an associated operation. IV. It was a necessary condition of liability under s 412 that the individual assessed was attempting to escape tax. V. The section did not apply to payments to trustees merely by reason of the fact that they were domiciled or resident outside the United Kingdom. VI. The G width of subs (2) should be limited by adding the word "those" before the words "associated operations" where they secondly occur; or, alternatively, by construing "has" as "has previously", so that no future assessments on the recipients of the capital sums would be possible. VII. Since the Hon. Mark Vestey was an infant at the time when the relevant sum was appointed to him, and it was not paid to him but to his mother, he neither received nor was H entitled to receive that sum, and so was outside the purview of subs (2). VIII. Since the share capital of Commercial Insurance Corporation Ltd. was purchased by the trustees, its income, as distinct from the income arising therefrom by way of dividends, does not accrue by reason of any chain of associated operations. The company's own income is therefore not within the description of "income which, by virtue or in consequence of the transfer, I either alone or in conjunction with associated operations", upon which subs (2) operates. So neither the company's own income, nor any income of NHF

(1) 30 TC 163. (2) 36 TC 313.

A apportioned to it under the surtax apportionment provisions of the 1952 Act, can be brought into account.

I have already indicated that I have rejected Mr. Potter's first submission, bound thereto as I am by the *Bambridge*(1) decision in the Court of Appeal, if not also by the decision of the House of Lords in *Congreve's* case(2). As regards his second submission, for the reasons already given I do not regard these cases
B as applicable to the specific point of construction of subs (2); they deal with what is now subs (1) only. I have rejected his third point, and his fifth; and, as regards his sixth, I have rejected it as it stands but reached a conclusion which will presumably be satisfactory to him by a slightly bolder (although I trust pedantically justified) road. This leaves for consideration his fourth, seventh and eighth submissions.

C As regards the fourth, I feel the force of Mr. Potter's submission that in the present case the individuals who are now assessed have not avoided liability to income tax at all. They have done nothing; and, indeed, they may not even know in any given case (although they clearly do now know) the source of the benefit they have received, nor whether it was intended to form part of a tax avoidance scheme. But, having said that, I think that on a fair reading of
D the section what Parliament was intending to do was to treat the avoidance intention as colouring all benefits under the scheme for such avoidance, no matter in whose hands they might be found, and to attack such benefits accordingly. And if the limitation which I think must be placed on subs (2), or some similar limitation, applies, then the not unjust situation will be reached where any appointee of capital will be liable to have a sum up to the whole
E of that capital treated as his income in the year of receipt, but will not suffer any further liability.

The seventh point raises, of course, a very special point. The relevant deed of direction of 1 January 1963 runs, in its operative part, as follows:

> "the said Edward Brown hereby irrevocably directs and appoints that the Trustees therein mentioned shall forthwith appropriate the sum of Two
> F hundred thousand pounds (£200,000) cash being part of the Capital of Samuel's Fund therein referred to to the Honourable Mark William Vestey (being a grandson of the said Samuel Baron Vestey party to the Settlement) and pay the same to Pamela Lady Vestey the Mother and lawful guardian of the said Honourable Mark William Vestey for his absolute use and benefit discharged from all the trusts powers and
> G provisions of the said Deed of Settlement";

and endorsed thereon is a receipt by Pamela Lady Vestey, his mother and lawful guardian. It is therefore plain that the Hon. Mark Vestey never himself actually received the money: it was received by his mother in the capacity of a trustee. Did he nevertheless become "entitled to receive" that sum? I think that the answer must be, in the light of In re *Somech* [1957] Ch 165, that he
H did not have, prior to attaining his majority, any strict entitlement to receive the money at once. But, as I think also clearly appears from that case, on attaining his majority he would have a right to call for the money, or the assets representing it, so far as they had not been properly expended by his mother, as his trustee on his behalf, in the meantime. In the light of this conclusion, no assessment could have been made on him in respect of the year 1963–64;
I it should have been for the year 1964–65 (a year for which he has of course

(1) 36 TC 313. (2) 30 TC 163.

been assessed), and, I imagine, the figures are at large, although readily ascertainable. A

On Mr. Potter's final point there was, unusually, a certain measure of agreement. Mr. Nolan, on behalf of the Crown, accepted that, for the purposes of subs (2) (he did not make any such concession as regards subs (1)), Mr. Potter's contention with regard to the income of Commercial Insurance Corporation Ltd. was correct. I think he nevertheless, as he said (and correctly) B that this was a new point not taken before the Special Commissioners, stated that he would like the case remitted to them to investigate the circumstances of the acquisition of the capital of this company by the trustees. But it appears to me that the Stated Case means what it says, and that a purchase means a purchase. Therefore, on this point, Mr. Potter's contentions succeed.

In the event, in my judgment, the appeals of the taxpayers must be C allowed. We know as a fact that all the "capital" payments were payments out of income, and nothing but income, so that the taxpayers fall to be assessed in the year of receipt in respect of the whole of such sums: all but Mark Vestey, who falls to be assessed in the following year in respect of the sum which he then became entitled to receive from his mother, his trustee. I do not know whether the figures are readily agreeable or whether the matter will have to be sent back D to the Special Commissioners to find the figures.

I have been informed that there was an assessment on Mr. Ronald Vestey under s 412(1) before the Special Commissioners and that they refused to deal with it on the ground that the Crown had recovered all the tax on the relevant income which it possibly could by reason of the assessments made on the Appellant taxpayers now under appeal under subs (2). That matter is clearly E not before me. It is not referred to in the Case Stated, and I do not therefore think I am seized of the position in any way.

I am now prepared to hear argument on the precise form of my Order, and costs; but before I finally part with this case I feel constrained to make one general observation. I conceive it to be in the national interest, in the interest not only of all individual taxpayers—which includes most of the nation—but F also in the interests of the Revenue authorities themselves, that the tax system should be fair. Absolute equity is, of course, impossible to achieve, and nobody would cry for the moon. But rank, blatant injustice, of the kind and on the scale exemplified in s 408 of the 1952 Act, s 412(1) in some circumstances, and s 412(2) on the Crown's construction of it, is another matter. Like Lord Upjohn in *Commissioners of Inland Revenue* v. *Bates*[1] 44 TC 225, at page 268, G I am quite unable to understand upon what principle of the law the Crown, as he said, "realising the monstrous result of giving effect to the true construction", or what it assumes to be the true construction, of these sections, feels itself entitled to mitigate their monstrosity by such concessions as it chooses to make. One should be taxed by law, and not be untaxed by concession. This has now proceeded for such a long time without the Revenue H authorities taking one of the numerous opportunities which they have—at least once a year—to put the matter right that I am afraid they must have failed to realise the deep, brooding resentment felt by every taxpayer who is not charged simply upon his own income (including, of course, what he himself could have had by way of his own income had he so chosen). A tax system which enshrines

(1) [1968] AC 483.

A obvious injustices is brought into disrepute with all taxpayers accordingly, whereas one in which injustices, when discovered, are put right (and with retrospective effect when necessary) will command respect and support.

Appeals allowed with costs.

Each case remitted to the Special Commissioners for them to consider the Crown's alternative contention based on s 412(1)*—also, in the appeal by Mark* B *William Vestey, to hear evidence as to the capital sum to which he became entitled on attaining his majority—and to adjust the assessments accordingly.*

Supplemental Case

Stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

C 1. The Case stated by us in this matter on 21 November 1974 was remitted to us by Order of Mr. Justice Walton made on 29 July 1977 and entered on 12 October 1977 to make appropriate findings of fact and conclusions of law in relation to the alternative contention on behalf of the Respondents to the effect that each assessment under appeal was supported by subsection (1) of section 412 of the Income Tax Act 1952 and to amend the Case accordingly and to D adjust as may be appropriate in accordance with such amendment or the Judgment of the Court (a transcript whereof is being filed with the Order) the assessments to income tax and surtax for the years 1963–64, 1964–65, 1965–66 and 1966–67. A copy of the said Order is annexed hereto marked exhibit "RAV"(1).

2. At a meeting held on 18 November 1977 and 9 December 1977 we heard E argument on behalf of the Appellant and the Respondents. At the same time we heard appeals by the Appellant against assessments to income tax and surtax for the year 1968–69. By agreement between the parties these appeals had been listed in order that our decision should cover that year, being the first year for which the amendment to section 412 made by section 33 of the Finance Act 1969 took effect. For convenience we have dealt with these appeals in our F decision set out below.

3. No additional evidence was adduced before us.

4. It was contended on behalf of the Appellant:

(a) There was no liability under subsection (1) of section 412 for the reasons set out in paragraph 7 of the said Case Stated; and in addition:

(b) None of the Appellants can be shown to have had any "rights". A G person who is merely a potential beneficiary under a discretionary power or trust does not have any "right" on the plain meaning of that word, but only an expectancy.

(c) None of the Appellants can be shown to have had power to enjoy any of the income of the property fund or of the rental fund, because all that income was directed to be, and was in fact, accumulated; any discretionary expectation H of any beneficiary was confined either to Edmund's fund or to Samuel's fund but not to both.

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(1) Not included in the present print.

(d) The residence and domicile of the trustees has to be determined irrespective of the residence or domicile of any individual trustee, and thus cannot be shown to be elsewhere than in the place of the proper law of the settlement, namely, Northern Ireland. A

(e) The preamble requires that, for liability under the section to arise the Crown must prove an objective avoidance to tax, that is, that by means of the transfer with or without associated operations each Appellant is avoiding a liability to tax that he would have incurred either if there had been no transfer, or if the transfer and all associated operations and all persons concerned had been within the United Kingdom. B

(f) As regards the company, Commercial Insurance Corporation Limited, the Crown cannot demonstrate *either* that any Appellant had power to enjoy its income, *or* that any alleged power to enjoy arose by means of the alleged transfer (namely the 1942 Settlement) *or* any alleged associated operation *or* that the payment of income to the Company was a consequence of the transfer, namely the 1942 Settlement, with or without associated operations. C

(g) The discretionary power to determine what taxes should be paid and by whom is vested in Parliament and not in the Crown, still less in any official of the Revenue. Therefore a taxing statute should not be construed as conferring upon the Revenue a discretion upon whom and to what extent to impose liability to tax, save where the discretion is conferred by such express and unequivocal language that Parliament may be taken to have delegated its discretionary power. D

(h) Section 412, particularly section 412(1), must be construed so as not to confer a discretionary power on the Revenue. No reported authority justifies any other construction. The reference to "individual" in section 412(1) indicates that the subsection does not bite save where there is a single individual who made or caused the transfer, or who is covered by the description in the subsection not concurrently with any other individual. E

(i) If the Revenue claim to have a discretion, it is judicial and so subject to review by the Courts. Furthermore, both (i) in determining how such a discretion is properly exercised and (ii) in determining the construction of section 412 by reference to the "mischief" rule, it is proper to take into account statements on behalf of the Crown to the House of Commons as reported in Hansard when the House of Commons first considered enacting what is now section 412(1). If the said discretion were not judicial but were executive, then the fact that the Revenue had never made known the manner in which they will exercise it is prima facie evidence that the exercise thereof may be inconsistent and capricious and is thus open to review by the Courts. F G

(j) Relief under section 413 should be given in respect of the capital sum paid to the Appellant, to the extent it was derived from accumulated income which had borne tax at the standard rate. H

5. It was contended on behalf of the Respondents:

(a) For the reasons set out in paragraph 8 of the Case Stated the Appellant had by means of a transfer of assets either alone or in conjunction with associated operations, acquired rights by virtue of which he had power to enjoy income of the Trustees.

(b) As regards the year 1968–69 he had power to enjoy such income. I

A (c) If on a true construction of section 412 "any income" of the Trustees was deemed to be the income of each beneficiary the Respondents did not have any such discretion as contended by the Appellant. The Appellant was taxable according to the terms of the statutes. In pursuance of their statutory duty to administer the Taxing Acts the Respondents were under no duty to exact tax on income in excess of the income of the Trustees.

B (d) The purchase by the Trustees of the share capital of Commercial Insurance Corporation was an "associated operation" and its income, as well as the income of the other offshore companies, fell to be included in the income deemed to be the Appellant's income.

(e) Relief under section 413 did not apply to capital sums to which section 412(2) applied.

C 6. We, the Commissioners who heard the appeal, gave our decision in writing on 11 January 1978 as follows:

We deal first with s 412(1) before its amendment in 1969.

It was said on behalf of the Appellant that his entitlement to income was subject to the exercise of divers powers and consents and he acquired no "rights" to income within s 412(1). We accept that according to the terms of the D 1942 settlement he had no right to demand income from the trustees but we prefer to pose the question in a different form. What we have to decide is, not whether he had "rights", but whether he acquired "rights" by virtue of which he had within the meaning of s 412 "power to enjoy" income; and the expression "power to enjoy" (which is a component of the sentence which we have to construe as a whole) is elaborately defined in subs (5) and amplified by E subs (6).

Under the 1942 settlement the Appellant acquired the "right" to be considered as a potential recipient of benefit and the "right" to have his interest protected by a court of equity. It is those "rights" in the context cited above which we have to consider.

By subs 5(*d*) an individual is deemed to have power to enjoy income if F he may, in the event of the exercise of any power vested in any other person, become entitled to the beneficial enjoyment of the income. Does the Interpretation Act 1889 permit "power"—in the singular—being construed as including separate exercises of separate fiduciary powers? We see nothing to prevent the application of the Interpretation Act to subs 5(*d*) and we take the view that by the exercise of the powers vested in the managers the Appellant G may become entitled to income of the trust property and that such income when received would be income to which the Appellant had a good title by virtue of his rights under the 1942 settlement in the sense referred to above. We do not think that the directions to accumulate income (clause 3(i) of the 1942 settlement and directions mentioned in para 5(11) of the Case Stated) prevent income from being deemed to be income of the individual concerned.

H We feel fortified in this conclusion first by the declared purpose of s 412 as set out in the preamble thereto and, secondly, by subs (6) thereof by which we are enjoined to have regard to the "substantial result and effect" of the transfer and associated operations.

A fortiori, after the section was amended by s 33, Finance Act 1969, the Appellant had power to enjoy income of the 1942 settlement. A

It was said that we ought not to adopt a construction which could result in each beneficiary being deemed to be entitled to "any income". Lord Greene M.R. in *Lord Howard de Walden* v. *Commissioners of Inland Revenue*(1) 25 TC 121 at pages 133–4 says "any income" cannot be limited to income which the beneficiary in fact enjoys. On very few occasions—section 42, Finance Act 1965, and section 37, Finance Act 1969—has the legislature enacted a formula relating the tax charged to the actual enjoyment of income of discretionary beneficiaries. If the beneficiary is chargeable at all it must be in respect of "any income" of the non-resident person. We see no middle course. B

Then it was said that by choosing to limit the total liability to the income of the trustees the Board of Inland Revenue are exercising a discretion. We do not think by so limiting the tax the Board are exercising a discretion in a sense offensive to the law. There are many instances in the Taxes Acts where the Board have express powers which affect the tax payable; for example, in s 115(2)(*b*) of the Income and Corporation Taxes Act 1970. The existence of such powers is consistent with their duty under s 1 of the Inland Revenue Regulation Act 1890 and s 1 of the Taxes Management Act 1970 whereby they are to have all the necessary powers for carrying into execution every Act relating to Inland Revenue and the care and management of taxes. We can accept Counsel's proposition that a person is not to be taxed by a discretion but by clear words charging him to tax, without construing s 412(1) so as to avoid charging the individual at all. We do not think we can look at Hansard as an aid to construction. We must look at what was enacted. C D E

The construction which we favour above need not result in double or multiple taxation. If the income of A is deemed to be the income of B, it cannot also be deemed to be the income of C unless the enactment clearly so provides, which s 412 does not; nor, so far as we are aware, does any other section of the Taxes Acts. In cases where income is deemed to be another individual's income there are instances where the words "and not the income of any other person" appear; for example, in Part XVI of the Income and Corporation Taxes Act 1970 (Settlements). There are no such limiting words in s 412. When s 412 was originally enacted in 1936 the maximum rate of income tax and surtax was 65 per cent. Although the principle has been somewhat eroded in modern times Lord Macnaghten's *dictum* that income tax is a "tax on income" then held good. It seems to us highly improbable that (with the caveat already mentioned) if income is deemed to be A's it can also be deemed to be income of B. In *Lord Herbert* v. *Commissioners of Inland Revenue*(2) 25 TC 93 Macnaghten J. describes such a proposition as extravagant. We take the view that the deeming process, whereby income of the non-resident person is deemed to be income of an individual, operates once only and that such income cannot be taxed more than once. F G H

Apportionment of the "deemed" income according to the quantum of the respective beneficial interests has much to commend it, but (as we noticed in para 12 of our original decision) s 412 does not so provide. We recognise that apportionment may be impossible in the case of some of the discretionary beneficiaries whose expectancy may be insignificant. Various methods of apportionment were canvassed before us, the merits of each differing according to the circumstances. In our view, in default of a method prescribed by the I

(1) [1942] 1 KB 389. (2) [1943] KB 288.

A section, and we can find none, it is for the Board in exercise of their powers in the execution of the Acts to decide on the appropriate apportionment.

The next matter is the income of Commercial Insurance Co. Ltd. It was said that the purchase of its shares broke the chain of transfers and associated operations. For the purposes of subs (1) we can see no warrant for treating its income differently from that of the other offshore companies. So to do would, B in our view, create a distinction between the subscribers' shares and purchased shares for which we can see no justification. In each case the individual has "power to enjoy" the income of the offshore companies by virtue of the wide definition in subs (5).

It was submitted on behalf of the Appellant that the capital sum appointed to him should be abated under section 413 so far as it is shown to be derived C from income which has borne tax at the standard rate. The said sums were appointed pursuant to the power contained in Clause 4(D) of the 1942 Settlement which gives Edmund's manager jointly with Samuel's manager, power to appoint any part of the capital of Edmund's Fund. It appears from the accounts that the respective sums were appointed out of accumulated income which had been effectively capitalised, and, this being so, section 413 can have D no application to section 412(2). We understand it has already been taken into account in arriving at the figures under section 412(1). It was not suggested that any different considerations apply to the other Appellants mentioned in the Order (namely, Lord Vestey, J R Baddeley, J G Payne, M W Vestey and E H Vestey) and our decision above applies to them also, except that in the case of M W Vestey adjustments to the 1963–64 and 1964–65 assessments (set out in E Schedule E) have been agreed consequent upon payment having been made to his mother.

We confirm the assessments as determined by us on 17 June 1975 as set out in the first and fifth columns of figures in Schedules E and F annexed.

We dismiss the appeals against the 1968–69 assessments and adjourn them for the figures to be agreed.

F 7. The Appellant immediately after our decision expressed dissatisfaction therewith as being erroneous in point of law and on 13 January 1978 required us to state a case in respect of the appeal for the year 1968–69 pursuant to the Taxes Management Act 1970 section 56. Having regard to the delay which would be occasioned by the agreement of figures consequent on our decision we have agreed to state a case on a point of principle which case we have stated G and included in this Supplemental case and do sign accordingly.

J. B. Hodgson
B. James
Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House
94–99 High Holborn
London WC1V 6LQ

H 27 January 1978

E. H. Vestey v. *CIR*; *M. W. Vestey* v. *CIR*; *J. G. Payne* v. *CIR*; *J. R. Baddeley* v. *CIR* and *S. G. Armstrong, Third Baron Vestey* v. *CIR*. The supplemental Cases stated in these appeals were in all material respects identical to the above supplemental Case.

The Cases stated and the supplemental Cases stated in these appeals were heard before Walton J. on 12, 13 and 14 April 1978 when judgment was reserved. On 26 May 1978 judgment was given against the Crown, with costs. A

D. C. Potter Q.C. and *J. Holroyd Pearce* for the taxpayers.

The Solicitor-General (Peter Archer Q.C.), Michael Nolan Q.C., Brian Davenport and *Peter Gibson* for the Crown.

The following cases were cited in argument in addition to those referred to in the judgment:—*Mangin* v. *Inland Revenue Commissioner* [1971] AC 739; In re *Gulbenkian's Settlement* [1970] AC 508; *Perry* v. *Astor* 19 TC 255; [1935] AC 398; *Russell* v. *Scott* 30 TC 375; [1945] NI 47; *Stock* v. *Frank Jones (Tipton) Ltd.* [1978] 1 All ER 948; *Earl Beatty* v. *Commissioners of Inland Revenue* 23 TC 754; In re *Baden's Deed Trusts* TC Leaflet 2361; [1971] AC 424; *Commissioners of Inland Revenue* v. *Transport Economy Ltd.* 35 TC 601; *Reg.* v. *Davison* [1972] 1 WLR 1540; *Norman* v. *Golder* 26 TC 293. B C

No. 2

Walton J.—This case is a sequel to the first *Ronald Arthur Vestey* case([1]), which is reported in [1979] Ch 177. It is concerned with the same settlement and the same payments made thereout to the Appellants. But whereas the Crown's attack was previously mounted under s 412(2) of the Income Tax Act 1952, it is now mounted under subs (1) of that section. I need not, I think, rehearse the facts, which I set out in my previous judgment; nor the terms of the section, which I likewise set out therein. I think I can plunge straightaway into the Crown's claim. D

It is that, given the terms of the settlement of 25 March 1942, each of the Appellants, as potential beneficiaries thereunder, has, within the meaning of the preamble and the combined effect of s 412(1), (4) and (5), rights by virtue of which each of them has power to enjoy the income of the trustees of that settlement, and that in consequence thereof such income must be separately deemed to be the income of each of these individuals for all the purposes of the Income Tax Act 1952 year by year as it arises, at any rate so long as each of them remains a potential beneficiary of the settlement. So that once again the Crown is claiming the right to recover multiple tax from the unfortunate Appellants and to recover it year by year quite irrespective of the question whether the Appellants do or do not receive anything further out of the settlement funds. If that is what the relevant subsections, on their true construction, do provide, then, of course, so be it. But this is a penal section, and accordingly falls to be construed extremely strictly, although of course this does not mean that the Court is at liberty to distort its fair meaning, only that the person who is alleged to have incurred the penalty must be given the benefit of any real doubt or ambiguity. There can, however, be no possible burking the fact that the consequences of the construction which the Crown seeks to place upon the relevant subsections produce a monstrous injustice: an injustice so monstrous that the Crown itself in the present case has resiled from its logical consequence and, while claiming a wider right, has sought to attribute to each of the Appellants only a fraction of the income of the trustees equivalent to the fraction of the total disbursements made to them collectively which each individual has himself received. Since at the moment I am dealing only with E F G H

([1]) See page 530 *ante*; referred to later in this judgment as *Vestey (No. 1)*.

A matters of principle and not with precise figures (which, if required, remain to be agreed), I do not think it is necessary to refer to the precise figures at all. It suffices to say that, precisely as in *Vestey (No. 1),* there are assessments to income tax and surtax upon all the relevant recipients for the years 1963–64, 1964–65, 1965–66 and 1966–67, which were the years which were previously in issue, and also the year 1968–69. These last appeals were added by agreement B between the parties, and are designed to elicit a decision as regards an amendment to s 312 which was effected by the Finance Act 1969, s 33, the year 1968–69 being the first year in which such amendment took effect.

It is at this point that there arises what Mr. Potter, for the Appellants, has denominated as a serious constitutional question; namely, what rights the Commissioners of Inland Revenue have to pick and choose when recovering C tax. The Solicitor-General says, and doubtless rightly says, that the Commissioners are under no duty to recover every halfpenny of tax which may be due. One may say "Amen" to that very readily, because the costs of recovery of extremely small amounts of tax would far outweigh the tax recovered. One expects the tax authorities to behave sensibly. In this connection I was referred to s 1 of the Inland Revenue Regulation Act 1890 and to s 1 of the D Taxes Management Act 1970, but I do not think that either of these provisions has any real bearing on the matter. What the Revenue authorities, through the Solicitor-General, are here claiming is a general dispensing power, no more and no less. He submitted that the system of extra-statutory concessions was well known and well recognised, and that what was happening in the present case was no more than the grant of an additional extra-statutory concession.

E In the first place, I, in company with many other Judges before me, am totally unable to understand upon what basis the Commissioners of Inland Revenue are entitled to make extra-statutory concessions. To take a very simple example (since example is clearly called for), upon what basis have the Commissioners taken it upon themselves to provide that income tax is not to be charged upon a miner's free coal and allowances in lieu thereof? That this F should be the law is doubtless quite correct: I am not arguing the merits, or even suggesting that some other result, as a matter of equity, should be reached. But this, surely, ought to be a matter for Parliament and not the Commissioners. If this kind of concession can be made, where does it stop; and why are some groups favoured as against others? As I have indicated, I am not alone in failing to understand how any such concessions can properly be made. I need refer G only to Scott L.J. in *Absalom* v. *Talbot* 26 TC 166, at page 181, the second full paragraph (and may I here, in parenthesis, add that I fully concur in his tribute to the staff of the Inland Revenue); to Lord Radcliffe in *Commissioners of Inland Revenue* v. *Frere*(1) [1965] AC 402, at page 429, and to Lord Upjohn in *Commissioners of Inland Revenue* v. *Bates*(2) [1968] AC 483, at page 516.

This is not a simple matter of tax law. What is happening is that, in effect, H despite the words of Maitland (The Constitutional History of England 1909) commenting on the Bill of Rights, "This is the last of the dispensing power", the Crown is now claiming just such a power. If I may, I would respectfully adopt the words of Freedman C.J. in the Court of Appeal in Manitoba in *Reg.* v. *Catagas* [1978] 1 WWR (NS) 282, a case which in terms decides that the Crown may not dispense with laws by executive action, at page 287, where,

(1) 42 TC 125, at p 154. (2) 44 TC 225, at p 268.

after dealing with cases of prosecution for infraction of the criminal law in which in individual cases there was undoubtedly an element of discretion, he said: A

> "But in all these instances the prosecutorial discretion is exercised in relation to a specific case. It is the particular facts of a given case that call that discretion into play. But that is a far different thing from the granting of a blanket dispensation in favour of a particular group or race. Today the dispensing power may be exercised in favour of Indians, tomorrow it may be exercised in favour of Protestants and the next day in favour of Jews. Our laws cannot be so treated. The Crown may not, by executive action, dispense with laws. The matter is as simple as that, and nearly three centuries of legal and constitutional history stand as the foundation for that principle." B C

But even if, contrary to my views, extra-statutory concessions are permissible and do form part of our tax code, nevertheless they do represent a published code, which applies indifferently to all those who fall, or who can bring themselves, within its scope. What is claimed by the Crown now is something radically different. There is no published code, and no necessity for the treatment of all those who are *in consimili casu* alike. In one case the Crown can remit one-third, in another one-half, and in yet another case the whole, of the tax properly payable, at its own sweet will and pleasure. If this is indeed so, we are back to the days of the Star Chamber. Again, I want to make it crystal clear that nobody is suggesting that the Crown has, or indeed ever would, so utilise the powers which it claims to bring about unjust results: or really, of course, which is not necessarily the same thing, results which it thought to be unjust. The root of the evil is that it claims that it has, in fact, the right to do so. D E

I turn next to the true construction of subs (1) and associated subsections of s 412. It would, I think, have been very much easier to make rational sense of subs (1) if the decision in *Lord Howard de Walden* v. *Commissioners of Inland Revenue*(1) [1942] 1 KB 389, had been cast in another mould, as I think it could have been without disturbing the actual result. For the effect of that case is to decide that the income which is to be deemed the income of the taxpayer is the whole of the income of the trustees, notwithstanding that (and at the moment I am putting the matter very loosely) he has only a right to enjoy a part of that income. Apart from that case (which received, of course, approval in the House of Lords in *Congreve* v. *Commissioners of Inland Revenue* 30 TC 163) it would have been possible to make better sense of subs (1) by reading the words "any income . . . that income" as being correlative to each other. So that, for example, if the taxpayer had the right to receive one-quarter of the income he would be taxable upon that one-quarter, and so forth. Indeed, I suspect that this is so obviously the sensible and natural interpretation of the subsection that it was adopted *sub silentio* in *Corbett's Executrices* v. *Commissioners of Inland Revenue* 25 TC 305. I am certainly not prepared to regard this case as one in which the Crown simply exercised its dispensing power, as claimed by the Solicitor-General. I accept that the figures do appear odd, but I think the reason for the apparently low assessment is as I have indicated, and not otherwise. However, I am bound, it appears to me, to hold that if a taxpayer has power to enjoy even a hundredth part of the income of the foreign trustees, the whole of their income is to be deemed to be his. I shall have to return to this point later in this judgment, but I see no escape from F G H I

(1) 25 TC 121.

A this position as the law now stands. I at one time thought that there might be an escape via the provisions of subs (6), which it will be convenient to recapitulate here:

> "In determining whether an individual has power to enjoy income within the meaning of this section, regard shall be had to the substantial result and effect of the transfer and any associated operations, and all B benefits which may at any time accrue to the individual as a result of the transfer and any associated operations shall be taken into account irrespective of the nature or form of the benefits."

But on reflection I have come to the conclusion that this is impossible, for this subsection does not deal with anything more than whether a person has power to enjoy income; there is nothing about quantum in it at all. Supposing it was a C millionth part of the income that a person was clearly entitled to enjoy, subs (6) could have no effect upon the consequence that the enjoyment of that modest fraction might entail—would entail—tax liability on a sum one million times as great. It therefore appears to me that the only effect which subs (6) could possibly have as the law now stands is to enlarge—never to restrict—the circumstances under which the individual has power to enjoy income.

D I next turn to the requirements which must be satisfied before subs (1) bites as regards the entitlement to income of the person sought to be charged thereunder. That person must

> "by means of any such transfer, either alone or in conjunction with associated operations", have "acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy . . . any income E of a person resident or domiciled out of the United Kingdom."

Shortening it for present purposes, that person must have acquired rights by virtue of which he has power to enjoy any income of a person resident or domiciled out of the United Kingdom. "Power to enjoy" is defined in subs (5), but for the moment I do not pause to consider what that precisely means, for the first step is to see precisely what "rights" have been acquired under the F settlement (for it has not been suggested on behalf of the Crown that there are any other relevant rights) by the Appellants.

Now the appointments here in question were made by the Appellant Ronald Arthur Vestey as Edmund's manager with the consent of Samuel's manager in his own favour, and as Edmund's manager in favour of Edmund Hoyle Vestey, Margaret Payne and Jane McLean Baddeley under the provisions G of clause 4(D) of the settlement; and by Edward Brown as Samuel's manager in favour of Lord Vestey and the Hon. Mark William Vestey under clause 6(D) of the settlement. In each case the power—and as matters stand they are the current relevant powers—is one to appoint capital among a class "in such shares (if more than one) and in such manner as" the appropriate "Manager shall think proper". Ronald Arthur Vestey could not, as Edmund's manager, H appoint in his own favour: the settlement required, in such an event, that the appointment had to be made jointly with Samuel's manager or the trustees themselves. The position therefore is that in each case we are dealing with a mere power (as distinct from a trust power) in the appropriate person enabling him to distribute among a class of beneficiaries as he thinks fit. What "rights" are by such a provision conferred upon any individual potential beneficiary? I In my judgment, the only relevant rights which are conferred upon such a beneficiary are: (i) the right to be considered by the person exercising the

power when he comes to exercise it; (ii) the right to prevent certain kinds of conduct on the part of the person so exercising the power—e.g., by distributing part of the assets to not within the class—and (iii) the right to retain any sums properly paid to him by the trustees in exercise of their discretionary powers. But beyond that he has no relevant "right" of any description: and none of those rights is a right under which he has power to enjoy the income. Indeed, no individual has any power over any part of the income whatsoever. The most relevant right is, indeed, the third; but a right to retain what is properly paid to you is simply the negative right of being afforded a complete defence to any claim for repayment, and no more. Prior to actual payment, to which there is no right whatsoever, the recipient has no right to the money at all.

One may, indeed, contrast the situation in the present case with a situation where trustees are obliged to distribute income year by year under the terms of their trust deed among a certain class in such shares and proportions as they may think fit—a case in which each potential beneficiary is very much more likely in ordinary parlance to have power to enjoy the income than the present case. Even in such a case no individual potential beneficiary has any relevant right whatsoever, although, collectively, they undoubtedly do have a right which, if they are all *sui juris*, they may collectively enforce: see In re *Nelson* (1918) [1928] Ch 920 (Note); In re *Smith* [1928] Ch 915; and compare *per* Lord Reid in *Gartside* v. *Inland Revenue Commissioners* [1968] AC 553, at page 606. But a collectively enforceable "right" is one which does not fall within the ambit of the word "right" in subs (1). For this there is direct House of Lords authority in *Lord Vestey's Executors* v. *Commissioners of Inland Revenue* 31 TC 1: see *per* Lord Simonds at page 85, Lord Morton of Henryton (with whose judgment Lord Normand expressly agreed: see page 92) at page 110, and Lord Reid at page 119. The present case is clearly *a fortiori* to this case.

Therefore, it appears to me that none of these discretionary beneficiaries had any "right" to anything at all which could possibly bring the subsection into play prior to the Finance Act 1969. Section 33 of that Act effected two changes in s 412. First, in subs (1) the words from "such an individual" to "he has" were deleted and replaced by the words "by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has". The second was that in subs (6) there were added, after the words "accrue to the individual", the words "(whether or not he has rights at law or in equity in or to those benefits)". Dealing first with this second amendment, no argument based on this addition has been advanced by Counsel for the Crown. I need therefore only say that the addition of these words merely serves to confirm me in my opinion that this subsection was not intended by Parliament as a restricting subsection. Turning back again to subs (1), I think it desirable to set out the relevant wording as amended in full:

> "Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom . . ."

The word "right" (upon which, in *Lord Vestey's Executors* v. *Commissioners of Inland Revenue*, already cited, Lord Simonds laid great emphasis (see page) 85) stating that it could not be disregarded) has vanished; and the sole question is whether the individual in question has power to enjoy the relevant income, as defined by subs (5). It is no longer necessary that he should have any right by

A virtue of which he has such power. And one can well understand the removal of that word, because in general no potential beneficiary has a right to income, having no entitlement beyond that of the usual discretionary beneficiary.

So I turn to consider the various paragraphs of subs (5). The argument has in fact exclusively raged around the second half of para (*d*), which was not an original part of the subsection when enacted for the first time in 1936, but was B added by the Finance Act 1938. Now it appears to me that, as submitted by Mr. Potter, throughout subs (5) "income" means income and nothing else. Thus one finds, in para (*a*), the words "income . . . so dealt with . . . as to be calculated . . . whether in the form of income or not, to enure for the benefit of the individual". There is no allotropic form of income known to me: the antithesis of income is capital, and income can, indeed, become capital by C being accumulated. Hence it appears to me that the section is drawing a deliberate contrast between income and accumulations of income which have become capital and is saying that it does not matter which enures for the benefit of the individual. The same argument is available as a result of para (*c*). The words

> "out of . . . income or out of moneys which are or will be available for the D purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income"

once again show that the draftsman was perfectly well aware of the distinction between income and what income may, by direction of the trust instrument or by the exercise of powers conferred upon the trustees, become (for example, a E policy of insurance). Hence it appears to me that the inevitable conclusion is that in this subsection "income" means income and does not, save as expressly so provided, mean or include accumulations of income which have become capitalised. Moreover, it appears to me that this is fully consistent with the structure of the section. I appreciate that subs (2) comes from a different source, but obviously Parliament now considers that the provisions properly F fall to be read as a whole, and one then has basically the simple dichotomy between the receipt of a capital sum, dealt with under subs (2)—and, if I am correct in *Vestey (No. 1)*, dealt with to the extent to which it indeed represents income—and the receipt of income, dealt with under subss (1) and (5).

As I have not had full argument on subs (5)(*a*), (*b*) or (*c*), I do not propose to deal with them beyond saying that it was submitted to me that "calculated" G in subs (5)(*a*) meant "likely". This is, of course, one of its possible meanings, although a glance at the Shorter Oxford English Dictionary makes it quite clear that this is not a precise translation of the word "calculated". On the other hand, its primary meaning is "reckoned, estimated, or thought out", and I would think that this is the meaning which is intended here. I hardly think that Parliament would have intended the "likely" interpretation. If it had wanted to H use that word it could so easily have done so. The question would then be, how likely?—an almost insoluble problem. This being, as I have already noted, a penal section, I think a stricter interpretation than "likely" is undoubtedly called for. I must here, however, note that the learned Solicitor-General expressly reserved the Crown's position with regard to paras (*a*) and (*b*), which he outlined very briefly, although, as the Special Commissioners had not dealt I with them, he otherwise, apart from such reservation, left alone. He accepted, at any rate for the purposes of the present case, that the argument turned on para (*d*). I turn therefore to that paragraph. Here, the meaning is quite clear:

"income" means income and as, on the facts of the present case, it was capital—capitalised income—which was paid out to each of the Appellants, the second half of para (*d*) is inapplicable to the actual situation here in question. A

My conclusion on construction in this matter would in fact be sufficient to decide the points at issue between the parties, but there are two more matters I must mention at this stage. That is the question of the possible operation of subs (1) and subs (2) together. One can imagine a case in which some paragraph of subs (5) dealing with the receipt of a capital sum applies and in which subs (2) also applies. It was, I think, the only point upon which the Crown and the Appellants were both agreed: these subsections are, they both accept, concurrent and not cumulative. A person cannot be taxed in any one year on the same sum under both subs (1) and also subs (2). Like Warren Hastings, the Crown, in making this concession, doubtless stood amazed at its own moderation in view of its other claims in the two cases, but make it it did. B C

I now turn to the Supplemental Cases Stated, in which the Special Commissioners give their reasons for coming to different conclusions, basically upon the construction of the section. I shall simply refer to that in the case of Ronald Arthur Vestey, since each of the other cases simply refers to the reasoning in his case. The Special Commissioners dealt first with what I may call the absence of any "rights" argument as follows: D

> "We deal first with s 412(1) before its amendment in 1969. It was said on behalf of the Appellant that his entitlement to income was subject to the exercise of divers powers and consents and he acquired no 'rights' to income within s 412(1). We accept that according to the terms of the 1942 settlement he had no right to demand income from the trustees but we prefer to pose the question in a different form. What we have to decide is, not whether he had 'rights', but whether he acquired 'rights' by virtue of which he had within the meaning of s 412 'power to enjoy' income; and the expression 'power to enjoy' (which is a component of the sentence which we have to construe as a whole) is elaborately defined in subs (5) and amplified by subs (6). Under the 1942 settlement the Appellant acquired the 'right' to be considered as a potential recipient of benefit and the 'right' to have his interest protected by a court of equity. It is those 'rights' in the context cited above which we have to consider. By subs (5)(*d*) an individual is deemed to have power to enjoy income if he may, in the event of the exercise of any power vested in any other person, become entitled to the beneficial enjoyment of the income. Does the Interpretation Act 1889 permit 'power'—in the singular—being construed as including separate exercises of separate fiduciary powers? We see nothing to prevent the application of the Interpretation Act to subs (5)(*d*) and we take the view that by the exercise of the powers vested in the managers the Appellant may become entitled to income of the trust property and that such income when received would be income to which the Appellant had a good title by virtue of his rights under the 1942 settlement in the sense referred to above. We do not think that the directions to accumulate income . . . prevent income from being deemed to be income of the individual concerned. We feel fortified in this conclusion first by the declared purpose of s 412 as set out in the preamble thereto and, secondly, by subs (6) thereof by which we are enjoined to have regard to the 'substantial result and effect' of the transfer and associated operations." E F G H I

It will be observed that the Special Commissioners correctly appreciated that the rights which they had to consider were the rights acquired by the Appellant under the 1942 settlement; but, having firmly grasped that point, they then

A allowed themselves to be diverted from the inevitable conclusion that no relevant right was conferred in this manner, chiefly because they posed an unreal question in relation to subs (5)(*d*). I would entirely agree with them that in that subsection "power" includes powers; but one cannot disregard the presence of the word "right" in the way they have done. As regards the position after the Finance Act 1969, the Special Commissioners say simply: "*A fortiori,*
B after the section was amended by s 33, Finance Act 1969, the Appellant had power to enjoy income of the 1942 settlement." The Special Commissioners do not appear to have considered the argument, which has appealed to me, concerning the precise meaning of "income" as "income" in subs (5)(*d*).

They then dealt with what I may term the "bad for duplicity" argument, and came to the conclusion (which I think, on authorities binding on them and
C this Court, cannot be refuted) that, if a beneficiary is liable at all, he is liable to be taxed on the whole of the income of the trustees and not merely that part whereof he is the recipient, thus creating multiple liability.

Their treatment of the "discretion" point is more debatable. They say:

> "Then it was said that by choosing to limit the total liability to the income of the trustees the Board of Inland Revenue are exercising a
> D discretion. We do not think by so limiting the tax the Board are exercising a discretion in a sense offensive to the law. There are many instances in the Taxes Acts where the Board have express powers which affect the tax payable; for example, in s 115(*b*) of the Income and Corporation Taxes Act 1970. The existence of such powers is consistent with their duty under s 1 of the Inland Revenue Regulation Act 1890 and s 1 of the Taxes
> E Management Act 1970 whereby they are to have all the necessary powers for carrying into execution every Act relating to Inland Revenue and the care and management of taxes. We can accept Counsel's proposition that a person is not to be taxed by a discretion but by clear words charging him to tax, without construing s 412(1) so as to avoid charging the individual at all. We do not think we can look at Hansard as an aid to
> F construction. We must look at what was enacted."

The last observation is, of course, one which has since been forcibly made in the House of Lords, and is undeniably correct. But the suggestion that the discretions conferred upon the Revenue authorities by s 115(2)(*b*) of the 1970 Act are in any manner comparable with the discretions here in question is laughable. By that provision (and there are many other similar provisions in
G taxing statutes of this general nature) the Board is entitled to choose which year is to be the relevant year for taxation purposes. A choice is the antithesis of a discretion. A provision that X is to be taxed on the profits of year 1 or year 2 results in X being taxed accordingly. What is here suggested is that the Revenue may decide whether or not to tax X and, if they do decide to tax him, upon what sum (not exceeding the income of the trustees) they choose. The one is
H reasoned and limited, the other is wholly arbitrary and despotic.

However, this is not in fact what the Special Commissioners thought was the result of their conclusions. They came to the conclusion that the manner in which the section worked was that the beneficiaries to be assessed in any one year could be assessed in total on the income of the trustees for that year, but no more. This conferred upon the Board a discretion merely as to the
I distribution of the income among the beneficiaries, which they could do in any

manner provided that the total amount did not exceed the trustees' income. They expressed themselves as follows:

> "The construction which we favour above need not result in double or multiple taxation. If the income of A is deemed to be the income of B, it cannot also be deemed to be the income of C unless the enactment clearly so provides, which s 412 does not; nor, so far as we are aware, does any other section of the Taxes Acts. In cases where income is deemed to be another individual's income there are instances where the words 'and not the income of any other person' appear; for example, in Part XVI of the Income and Corporation Taxes Act 1970 (Settlements). There are no such limiting words in s 412. When s 412 was originally enacted in 1936 the maximum rate of income tax and surtax was 65 per cent. Although the principle has been somewhat eroded in modern times Lord Macnaghten's *dictum* that income tax is a 'tax on income' then held good. It seems to us highly improbable that (with the caveat already mentioned) if income is deemed to be A's it can also be deemed to be the income of B. In *Lord Herbert* v. *Commissioners of Inland Revenue*(1) . . . Macnaghten J. describes such a proposition as extravagant. We take the view that the deeming process, whereby income of the non-resident person is deemed to be income of an individual, operates once only and that such income cannot be taxed more than once. Apportionment of the 'deemed' income according to the quantum of the respective beneficial interests has much to commend it, but (as we noticed in para 12 of our original decision) s 412 does not so provide. We recognise that apportionment may be impossible in the case of some of the discretionary beneficiaries whose expectancy may be insignificant. Various methods of apportionment were canvassed before us, the merits of each differing according to the circumstances. In our view, in default of a method prescribed by the section, and we can find none, it is for the Board in exercise of their powers in the execution of the Acts to decide on the appropriate apportionment."

I regret that I do not follow the logic of the second paragraph of this reasoning; but, more importantly, it appears to contradict their own earlier reasoning as to the amount for which each beneficiary was liable—i.e., the whole income—following *Lord Howard de Walden* v. *Commissioners of Inland Revenue*(2). This is certainly not how the Crown now seeks to interpret the section.

There are two remaining points in the Special Commissioners' decision, one of which is a point on s 413 which is not now, I understand, pursued. I shall defer consideration of the other point (the position of the income of a company in which the trust securities are invested) until later.

Finally, they pointed out, quite correctly, that there are no different considerations which affected any of the other Appellants, save for Mark Vestey (see [1977] 3 All ER at page 1097), and so they dismissed the appeals against all the assessments, including the 1968–69 assessments, and adjourned them for the figures to be agreed. The matter has, however, been brought before me as a matter of principle without waiting for the figures to be agreed. I am not concerned with the precise figures. This being the state of the matter when the case came on for hearing Mr. Potter, for the Appellants, formally repeated some of the submissions which he made in *Vestey (No. 1)*, and which are to be found in [1977] 3 All ER at page 1096—namely, No 1, No 4 and No 5—and then added the following new submissions: No 9, that as regards the earlier four years prior to the year 1969, none of the Appellants had any

(1) 25 TC 93; [1943] KB 288. (2) 25 TC 121.

A relevant "rights"; No 10, that on the true construction of the words "power to enjoy" as defined for the purpose of s 5(*d*), neither in fact nor in law did any of the Appellants have power to enjoy any income of any part of the trust property; No 11, that the liability of any individual under subss (1) and (2) was concurrent and not cumulative.

As regards Mr. Potter's first point, it is quite true, as he submitted, that B there is no direct authority based on s 412(1) as distinct from subs (2) of that section, and he therefore submitted that, notwithstanding the *Congreve*(1) and *Bambridge*(2) decisions, the matter was still open. I do not, however, feel able to accept this submission. I cannot think that the section forces different tests in this regard according to whether the payments made are income or capital.

Still under this same head, he submitted that if the Special Commissioners C were correct in their views—namely, that the Crown has a discretion as to apportionment of the total liability among the beneficiaries—the Crown could not have fulfilled its duty as it has all along been arguing for a wider discretion than that of mere apportionment. If this submission had been accepted, then the assessments would, I suppose, have all been bad, notwithstanding that the Crown would have, if asked to start again in the light of the Special Commis- D sioners' decision, arrived at precisely the same answer. The benefit to the Appellants would be that it would by now be well out of time. I am, however, unimpressed by this argument. I am unable to see, in a case where the sub- section clearly applies and an individual has any right by virtue of which he has power to enjoy the income in question, he is not liable to tax upon the whole of that income. I am, of course, equally unable to see by virtue of what E right the Crown sees fit to remit a portion of that liability, but that is an entirely different matter of which no assessed—that is to say, otherwise properly assessed—taxpayer is entitled to complain, whatever anguished howls his companions in misfortune who do not have the luck to find the greater part of their tax bill remitted may utter.

Mr. Potter's nos 4 and 5 were simply submitted to keep them open, since F he could not properly (and of course did not) seek to persuade me to distinguish my own earlier decision against him on them.

So far as his ninth point is concerned, he expanded this in the following form; namely, that the Crown must be able to point to a single individual who had, as respects any year of assessment, an individual right by virtue of which he had power to enjoy any income of the trustees. In other words, subs (1) did G not bite where the power was collectively that of a group of individuals. As I have already indicated, I see no answer to Mr. Potter's submission under this head, more particularly in view of the fantastic—and I use the word advisedly— results which a contrary conclusion would entail, and which I shall consider in more detail when analysing the contentions of the learned Solicitor-General.

It was under his tenth point that Mr. Potter dealt with the fact that the H settlement and associated directions direct accumulations of income until the year 2030. Although these directions could be revoked, so long as the income was being accumulated it was all being accumulated in this manner, and there was just no income which could be enjoyed by any potential beneficiary. Of course, if they lived to the year 2030 the Appellants, as matters stood, did indeed stand to collect the accumulated income. As, however, their ages would

(1) 30 TC 163. (2) 36 TC 313; [1955] 1 WLR 1329.

then range from 87 (in the case of Mark Vestey) to 132 (in the case of Ronald Arthur Vestey) this would be highly unlikely. And here Mr. Potter, like the Crown, sought to use the provisions of subs (6) restrictively, pointing out that the "substantial effect" of the settlement was to give the Appellants very remote interests indeed. I think the trouble with this submission is that, however theoretically remote their interests may be, these Appellants have, each and every one, received sums out of the settlement of a not insubstantial amount.

I follow entirely Mr. Potter's analysis of the settlement, the division of the settled funds and so forth, with the result that there are now two funds with 16 (later 18) potential beneficiaries on the one side and 13 (later 14) on the other. One may well ask why they, too, have not been assessed if, as the Crown maintains, they are one and all theoretically liable to be assessed on the whole of the income of the trustees (and, indeed, more even than that, as I shall mention later), but this is no answer to the problem. I prefer to place the matter securely upon the footing that in subs (5)(*d*) "income" means income, and the beneficiaries have had capital sums paid to them which fall to be assessed under subs (2) and not subs (1).

Again, apart from the question of the income derived from certain investments, consideration of which I once again postpone at this stage, Mr. Potter's last point was, indeed, conceded by the Crown, and that is that.

For the Crown, the Solicitor-General submitted, with evident enthusiasm, that if the conditions of the section were satisfied then the taxpayer was chargeable in respect of the whole of the income of the non-resident—in this case, of course, the trustees—and that none the less because there might also be somebody else who was in precisely the same situation. Moreover—and here he was able in part to cite the conclusions of the Special Commissioners in his favour—the relevant income included not only the income received by the trustees as the result of the transfer, but the whole of the income of the trustees. Thus, to take a simple example, if the settlors in the present case had been unwise enough to select as their foreign resident trustees, say, a New York bank which was trustee of many other settlements as well, the whole of the income of that New York bank, not only that derived from the actual settlement of which they were trustees but the income of all other settlements of which they were trustees, and the whole of the bank's ordinary trading income (not alone profits), was income upon which the beneficiary who fell within the scope of subs (1) could be assessed. Nay, further: if the foreign trustees were unwise enough to invest part of the trust assets in the shares of a foreign company, then, because there is no correlation between the amount of income actually enjoyed and the amount of the income of the foreign residents, the whole of that income also falls within the scope of the assessment. Thus, if the trustees invest in one share of, say, Standard Oil, the whole of the income (again, not even profits) of that company falls to be taken into consideration when assessing the taxpayer, as Standard Oil would then become a foreign resident part of whose income the taxpayer had power to enjoy.

But the cream of the jest is still to come. It was wholly unnecessary for the purposes of *Vestey (No. 1)* to set out the provisions of clause 14 of the settlement, but I must do so now. It provides:

> "Lastly Provided Always that Edmund's Manager and Samuel's Manager jointly may in their discretion at any time or times within the Specified Period by deed revoke in respect of the whole or any part or parts

A of the trust premises (then subject to the trusts hereof) all the trusts powers and provisions hereinbefore contained and transfer in respect of the property concerned all or any of such trusts powers and provisions to and constitute the same (with any desired modifications) as trusts powers and provisions operating in respect of such property in and according to the law of any country or place in the World. But this power shall be exercisable B only as a power of revocation and transfer combined (and not by way of mere revocation) and shall not be exercised so as to give to the Settlors or either of them (or any wife or widow of either of them) or to enable them or either of them (or any wife or widow of either of them) to take by resulting trust or otherwise howsoever any property benefit right power or control whatsoever."

C The Solicitor-General submitted or accepted that, having regard to the clear possibility envisaged of the settlor, or any wife or widow of the settlor, being constituted a beneficiary by any such resettlement, this power must be in the widest possible terms, not only so far as the trusts but also so far as the beneficiaries are concerned; so that anybody in the United Kingdom—anybody whatsoever—might be included in the reconstituted settlement. I am not D certain that I agree with this interpretation, and I must certainly not be taken as having decided that it is indeed the correct meaning of clause 14. But, given the meaning accepted by the Solicitor-General, he solemnly submitted that, unless subs (6) came to the rescue, which he thought it did (but which, as I have already indicated, I do not think is a correct interpretation), anybody in the United Kingdom could be assessed for the entire income of the trustees, E together with the not insignificant enlargements which I have already indicated, in every year that the settlement continued and the funds were undistributed; because, by virtue of the exercise of the powers conferred by clause 14, and possibly the exercise by the trustees of the reconstituted settlement of powers of selection among a group of discretionary beneficiaries, they might become entitled to the beneficial enjoyment of a part of the trust F income. Of course, he also submitted that the whole of this was tempered by the discretion of the Crown to select who was and who was not assessed, and for what amount. However, to this submission in total Mr. Potter made the acid but fully justified comment that, their powers clearly being fiduciary, to whomsoever else the Commissioners of Inland Revenue were entitled to show discretionary mercy, they were certainly not so entitled to show it to G themselves. Nor do I think that they would be entitled to show it to Her Majesty's Ministers of State, who, by their inactivity in this regard, clearly show that they approve of the legislation as it stands. We are therefore doubtless in for an interesting crop of bankruptcies.

The whole submission, however, is so far removed from reality, from even the most rudimentary notions of justice and fair play, that one has no more than H to state it for it to be abundantly obvious that it cannot be maintained. Yet here was the Solicitor-General, whom we all know as one of the most amiable of men, voluntarily casting himself in the role of Count Dracula. What has gone wrong? Of course, if the Solicitor-General's contentions are correct there is an even greater need to read the whole section strictly than if they are wrong; and, reading it strictly, I have already indicated that the appeals of the Appellants I fall to be allowed. But it would not be right to leave the matter there and to say that these submissions fall to be considered in a case where income is actually in question.

In my view, what has gone wrong is the failure by the Courts to correlate the income upon which the taxpayer is to be taxed with the income of which he

has power to enjoy. In other words, I have persuaded myself that what is wrong is the decision of the Court of Appeal in *Lord Howard de Walden* v. *Commissioners of Inland Revenue*(1). If this decision were to be out of the way and "that income" in subs (1) be taken to be "the income which the taxpayer has power to enjoy", then the whole section would be quite logical and straightforward. Moreover, in this case subs (6) would have a much more logical place in the scheme of the section, and quantum would then become a material factor. However, standing this decision, I can see no answer to the learned Solicitor-General's main proposition that if a person receives the income of the settlement to an insubstantial degree he is nevertheless taxable upon the whole income of the trustees. Sitting in this Court, I am bound to follow the decision of the Court of Appeal and give effect thereto, monstrous as the result may be. I do not see how I can escape the straightjacket.

However, the matter is otherwise in relation to two matters. The first is as regards what I may call the "other income" of the trustees—income which has not arisen as the result of the transfer and associated operations. I just refuse to believe that Parliament can ever have intended that other income to be brought into charge to tax, the results being so utterly unpredictable and unjust. So far as this submission is concerned, at any rate, I have no contrary authority to bind me, and I simply hold that the income with which s 412 is dealing throughout is the income which becomes payable to the foreign trustees as a result of the transfer and associated operations, and none other. It is quite ridiculous to think that the prevention of tax avoidance requires any operation of any description upon any other income than that which has, in effect, been transferred abroad.

Secondly, there is the income of any body in which the trustees have invested any of the trust money. In the present case this arises directly, because one of the trust investments made by the trustees by means of a purchase is shares in Commercial Insurance Co. Ltd. This is a company incorporated and managed and controlled in Jersey. It carries on the business of fire, fidelity and marine insurance. As regards this company, the Special Commissioners said:

> "The next matter is the income of Commercial Insurance Co. Ltd. It was said that the purchase of its shares broke the chain of transfers and associated operations. For the purposes of subs (1) we can see no warrant for treating its income differently from that of the other offshore companies. So to do would, in our view, create a distinction between the subscribers' shares and purchased shares for which we can see no justification. In each case the individual has 'power to enjoy' the income of the offshore companies by virtue of the wide definition in subs (5)."

And Mr. Nolan, for the Crown, said much the same thing in more felicitous language. The answer to this fantastic suggestion—for, if those who subscribe to it will allow me to say so, it is utterly fantastic—is the very simple one that, as was pointed out by Mr. Potter in reply, the income of the company and the income derived from the company by the shareholders are two quite different incomes. Indeed, I know of no manner in which a shareholder can under any circumstances enjoy the income of a company in which he is interested. He may hope, and frequently if not invariably does hope, that a distribution by way of dividend will be made to him out of its profits; but income and profits are, in the case of commercial undertakings, often two vastly different things.

(1) 25 TC 121.

A Once again, the fact that the section is a penal section would fully justify one in reading "income" as meaning income and not profits; but even were that solid rock to be swept away it would not avail the Crown in this instance, for in *Canadian Eagle Oil Co. Ltd.* v. *The King*(1) 27 TC 205, at page 257, Lord Macmillan made it perfectly plain that

> "for the purposes of Income Tax, the income of a foreign company and the
B income received from it in dividends by its British shareholders are not to any extent or effect one and the same income, but are two distinct incomes."

So here, the dividends received by the trustees from Commercial Insurance Co. Ltd. are part of the income of the trustees derived from the transfer of assets and associated operations, and it is upon that income, and no further
C component provided by that company, that s 412 fastens.

Accordingly, the more fantastic suggestions of the Solicitor-General fall to the ground. Enough remains, however, even when these excrescences are pared away, to be profoundly disturbing to anybody who cares about equity or equality in taxation, or, more importantly, the rule of law. I need not repeat what I said on this topic in *Vestey (No. 1)*, especially since on this particular
D aspect of the Revenue's alleged discretion Ungoed-Thomas J. put it far better than ever I could when, in *Commissioners of Inland Revenue* v. *Clifforia Investments Ltd.*(2) [1963] 1 WLR 396, at page 402, he said:

> "It would to my mind be intolerable that exception taken to the construction of a section on the ground that it leads to such a patently unjust result as double taxation should be overruled on the ground that the
E Revenue would only apply it when it considered it equitable to do so. Such a discretion in the Revenue would go far beyond that degree of discretion which is inevitably involved in applying and administering the statutes. It would be a wide and arbitrary discretion applied without publicly established principles and, of course, without legislative authority. It would imply that the Revenue could exempt from, and was therefore
F entitled to disregard and overrule, the legislation. This offends our fundamental conception of the rule of law."

Standing *Lord Howard de Walden's* case(3), my own fundamental conception of the rule of law is deeply offended. The only alternative is for the Crown to tax all who could possibly under any circumstances be recipients of any sliver of income upon the whole of that income—a suggestion equally as offensive.
G Being bound by that case I am, unhappily, in no position to right a clearly perceived wrong. Fortunately, so far as the individual Appellants in the actual case before me are concerned, they, whether by accident or design, escape the charge under subs (1) as I have already explained, an escape well merited as they fall to be taxed, as I have already decided in *Vestey (No. 1)*, under subs (2). The final result, therefore, is that all the assessments upon the Appellants are
H left standing to the extent, but only to the extent, indicated in my judgment in *Vestey (No. 1)*; any other assessments, and any assessments in excess of the figures thereby established, are discharged.

Appeals allowed with costs.

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(1) [1946] AC 119. (2) 40 TC 608, at p 615. (3) 25 TC 121.

Certificate granted to the Crown to appeal direct to the House of Lords pursuant to s 12, *Administration of Justice Act* 1969. A

The Crown's appeals and the taxpayers' cross-appeals were heard in the House of Lords (Lord Wilberforce, Viscount Dilhorne, Lords Salmon, Edmund-Davies and Keith of Kinkel) on 23, 24, 25, 26 and 30 July 1979 when judgment was reserved. On 22 November 1979, judgment was given against the Crown, with costs. B

(1)*Michael Nolan Q.C., Peter Gibson* and *Brian Davenport* for the Crown. These appeals raise the question whether it is possible for income from foreign sources to be accumulated free of United Kingdom tax in the hands of non-resident trustees and then distributed in the form of tax-free capital sums to United Kingdom resident beneficiaries. The taxpayers say that it is: the C Revenue say that in such circumstances s 412 applies, with the result that the income of the non-resident trustees is deemed to be that of the beneficiaries for United Kingdom tax purposes. The claim for tax in the present case may be justified either under s 412(1) or under s 412(2), and the Revenue invoke both subsections in the alternative.

Walton J. objected to the Revenue claim on the grounds that it depended D on an apportionment of the liability by the Revenue among the beneficiaries and that the amount apportioned to each beneficiary might exceed any sum actually received by him. The need for apportionment is, however, implicit in s 412, since it is plain that more than one individual may satisfy the conditions of liability in relation to the same income. It is equally plain that the liability imposed by the section is a liability to tax on the income of the non-resident E person, not on the benefit received by the United Kingdom resident individual. These points are clearly illustrated by, for example, the latter part of s 412(5)(*d*).

Walton J. held that s 412(1) did not apply in the present case. He held that s 412(2) did apply, but in reliance on a passage from the speech of Lord Loreburn in *Drummond* v. *Collins*(2) [1915] AC 11011, 1018, he rejected the F natural meaning of the subsection and concluded that the liability should be limited to tax on the capital sum received by the beneficiary in question. Read as a whole, however, the speech of Lord Loreburn states the familiar proposition that one must follow the natural meaning of statutory words unless the context otherwise requires. Here, the context of s 412(2), so far from going against the meaning that it naturally bears, powerfully supports it. The grounds G of liability at every stage rest on something other than the receipt of income. So, by introducing the restriction of the charge to what was received, Walton J. was imposing a restriction that was not within the scheme of s 412. In any event, his restriction does not fit the opening words: "Whether before or after any such transfer".

The *ratio decidendi* of *Congreve* v. *Commissioners of Inland Revenue*(3) H [1948] 1 All ER 948 is that s 412 is not limited to the case of a transfer made or

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(1) Argument reported by Michael Gardiner Esq., Barrister-at-Law.
(2) 6 TC 525, at p 540. (3) 30 TC 163.

A procured by the person liable to be assessed; on the contrary, it was quite clearly held that his liability was independent of his having made a transfer. [Reference was made to *Lord Howard de Walden* v. *Commissioners of Inland Revenue*(1) [1942] 1 KB 389.]

Read as a whole, s 412 only imposes single taxation, however difficult the problem of apportionment may be. There was no attempt by the Revenue in B *Latilla* v. *Commissioners of Inland Revenue*(2) [1943] AC 377 (see *per* Viscount Simon L.C., at page 381) to charge each of the transferors with the whole income: see also at page 382. [Reference was made to *Corbett's Executrices* v. *Commissioners of Inland Revenue*(3) [1943] 2 All ER 218, 221E–F.] These cases show that the operation of the section has not been regarded as confined to cases where there is only one possible target. Both on the natural meaning of C s 412 and on the way in which it has been accepted by the courts, it does apply where there is more than one individual and the charge does fail contemporaneously.

The courts have never adopted an entirely clear line as to the permissibility of double taxation. The House of Lords in *Canadian Eagle Oil Co., Ltd.* v. *The King*(4) [1946] AC 119, *per* Viscount Simon L.C., at p 139, Lord Russell of D Killowen, at p 142, said that there was no rule against it. A case the other way is *F. S. Securities, Ltd.* v. *Commissioners of Inland Revenue*(5) [1965] AC 631; see *per* Lord Reid, at p 644E, Viscount Radcliffe, at pp 650F–651C. The Revenue for their part approach the matter with the strong bias against double taxation to which Lord Radcliffe refers. Similar principles must apply with regard to the taxation of more than one individual on the same income, though perhaps E with not quite so much force. In applying s 412 to cases where more than one individual falls within the charge, the Revenue have consistently acted on the view that the Legislature does not impose on them a duty to recover tax on the full amount of the income from each individual concerned. Their practice has always been to apportion the income between the individuals concerned in what seems the most appropriate manner. This practice may be justified either F on the ground that the section does impose multiple liability, but that the Revenue are not required, as a matter of law, and ought not as a matter of proper administration, to recover tax on the income more than once, or on the ground (which was adopted by the special commissioners) that they are not entitled to tax the same income more than once. On either view, the practical result is the same. The Revenue do not claim to be entitled to assess G Mrs. Baddeley for more than £274,000. They say that their right to assess each beneficiary on the whole income is coupled with their duty to apportion it amongst the assessees. In that sense, it is a dispensation. Nothing short of rewriting the code can deal with the criticisms made of the Revenue's procedure for dealing with apportionment between the taxpayers: see *Commissioners of Inland Revenue* v. *Hinchy*(6) [1960] AC 748. *Stock* v. *Frank Jones* H *(Tipton) Ltd.* [1978] 1 WLR 231 said much the same. The problem cannot be solved by reversing *Congreve* v. *Commissioners of Inland Revenue*(7) [1948] 1 All ER 948 because, first, reversing it to deal with this point would also reverse it with regard to multiple transferors, and, secondly, it would also have the effect of reversing it with regard to the intended effect of s 412.

(1) 25 TC 121. (2) 25 TC 107, at p 117. (3) 25 TC 305, at p 314.
(4) 27 TC 205, at pp 248 and 250. (5) 41 TC 666, at pp 692, 696–7.
(6) 38 TC 625. (7) 30 TC 163.

Walton J.[1] [1979] Ch 177, 184D–185G reached a conclusion contrary to that of the special commissioners only by the expedient of a radical emendation of the language of s 412(2). He construed the subsection as though certain words had been added thereto (see *per* Lord Wilberforce, post, [1980] AC 1148, 1170B–C[2]). In consciously "cutting down", as he put it, the language of the subsection, he relied on a passage from the speech of Lord Loreburn in *Drummond* v. *Collins*[3] [1915] AC 1011, 1017: ". . . courts of law have cut down . . . relied upon by the Crown". That citation provides no such support. The manifest purpose of the section was a deterrent one, as is made plain in the preamble to the section and in *Latilla* v. *Commissioners of Inland Revenue*[4] [1942] 1 KB 299, 303. It is not possible to say that the intention of the section would be defeated by giving effect to the enacted words, and it is impermissible for the court to rewrite the clear provisions of a statute to accord with its own notions of fairness or reasonableness: see *Stock* v. *Frank Jones (Tipton) Ltd.* [1978] 1 WLR 231. Further, just as for the purposes of s 412(1) the income deemed to be that of the taxpayer is not limited to the income that he is entitled or able to receive but may be the whole income of the foreign resident (as the Court of Appeal decided in *Lord Howard de Walden* v. *Commissioners of Inland Revenue*[5] [1942] 1 KB 389), so the income that under s 412(2) is the income of the taxpayer is not limited to the income comprised in the capital sum that he receives or is entitled to receive. The Revenue rely on the words of Lord Greene M.R. in *Lord Howard de Walden* v. *Commissioners of Inland Revenue* at pp 396–397[6] where he said: "If, as it seems to us . . . against the public interest". Walton J.'s emendation is not only quite unjustified on any ordinary principles of statutory construction but is contrary to the plain intention of Parliament. As with a number of anti-avoidance provisions, Parliament has used, in s 412, very wide words in order to bring into liability to tax persons who may be involved in many types of tax avoidance from the simple to the highly sophisticated. Section 412(3) excludes from liability (in summary) those occasions where the transfer was not for tax avoidance motives. Where this is not shown the section is extremely forceful in its results. Under s 412(1) the income of a person is deemed to be that of an individual ordinarily resident in the United Kingdom because the latter has, within the very wide words of s 412(5), "power to enjoy" that income regardless of whether in the years in question he actually did receive that income. Under s 412(2), Parliament deemed the income of the overseas resident to be that of the individual ordinarily resident in the United Kingdom because the latter received or was entitled to receive any capital sum the payment of which was in any way connected with the transfer or any associated operation, regardless of how much (if anything) he actually received. Parliament, no doubt, intended (as Lord Greene M.R. pointed out) that these very stringent provisions would be effective to deter if not to prevent. Yet Walton J., by adding the words that he did add, has entirely changed the meaning of the subsection so that a person is only taxed on what he actually receives. This ignores the basic concept of deeming one person's income to be that of another that is so clearly provided for in s 412. Walton J.'s dislike of the consequence of deeming one person's income to be that of another is no reason for not giving effect to what Parliament so clearly provided. The remark of Lord Loreburn cited by Walton J. was taken out of its context. At the end of his speech in *Drummond* v. *Collins*[7] [1915] AC 1011, 1018, Lord Loreburn said: "Lord Cairns long ago said. . . . It must be a necessary interpretation." In the present case, the other statutory language surrounding the emendation

A B C D E F G H I

(1) Pages 533–4 *ante*. (2) Pages 579–80 *post*. (3) 6 TC 525, at pp 538–9.
(4) 25 TC 107, at p 132. (5) 25 TC 121.
(6) *Ibid*, at p 134. (7) 6 TC 525, at p 539.

A proposed by Walton J., so far from making his emendation necessary, is irreconcilable with it. Thus the opening words of s 412(2) make it clear that the subsection can apply to a capital sum received before the relevant transfer. The scope of the subsection cannot, therefore, be confined to capital sums comprising income that has become that of the foreign resident by virtue or in consequence of the transfer. Further, the language of s 413(3) (echoing the B language used by the Legislature in s 412(2)) contemplates that the charge imposed by s 412, subs (2) as well as subs (1), is a charge on the income of the non-resident which is deemed to be that of the resident individual: it is not a charge on a capital sum. (There is an interesting contrast in this respect between the language of s 412(2) and that of s 33(4) of the Act of 1969, which is evidently designed to tax capital sums paid out of income that has escaped the C charge under s 412.) Section 412 sets out to achieve its deterrent effect by deeming the income of the non-resident to be that of the individual without regard to the quantum of any benefit received by the latter. Accordingly, even Walton J.'s emendation not only disregards the letter of s 412(2) but also its spirit and is in no way justified by the speech of Lord Loreburn in *Drummond* v. *Collins*(1) [1915] AC 1011. Furthermore, the passage from Lord Loreburn's D speech relied on by Walton J. is not a passage that was approved by the other members of the House and is inconsistent with modern principles of statutory construction, especially those applied in the construction, of taxing Acts, where what one man considers grossly unfair may be considered by another wholly proper. Where, as in the case of taxing Acts, the great majority of subjects pay their tax, however unwillingly, in accordance with the wording of E the relevant enactment, it is particularly undesirable that the courts should, many years after the relevant section first came into force, rewrite it in accordance with their own ideas of what at the time of the decision is considered to be fair.

Walton J.'s emendation of s 412(2) does not square with subs (3), because he says that it is a charge on a capital sum at the time of receipt. As to his F seventh point(2) [1979] Ch 177, 196C–G, In re *Somech, decd.* ([1957] Ch 165) related to the question whether as a matter of trust law an infant had the right to call for a share of residue under a will. It had nothing to do with taxation. When a sum is received by an agent or bare trustee for an infant, it is received by the infant for all taxation purposes, including those of s 412(2): liability to tax does not depend on the sum having come into the infant's own hands. If that G were wrong, it would still be true to say that, where a capital sum has been appointed to be held by a bare trustee for the absolute use and benefit of an infant, the infant is "entitled to receive" that sum as the sole beneficial owner. [Reference was made to *Stanley* v. *Commissioners of Inland Revenue*(3) [1944] KB 255.]

As to *Vestey* v. *Commissioners of Inland Revenue (No. 2)* [1979] Ch 198, H 203–204, extra-statutory concessions do not fall to be considered in this case. At page 204F(4), Walton J. is confusing "right to receive" with "power to enjoy". [Reference was made to *Lord Howard de Walden* v. *Commissioners of Inland Revenue*(5) [1942] 1 KB 389, 394 and *Corbett's Executrices* v. *Commissioners of Inland Revenue* 25 TC 305.] It is noteworthy that in the Act of 1969 the only measure that Parliament adopted was to *extend* the provisions of I s 412(1). As to Walton J.'s judgment, at pp 205H–206H(6) when one reads s 412(1) with the latter part of subs (5)(*d*) one is looking for an individual who

(1) 6 TC 525. (2) Page 543 *ante*. (3) 26 TC 12.
(4) 552 *ante*. (5) 25 TC 121, at p 132. (6) Pages 553–4 *ante*.

has acquired a right whereby he is entitled to keep what is paid to him by the trustees. One looks for a meaning of "right" that will fit the closing words of subs (5)(*d*), and, indeed, all the words of subs (5). As to "become entitled to the beneficial enjoyment of the income", one asks: "how; by what right?". Only by means of being the beneficiary under the trust. It is her right if the manager so directs. The words of subs (5)(*d*) only make sense on the basis that, although it is true that before the discretion was exercised the beneficiary had no right to call for any money, she is in a different position from those of us who are not in that class. That is a right that corresponds to the "beneficial entitlement" at the end of subs (5)(*d*).

As to hardship, with huge tax assessments going on year after year, it is right to point out that the reason for the application of the section is that this family trust is in the hands of non-resident trustees. If United Kingdom trustees had been appointed, the hardship could have been avoided. The trustees must have been well aware of the consequences when they appointed the capital sums.

As to the second point taken by Walton J. against the Revenue, at page 206([1]) that, if the right is a collective right, it must be ignored, the Revenue rely here not on any collective right but on the right of the individual beneficiary. They can, therefore, accept what Lord Morton of Henryton said about collective rights in *Lord Vestey's Executors* v. *Commissioners of Inland Revenue* [1949] 1 All ER 1108, 1135; 31 TC 1, 110. Walton J.'s point regarding subs (5) is contrary to the direction in subs (6), and subs (8)(*c*) is a further indication of the width of the legislative intent. [Reference was made to the judgment of Walton J., at page 215F([2]).]

As to *Lord Chetwode* v. *Commissioners of Inland Revenue*([3]) [1977] 1 WLR 248, in the case of a company, an individual might become entitled to income on the direction of another individual through whom that income could come. Here, Ronald Arthur Vestey may be said to be able to direct the application of his fund.

The special commissioners were correct in holding that the assessments on the taxpayers were supported by s 412(1) in its unamended form. Walton J. held that the object of a mere power had no "right" under which he had power to enjoy income. The term "right" falls to be construed in its statutory context and in particular with regard to the fact that the Legislature contemplated, as s 412(5)(*d*) shows, that a mere object of a power might have power to enjoy the income by virtue of the right. Further, that right is an individual right in that each object of a power is in competition with each other object and what the donee of the power gives in exercise of that power to an object of that power is that object's alone. The latter part of s 412(5)(*d*) applies fairly and squarely to the objects of both discretionary trusts and powers. It would be astonishing if the Legislature had failed so to provide. For the greater part of this century such trusts and powers have been very widely used as a means of avoiding tax and have thus been natural targets for anti-avoidance legislation. It may be objected that, on this basis, liability under s 412(1) could attach to a large number of individuals merely on the ground that they were objects of a widely drawn trust or power, even though they had no likelihood of benefit and might never have heard of the disposition in question. The answer to this objection lies in s 412(6). The question is thus one of substance and fact. The terms of s 412(5) are very widely drawn, but in any given case it should be possible to

([1]) Page 554 *ante*. ([2]) Page 562 *ante*. ([3]) 51 TC 647.

A determine in whom the real and substantial power to enjoy the income resides and in whom it does not. [Reference was made to s 25 and to *Canadian Eagle Oil Co., Ltd.* v. *The King*(1) [1946] AC 119.]

It is immaterial for the purposes of s 412 that income should have been accumulated between its receipt by the trustees and its potential enjoyment by the beneficiary: s 412(6). Alternatively, for the purposes of s 412(5)(*d*) each of B the appointees could have obtained the beneficial enjoyment of income (*a*) under clauses 4(B) or 6(B) of the settlement by the exercise by R. A. Vestey as Edmund's manager or by Samuel's manager of the powers to revoke the direction under clauses 4(A) or 6(A) to accumulate income and (in the case of R. A. Vestey with the consent of Samuel's manager or the trustees) to direct the payment of income to him or her, or (*b*) under trusts reconstituted by an C exercise by R. A. Vestey as Edmund's manager with Samuel's manager of the powers under clause 14.

The special commissioners were also right to hold that the income of Commercial Insurance Co. Ltd. was deemed for the purposes of s 412(1) to be the income of the taxpayers. The taxpayers have not disputed that, if the share capital of Commercial Insurance Co. Ltd. had been subscribed for out of D the accumulations of trust income, its income would properly have been so deemed (provided that the other conditions of s 412(1) were satisfied); but they contend that the purchase broke the chain of transfers and associated operations and that accordingly only the dividends received by the trustees fell within s 412(1). Walton J.'s reasoning on this [1979] Ch 198, 216F(2), is inconsistent with *Lord Chetwode* v. *Commissioners of Inland Revenue*(3) [1977] E 1 WLR 248, and again ignores the mandatory requirements of s 412(6). As the trustees could through their total control of Commercial Insurance Co. Ltd. cause all the income of the company to be paid to them, or cause no dividend to be paid, it is unrealistic to limit the income deemed to be that of the appointees for the purposes of s 412(1) to the dividends actually paid. By the combined effect of the transfer of properties to the trustees of the settlement F and associated operations comprising the accumulation of income and the purchase of the Commercial Insurance Co. Ltd. shares therewith, by reason of the appointees' power to enjoy income of that company in the form of dividends the whole income of that company is deemed to be that of the appointees.

D. C. Potter Q.C., *J. E. Holroyd Pearce Q.C.* and *Alastair Wilson* for the G taxpayers. Section 412 applies only to the transferor, i.e., the person who made, or "engineered", or, having power to stop it, allowed, the transfer. This is, on the construction of the language of s 412, the most probable meaning. If so, the jigsaw puzzle fits and there is no room for discretion. That was what Parliament intended in 1936.

As regards s 412(1), Walton J.'s decision was correct. As regards subs (2), H he erred only in so far as he imposed any liability on the taxpayers. They should escape, even if the House does not accept their submission on *Congreve* v. *Commissioners of Inland Revenue*(4) [1948] 1 All ER 948 and *Bambridge* v. *Commissioners of Inland Revenue*(5) [1955] 1 WLR 1329. In the alternative, of course, the House should not impose any greater liability on them than was imposed by Walton J., who reduced it from £5,000,000 to a little over £500,000.

(1) 27 TC 205. (2) Page 563 *ante*. (3) 51 TC 647.
(4) 30 TC 163. (5) 36 TC 313.

There was no nexus between any transfer and associated operations and the payments out of Samuel's fund and Edmund's fund. No surtax was saved by this settlement being made abroad. Underlying *Lord Howard de Walden* v. *Commissioners of Inland Revenue*(1) [1942] 1 KB 389 is the concept that only the transferor was caught by the section. If the House decides that all that *Congreve* v. *Commissioners of Inland Revenue*(2) decided was that "transferor" could include the person who engineered the settlement, it should say nothing about *Lord Howard de Walden* v. *Commissioners of Inland Revenue*. The headnote to *Congreve* in the All England Law Reports is correct. Lord Simonds also propounded the question correctly in his alternative reasoning. The "individual" mentioned in s 412(1) and (2) is an individual who answers the description in the preamble to the section, i.e., one who for the purpose of preventing or avoiding liability to income tax by means of transfers of assets, etc.

The ratio of *Congreve* should be limited to its facts, in particular to the fact that Mrs. Congreve made, or brought about, the relevant transfer. The House should review its reasoning, though not the decision as such. It does not apply to a case of multiple liability, nor does it on its face extend to the circumstance where the person taxed is the child or grandchild of the original settlor in no way concerned with the transfer. As to the question of the binding nature of the *rationes decidendi* of cases in the House, see *Midland Silicones Ltd.* v. *Scruttons Ltd.* [1962] AC 446. The taxpayers ask the House formally to overrule *Bambridge* v. *Commissioners of Inland Revenue*(3) [1955] 1 WLR 1329, but the present question was not raised before the House in that case: see the appellants' reasons in their printed case. The *ratio decidendi* of *Philippi* v. *Commissioners of Inland Revenue*(4) [1971] 1 WLR 1272 related to the escape clause in s 412(3). It does not require to be overruled. The question was one of law, which the Court of Appeal answered correctly. The present question was not raised in the stated case.

It is difficult to see how any meaning can be given to s 412(8)(*a*) if the Revenue is right. Subsection (3) suggests that Parliament had only one individual in mind. Also, one individual, for example, the one who made the transfer, might escape, but what about the others, who are innocent? The House in *Congreve* v. *Commissioners of Inland Revenue* [1948] 1 All ER 948 did not consider the anomalies that might arise from subs (2); they did not arise there. For example, "capital sum" includes a sum paid by way of loan or repayment of a loan. There must be millions of individuals ordinarily resident in the United Kingdom who during the last 40 years have borrowed moneys, or received payment of moneys lent, in circumstances where those moneys were "in any way connected with" some transfer or associated operation that would be caught by s 412. Indeed, a person borrowing or lending money has no means usually of discovering whether or not he is or is likely to be caught by s 412(2), with results that (if the Revenue's claim is correct) are devastating. Such an individual is unlikely (save in a very exceptional case) to be able to rely on a possible escape under subs (3). The effect and consequences of the *Congreve* reasoning in cases of potential multiple liability such as the present, were not considered in *Congreve*; when they are considered it becomes evident that Parliament can never have intended those consequences. There are numerous judicial dicta, including some in this House, that cannot be reconciled with the *Congreve* reasoning: see, for example, *MacDonald* v. *Commissioners of Inland Revenue* [1940] 1 KB 802, 806; 23 TC 449, 456; *Corbett's Executrices* v. *Commissioners of Inland Revenue* 25 TC 305, 312. The whole basis of *Lord*

(1) 25 TC 121. (2) 30 TC 163. (3) 36 TC 163. (4) 47 TC 75.

A *Howard de Walden* v. *Commissioners of Inland Revenue*(1) [1942] 1 KB 389 (see at pp 396, 397–398) was that the taxpayer was the transferor. [Reference was made to *Lord Vestey's Executors* v. *Commissioners of Inland Revenue* 31 TC 1, 72 *per* Evershed L.J.] Lord Wilberforce's analysis in *Lord Chetwode* v. *Commissioners of Inland Revenue*(2) [1977] 1 WLR 248, 251c was correct. He compared the situation before the transfer with that after: that restricts s 412 to B the transferor. The House should, therefore, review *Congreve* v. *Commissioners of Inland Revenue*(3) [1948] 1 All ER 948 and affirm it as correctly decided, but on its narrow ground.

Assuming that the taxpayer's submissions above are wrong, how do they distinguish *Congreve* under s 412(1) and (2)? Under subs (1), as respects the first four years, there must be shown to be rights. (Surtax on the fifth year is C caught by the Act of 1959, where "rights" has been excised.) Walton J. was correct in his reasoning and conclusion [1979] Ch 198, 206(4) when he relied on *Gartside* v. *Commissioners of Inland Revenue* [1968] AC 553. There is no "right" in the present case, only a hope; this is especially so where there is a mere power in the nature of a trust: see *per* Lord Reid in *Gartside,* at pp 605–606. As to the last words of s 412(5)(*d*), "rights" appeared in 1936, D but the last three lines were not added until 1938; they cannot have altered the meaning of "rights" already established. *Lord Vestey's Executors* v. *Commissioners of Inland Revenue* 31 TC 1 is clear authority that one looks to the single individual and not to the group of individuals of which the person whom it is sought to charge is one. What Lord Simonds says, at page 85, applies here. If power to enjoy is not vested in one individual, but equally in a E number of persons, then what Lord Simonds says is clear authority that the individual does not have "power to enjoy" under s 412(1). A fiduciary power does not give power to enjoy. *Lord Vestey's Executors* v. *Commissioners of Inland Revenue* therefore decided that the subsection only bites where there is only one individual. In the present case, there is no such individual. None of these individuals have "power to enjoy" within s 412(5)(*c*). Once the income F has been accumulated under the direction in the trust document to accumulate, it ceases to be income and is capital. On the definition of "associated operations", the accumulation of income was not an associated operation. The words of s 412(5)(*d*), "entitled to the beneficial enjoyment of the income", mean what they say; they do not mean beneficial enjoyment in the future. When the sum is appointed, it is simply a sum of capital. Future income is not G income for tax purposes. The power of appointment relates only to the capital. Section 412(5)(*b*) does not apply; the money is not held for the person's benefit until it is appointed. When it is appointed, it is cash, and it does not increase in value between appointment and payment. Nor does s 412(5)(*a*) apply.

As to subs (2), the definition of "associated operations" in subs (4) is also relevant here. "Accumulations of income" do not include sub-accumulations. H Nor are they "associated operations" within subs (5)(*c*). No individual has received such a sum as is mentioned in subs (2). There must be some limit to "in any way connected therewith". When Parliament wants to refer to compound accumulation, it knows how to do so; see, for example, the Trustee Act 1925, s 31. In s 412(4), one has a clear indication that compound accumulation is not intended: "arising from any such assets". As to "connection", there must be a I payment out of a fund. The limitation is that it has to be either out of the property transferred or out of the property that exists by virtue of an associated

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(1) 25 TC 121, at pp 133–135. (2) 51 TC 647, at p 685.
(3) 30 TC 163. (4) Pages 553–4 *ante*.

operation. If a wide class not restricted to transferors is to be caught, then a more restricted interpretation of these provisions is desirable: for example, what is to be caught should be restricted to payment directly or indirectly out of the transferred assets, or payment as a direct result of any associated operation. Payment out of a fund of sub-accumulations is not "connected with the transfer" or with any associated operation. As to Walton J.'s emendation of s 412(2), the taxpayers' suggested emendation is a very modest one: "in conjunction with *those* associated operations". The result is that it limits it to a lump sum received to the extent that it is backed by the income that produced it: in this case, Edmund's fund.

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An alternative argument for the taxpayers, which requires no emendation, relates to s 412(8)(*b*): "transfer" and "assets". One can be said to transfer in relation to a block of assets, or in relation to each asset. In s 412(2), one should work backwards from the capital sum and ask, first, what is the origin of the capital sum?: such and such a fund, formed by the accumulation of income; secondly, what was the origin of that income?: the rental fund; thirdly, what was the origin of the rental fund?: the actual transfer. What part of that transfer can be ascribed to this particular payment? One has to do some violence to the wording, and the taxpayers' emendation is the least violent. It is very difficult to apply s 412(2) once one abandons the idea that the transferor is the individual.

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D

The following general submissions are made on s 412(1) and (2). The authorities cited, for example, *Latilla* v. *Commissioners of Inland Revenue*(1) [1943] AC 377 and *Bambridge* v. *Commissioners of Inland Revenue*(2) [1955] 1 WLR 1329, deal with successive individuals. The present case is concerned with concurrent individuals. There is authority that, if it is not clear which individual is to bear the tax, the tax fails: *Lord Herbert* v. *Commissioners of Inland Revenue*(3) [1943] KB 288 (Macnaghten J.) and *Commissioners of Inland Revenue* v. *Clifforia Investments Ltd.*(4) [1963] 1 WLR 396. As to tax avoidance, the preamble to s 412 refers to the avoidance of taxation. What is meant by "avoidance of taxation" has never been explained in the courts. None of the taxpayers here has avoided taxation.

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Walton J. was correct in relying on *Canadian Eagle Oil Co., Ltd.* v. *The King*(5) [1946] AC 119. One does not have power to enjoy the income of a company if one is only a discretionary beneficiary. There is no power in the taxpayers to enjoy the income of any of these three companies. Once the money has been paid to the trustees, it ceases to be the income of the companies.

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Lord Howard de Walden v. *Commissioners of Inland Revenue*(6) [1942] 1 KB 389 is good law on the transferor theory.

Holroyd Pearce Q.C. following. The approach in *Luke* v. *Commissioners of Inland Revenue*(7) [1963] AC 557 supports the principles of statutory construction applied by Walton J.; it is not inconsistent with the decision in *Commissioners of Inland Revenue* v. *Hinchy*(8) [1960] AC 748 (which was not cited), and it is the proper one. The decision of the House of Lords in *Hinchy* had been based on the fact that there was a fixed penalty that had come through

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(1) 25 TC 107. (2) 36 TC 313. (3) 25 TC 93. (4) 40 TC 608.
(5) 27 TC 205. (6) 25 TC 121. (7) 40 TC 630. (8) 38 TC 625.

A from earlier legislation and Lord Reid said, at page 767, that its meaning could not be changed when incorporated in the subsequent legislation. *Hinchy*(1) is thus reconcilable with *Luke*(2).

Nolan Q.C. in reply. On the cross-appeal, first, the *ratio decidendi* of *Congreve* v. *Commissioners of Inland Revenue*(3) [1948] 1 All ER 948 was that liability under s 412 was not confined to the transferor; secondly, it was rightly B decided in that sense; thirdly, even if it was wrong, it should be followed in the public interest. As to the ratio, see the bound record, and *per* Lord Simonds, 30 TC 163, 203–204. The decision would have been the same if Mrs. Congreve had made no transfer herself to the Canadian company. Lord Simonds, at page 205, rejects the limitation suggested as to procurement, though he agrees (see at page 204) with Cohen L.J. (see *per* Cohen L.J., at page 196). The ground on C which he is putting it could not be plainer.

As to tax avoidance, tax is on the income, and the tax avoidance is on the income itself. Section 412 is aimed at keeping income within the United Kingdom tax net: see *Sassoon* v. *Commissioners of Inland Revenue* 25 TC 154. It is not a question of the reason in *Congreve* having gone wider than necessary. It was a specific ground of the decision, which of course went wider D but only because that was of its own nature.

Congreve should not now be reversed, for a number of reasons. First, it has been accepted without question for 30 years by the Revenue and taxpayers and by the House in *Bambridge* v. *Commissioners of Inland Revenue*(4) [1955] 1 WLR 1329 as meaning what it says. Secondly, the consequences of the decision during that time have been enormously wide. Numerous cases have been E affected. Thirdly, it has been accepted by the Legislature. Two consolidating Acts have been passed since, and there has also been the enactment of amending legislation in 1969. Fourthly, if the decision had gone the other way, it is inconceivable that the gap, which is a yawning one, would not by now have been filled. [Reference was made to *Reg.* v. *National Insurance Commissioner,* ex parte *Hudson* [1972] AC 944, *per* Lord Reid.]

F The provision of income in a tax-free form can also fairly be described as tax avoidance (see *Philippi* v. *Commissioners of Inland Revenue*(5) [1971] 1 WLR 1272 and *Lord Vestey's Executors* v. *Commissioners of Inland Revenue* 31 TC 1); these are also useful on the "escape clause" in s 412(3). As to *Philippi* the judgment of Ungoed-Thomas J. [1971] 1 WLR 684 shows that there can be tax avoidance coupled with a gift. In *Lord Vestey's Executors,* see at pages 26 G (special commissioners), 81 (Lord Simonds), 104 (Lord Morton of Henryton). Section 245 of the Act of 1952 is another small indication.

The taxpayers say that s 412(8)(*a*) has a function if they are right but is otherwise superfluous. It is not superfluous; it would apply in the case of a third party who was not the transferor. Suppose that an individual transferor and his wife each own 30 per cent. of the voting rights in a company. Neither H individually would be caught by s 412(5)(*e*), whereas, if they are considered together as a combined individual, they can "control the application of the income". "Connected with", in the context of s 412 as a whole, is confined to cases where the payment (it is the payment, not the money) of the capital sum is connected with the tax avoidance purpose for which, *ex hypothesi,* the transfer and the associated operation were carried out. [Reference was made

(1) 38 TC 625. (2) 40 TC 360. (3) 30 TC 163.
(4) 36 TC 313. (5) 47 TC 75.

to *Fynn* v. *Commissioners of Inland Revenue*(1) [1958] 1 WLR 585.] *Congreve* v. *Commissioners of Inland Revenue*(2) [1948] 1 All ER 948 was within a comparatively short compass. It was decided within a short time of *Latilla* v. *Commissioners of Inland Revenue*(3) [1943] AC 377, and the House would have been aware of *Latilla*. A

Mrs. Baddeley became assessable under s 412(5)(*c*) as well as under s 412(2). Before she receives the capital sum, there is no evidence on which she could be assessed. It could, however, happen that the evidence supporting the assessment would not arise until after the end of the year in which it was made. B

It is true that the effect and consequences of the *Congreve* reasoning in cases of potential multiple liability such as the present were not considered in *Congreve*. The House did, however, have the 1938 amendment in front of it, which included discretionary power in "power to enjoy". The House here should only reverse *Congreve* if it makes better sense of the provision to do so, but it does not. The sensible reading of the section is the *Congreve* reading, for all the difficulties that it involves. Lord Reid's remark in *Midland Silicones Ltd.* v. *Scruttons Ltd.* [1962] AC 446, 475 was strictly *obiter*. This part of the decision of the Court of Appeal in Northern Ireland in *Commissioners of Inland Revenue* v. *Herdman*(4) [1969] 1 WLR 323 was not appealed against to the House. C D

As to injustice, see clause 10 of the 1942 deed of settlement. At all material times, the joint managers have had power to remove the non-resident trustees and appoint trustees resident in the United Kingdom. Had they exercised that power before any sort of capital sums had been paid to the taxpayers, the case would never have arisen. There was no reason to have non-resident trustees except for the avoidance of tax. The reason that the power in question has not been exercised is that the family are waiting for the result of this case. E

Eight short points arise from the taxpayer's submissions as to *Latilla* v. *Commissioners of Inland Revenue* [1943] AC 377, etc. (1) As to the rights of a discretionary beneficiary, the taxpayers referred to *Gartside* v. *Commissioners of Inland Revenue* [1968] AC 553. See *per* Lord Reid at page 605: they each had individual rights. (2) The word "right" is used in Lord Reid's sense in s 412(1) read with subs (5)(*b*) (which came in in 1938), otherwise the rest of (*b*) is meaningless. (3) The taxpayers say that one should look behind the consolidating Act of 1952 to see how the words got there, but the general trend nowadays is against referring back behind consolidating Acts unless there is an ambiguity to be resolved. Here, either the section means something or it means nothing: that is not an ambiguity. If one does go behind the Act, one cannot say more than that in 1938 Parliament enacted a nullity. That is possible, but it is not a construction that the House should favour. (4) The taxpayers complained that they had been given no opportunity to object to the method of apportionment of the s 412(1) claim. There is some conflict of recollection here, but see the supplemental case stated in the case of Ronald Arthur Vestey, dated 27 January 1978: it seems that there was an opportunity to discuss the question of apportionment, to make representations. The Revenue would not want to put anything in the way of the special commissioners considering that again. (5) The taxpayers complained of the presentation of the Revenue's argument as changing from one of absolute liability to one of discretionary power. The argument before Walton J. tended to be on the extremes, but the Revenue did F G H I

(1) 37 TC 629. (2) 30 TC 163. (3) 25 TC 107. (4) 45 TC 394.

A also put forward the special commissioners' way of putting it. (6) As to s 412(2), the taxpayers said that the payments were not connected with transfers or associated operations: such operations did not include sub-accumulations and these were sub-accumulations. The payments having been made under the settlement itself, they were clearly made in connection with the transfer or associated operations. "Accumulations" clearly include sub-B accumulations. It is inconceivable that the Legislature would have intended to exclude them. The taxpayers referred to s 31 of the Trustee Act 1925: the words used in s 31(2) are clearly used to cover both interest and compound interest (see the Law of Property Act 1925, s 164(1)); there would be a hole in the rule against sub-accumulations if the taxpayers are right, but there is authority that sub-accumulations are caught by that rule. (7) There is an C illuminating contrast between "capital" in s 412 and in s 408, also introduced in 1938. It is clearly a charge on the capital sum in s 408 and not on the income. [Reference was made to *Lord Herbert* v. *Commissioners of Inland Revenue*[1] [1943] KB 288.] In s 412 the charge depends on power to enjoy or the receipt of a capital sum but is a charge on the income of the non-resident person; this is just as well, because otherwise the overseas tax-avoidance problem would D not be solved. (8) The taxpayers say that s 412(2) only bites on the income of an overseas company if it arises as the result of a transfer or associated operations. The Revenue agree: they accepted that before Walton J. The concession is mentioned by him at [1979] Ch 177, 196H–197A; see also at page 195F–G[2].

Potter Q.C. As to the *ratio decidendi* of *Congreve* v. *Commissioners of* E *Inland Revenue*[3] [1948] 1 All ER 948, the Revenue sets store by the fact that Mr. Glasgow made two transfers. If the case had turned on those transfers, it would be against the taxpayers. There is an element of equivocation, uncertainty or ambiguity about the transfers made by Mr. Glasgow. This drives one back to the facts found by the commissioners. Compare para 19, 30 TC 163, 178, 179, with the finding at page 180. Mr. Glasgow's transfers were not F strictly in issue in the stated case; therefore, it is not a case that is so binding on the House that it cannot be distinguished on Lord Reid's third ground, and it should be. The Revenue knew about this settlement from an early date: in 1944 there was liability to estate duty. In *Lord Vestey's Executors* v. *Commissioners of Inland Revenue* 31 TC 1, it was inferred that the settlement had been replaced by another. As to the removal of "rights" from s 412(1) in 1969, one G surmises that this was done to bring in discretionary trusts, following a change of policy by the Crown. There does not, therefore, appear to be a consistent policy by the Crown as to the application of *Congreve* v. *Commissioners of Inland Revenue.*

By taking capital sums the taxpayers have not avoided United Kingdom tax on past income.

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The following cases were cited in argument in addition to those referred to in the speeches:—*Canadian Eagle Oil Co., Ltd.* v. *The King* 27 TC 205; [1946] AC 119; *Stanley* v. *Commissioners of Inland Revenue* 26 TC 12; [1944] KB 255;

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(1) 25 Tc 93. (2) Pages 544 and 542–3 *ante*. (3) 30 TC 163.

Scruttons Ltd. v. *Midland Silicones Ltd.* [1962] AC 446; *MacDonald* v. *Commissioners of Inland Revenue* 23 TC 449; [1940] 1 KB 802; *Commissioners of Inland Revenue* v. *Luke* 40 TC 630; [1963] AC 557; *Sassoon* v. *Commissioners of Inland Revenue* 25 TC 154; *Fynn* v. *Commissioners of Inland Revenue* 37 TC 629; [1958] 1 WLR 585; *Herdman* v. *Commissioners of Inland Revenue* 45 TC 394; [1969] 1 WLR 323.

Nos. 1 & 2

Lord Wilberforce—My Lords, these are six appeals and cross-appeals from two decisions of Walton J.: they come direct to this House under Part II of the Administration of Justice Act 1969. They are concerned with assessments for income tax and surtax made upon the six respondents for the years 1963–64, 1964–65, 1965–66, 1966–67 and 1968–69 (except that no assessments were made upon Lord Vestey for 1964–65 and 1965–66 and no assessment was made upon M. W. Vestey for 1966–67). The assessments were made under s 412 of the Income Tax Act 1952 (now incorporated in s 478 of the Income and Corporation Taxes Act 1970) which is concerned with the transfer of assets abroad. The original sources of these sections were the Finance Act 1936, s 18, and the Finance Act 1938, s 28. The assessments for 1968–69 are additionally made under the Finance Act 1969, s 33. The sums involved are very large and important and difficult questions arise for decision.

The origin of the matter is a settlement made on 25 March 1942 by the second Baron Vestey and his uncle Sir Edmund Hoyle Vestey Bt. as settlors. These persons were the heads of two Vestey families, to one or other of which the respondents belong. The respondents transferred no assets and had no hand in the settlement: they, together with a number of other persons, are potential beneficiaries under it. By the settlement the settlors conveyed certain very valuable properties outside the United Kingdom to trustees resident outside the United Kingdom to hold upon the trusts of the settlement. There is no doubt that this was a transfer of assets by virtue of which income became payable to persons resident out of the United Kingdom (viz. the trustees) so as potentially to bring s 412 into operation. However, it is important to notice that neither of the settlors had any rights, nor at any time received any sum, so as to make themselves liable to be charged with tax under either s 412(1) or s 412(2). The claim is, and is only, against beneficiaries under the settlement.

The trusts of the settlement are elaborate and are fully set out in the Case Stated. I think that the following summary is sufficient to enable the contentions of the Revenue to be understood. 1. The trustees were obliged during a period called "*the prescribed term*", which, unless extended, will expire in 1984, to accumulate the income of the trust property by investment so as to form a capital fund, called the "rental fund". Advantage was taken, in this connection, of the law of Northern Ireland under which the settlement was made, which does not include the Thellusson Act [Accumulations Act 1800], which would have limited the period of accumulation. After the end of the *prescribed term* the rental fund was to be divided into two equal parts—Edmund's fund and Samuel's fund—and held on the trusts declared concerning these funds. During the *prescribed term* the income of the rental fund was to be divided into two equal parts which were to be held on the trusts which would be applicable to Edmund's fund and Samuel's fund if already in possession. 2. Subject to the above provisions the trust property was to be held in trust for

A the son of Sir Edmund, the respondent Ronald Arthur Vestey, and the son of the second Lord Vestey, W. H. Vestey, in equal shares. 3. During a period defined by reference to the law against perpetuities, designed to last until 2030 A.D., and called the *specified period,* a person designated as Edmund's manager (who in fact was at all material times the respondent Ronald Arthur Vestey) had power to direct the accumulation of the income of Edmund's fund.
B Edmund's manager did in fact so direct. 4. Subject as aforesaid Edmund's manager had power during the *specified period* to appoint the income of Edmund's fund between a class including Ronald Arthur Vestey and his issue and other persons. Subject thereto the income was to be held on protective trusts for (*inter alia*) the issue of Ronald Arthur Vestey *per stirpes*. 5. Trusts were declared of Edmund's fund to take effect after the end of the specified
C period. 6. (This is the material provision as regards these appeals.) Edmund's manager had power during the *specified period* to direct the trustees to pay or apply capital of Edmund's fund to or for the benefit of Ronald Arthur Vestey or his issue, or, failing this, the issue of Sir Edmund, but Edmund's manager could only exercise this power in favour of himself jointly with Samuel's manager or the trustees. 7. Similar trusts *mutatis mutandis* to those referred
D to under 4—6 above were declared as regards Samuel's fund—there being designated a person to act as Samuel's manager. He also directed accumulation. 8. There were cross-remainders applicable to Edmund's fund and Samuel's fund in the event of failure of the trusts applicable to them respectively. 9. Finally there was (clause 14) a wide power given to Edmund's manager and Samuel's manager during the specified period to revoke the
E trusts, powers or provisions of the settlement and to reconstitute the same, but not so as to confer any interest upon either of the settlors. Thus, in the most summary form, the income from the transferred properties was to be accumulated in three stages. First it was to be accumulated so as to form the rental fund. Secondly the income of the rental fund was to be accumulated so as to form (i) Edmund's fund and (ii) Samuel's fund. Thirdly the income of (i)
F Edmund's fund and (ii) Samuel's fund was to be accumulated, and it was out of these accumulations that the relevant capital payments were made.

It is next necessary to ascertain who were (i) the potential and (ii) the actual beneficiaries who either had rights by virtue of which they had power to enjoy income of the settlement (s 412(1)) or might receive capital payments under (6) and (7) above (s 412(2)).

G The *potential* beneficiaries in 1963–64 were (*a*) 16 members of the Vestey family on Sir Edmund Vestey's side, (*b*) 12 members of the Vestey family on Samuel Vestey's side. In 1963–64 two more persons became members of class (*a*), making 18, and one of class (*b*), making 13, and these remained the relevant numbers through 1966–67. Each class was, of course, susceptible of increase in any subsequent year, and has in fact been so increased.

H The *actual* beneficiaries were the respondents to whom capital payments were made. I shall set these out not only against the individual recipients but also under each relevant year of assessment; I do this because, as I think it important to emphasise, it is each assessment on each separate beneficiary in each separate year that has to be justified (or attacked). The combination in this case of a number of years of assessment upon a number of beneficiaries,
I however convenient for the Revenue, or for argument, is liable to confuse the legal issues. The dates mentioned are the dates when the sums were appointed: it does not appear whether they were paid on the same dates or later.

The payments were:

Beneficiary	*Date(s)*		*Amount*
	Edmund's Fund		£
R. A. Vestey	29 October	1962	215,000
	18 November	1964	150,000
E. H. Vestey	1 January	1963	700,000
	18 November	1966	220,000
Mrs. Payne	2 May	1966	100,000
Mrs. Baddeley	2 May	1966	100,000
	Samuel's Fund		
Baron Vestey	9 July	1962	123,000
	1 January	1963	800,000
M. W. Vestey (through his mother)	1 January	1963	200,000

and, arranged according to date,

Tax year	*Dates*		*Beneficiary*	*Amount* £
1962–63	9 July	1962	Baron Vestey	123,000
	29 October	1962	R. A. Vestey	215,000
	1 January	1963	E. H. Vestey	700,000
1962–63	1 January	1963	Baron Vestey	800,000
	1 January	1963	M. W. Vestey	200,000
1963–64	nil		nil	nil
1964–65	18 November	1964	R. A. Vestey	150,000
1965–66	nil		nil	nil
1966–67	2 May	1966	Mrs. Payne	100,000
	2 May	1966	Mrs. Baddeley	100,000
1967–68			[No evidence of any payments]	

On these figures, the Commissioners of Inland Revenue have made the assessments now in question. The assessments were first made in 1970, i.e. subsequent to all the payments of capital sums in issue in these appeals. The Commissioners then appear to have looked back at six years of assessment, and to have assessed each beneficiary in respect of a proportion of the total income of the trustees in each year (allowance being made for periods when he was resident outside the United Kingdom), irrespective of whether that beneficiary received any payment in that year, or in any year prior to or subsequent to that year. The proportion decided upon was that which the capital sum(s) received by each beneficiary bore to the total income of the trustees for *each* year, i.e. not to the income of the trustees in the year of payment. The resultant figures for 1963–64 to 1966–67 are set out in the case for the respondents: for convenience I reproduce them in an appendix to this opinion(1). There are many remarkable features about these figures: I shall comment on some later. They can be highlighted by reference to the cases of Mrs. Payne and Mrs. Baddeley. Though these beneficiaries received nothing until 1966–67, in which year each received £100,000, they (in fact their husbands) have been assessed for a proportion of the trustees' income in each relevant year, starting with 1963–64, totalling (in each case) £274,121·97. It is the Commissioners' claim that they could have been assessed for many times that amount. The Revenue's claim, on these figures, was based first on subs (2) of s 412, on the ground that

(1) See pages 604–5 *post*.

A each beneficiary received a capital sum of the character described, and secondly on subs (1), on the ground that each beneficiary had rights by virtue of which he had power to enjoy income of the trustees. Whichever subsection applied, the Revenue claimed to be entitled to tax each beneficiary on the whole of the trustees' income, but they limited their actual claim to a proportion fixed as described above. The taxpayers dispute each of these B claims, and additionally, as an overriding contention, submit that s 412 does not apply at all to a case where (as here) the transfer of assets was not made by any of them, but by other persons (viz. the original settlors).

The learned Judge (Walton J.) considered that he was precluded from accepting the overriding contention by the decision of this House in *Congreve* v. *Commissioners of Inland Revenue*(1) [1948] 1 All ER 948 and by that of the C Court of Appeal in *Bambridge* v. *Commissioners of Inland Revenue*(2) [1955] 1 WLR 1329. On the particular arguments, he rejected the Revenue's claim under s 412(2), holding that each taxpayer's liability was limited to tax in respect of the actual sum(s) received by him in any particular year of assessment. As to s 412(1), he held that, before the subsection was amended by the Finance Act 1969, s 33, the Revenue's claim failed because no beneficiary D had *any rights* by virtue of which he had power to enjoy income: as to the last year, to which the amended subsection applied (deleting any reference to "rights"), the claim failed because what the beneficiaries had power to enjoy was not income but capital, viz. accumulations of income which had been capitalised. All of these contentions (and others involving subsidiary but important points) are in issue in these appeals, and the House is invited if E necessary to depart from its previous decision in *Congreve* and to overrule the Court of Appeal's decision in *Bambridge*. Since, if it were to do so, that would dispose of all the appeals in the taxpayers' favour, it would appear to be logical and economical to consider this question first. I find myself unable immediately to take this course. A decision whether *Congreve* should be followed cannot be made until it is seen what the consequences of following the case would be, and F this involves consideration of the meaning of the two subsections of s 412 and of the Judge's decisions with regard to them. These, on the view which I take, need not be lengthy. I make it clear that the following analysis only applies on the assumption that *Congreve* is correct.

I take first s 412(2). If this subsection could be limited in the way suggested by the Judge, a result would be produced that would be intelligible, workable, G certain, and, from some points of view, not unjust. The taxpayer receiving a capital sum, assuming that the trustees had income in that year, would pay tax on it as income: assessment on this basis would be clear and mandatory, and lacking in any element of arbitrariness or discretion. I have sympathy with the Judge's efforts to achieve this result. However, I regret that I am unable to accept the suggested limitation. The Judge achieved it by means of what H he (justly) described as a bold emendation through the insertion of words. I transcribe the subsection as emended, the inserted words being underlined.

> "Where, whether before or after any such transfer, such an individual receives or is entitled to receive any capital sum the payment whereof is in any way connected with the transfer or any associated operation, <u>to the extent to which it comprises</u> any income which, by virtue or in I consequence of the transfer, either alone or in conjunction with associated operations, has become the income of a person resident or domiciled

(1) 30 TC 163. (2) 36 TC 313.

out of the United Kingdom it shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be the income of that individual for all the purposes of this Act."

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My Lords, it is not necessary to enter upon objections of a detailed character to this emendation though some are formidable. For inspection of it unanswerably shows that the process involved is not one of construction, even one of strained construction, but is one of rewriting the enactment. The subsection says in the clearest terms that "any income" of the foreign resident, etc., is to be deemed the income of the recipient of the capital sum. To say that what is to be deemed the recipient's income is not "any income" but a portion of that income equal to the capital sum received would be a totally different fiscal approach—one which Parliament might certainly have taken, but which it has manifestly avoided in this instance. Certain other suggestions were made by Mr. Potter as to the manner in which the subsection might be cut down. These had the merit of being less radical than the Judge's emendation, but the defect of being ineffective. I do not pursue them for the reason, which I find overwhelming, that the subsection is clear beyond doubt in its terms. It is "any income" of the foreign transferees which is deemed to be the income of the recipient of a capital sum, indeed of each and every recipient of any capital sum, small or large, whenever received. From these words there is no escape.

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I pass to subs (1)—still on the assumption that *Congreve* v. *Commissioners of Inland Revenue*(1) [1948] 1 All ER 948 is correct. It is the Revenue's contention that each and every one of the potential beneficiaries (viz. 13 to 14 as to one fund and 16 to 18 as to the other, making 29 to 32 in all) had rights by virtue of which they had power to enjoy income, etc. They accept, and indeed maintain, that at least each *actual* recipient—having such rights—can be assessed in respect of any income of the foreign transferees: inferentially they must accept, for there is no basis for any distinction, that each *potential* recipient—each of the 29 to 32 persons—can be so assessed, and this in respect of each year in which he has the rights, etc. They submit that the subsection, coupled with *Congreve*, compels this.

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My Lords, I do not agree, in this particular case, that any of the taxpayers had "rights by virtue of which they had power to enjoy". On this point, in my opinion, the Judge was clearly right: they were simply members of a discretionary class to which income, or capital, might in the discretion of other persons become available. To hold that as such they had any rights of the character described would be inconsistent with much authority and with principle (see, *inter alia, Gartside* v. *Commissioners of Inland Revenue* [1968] AC 553, 606 *per* Lord Reid; *Lord Vestey's Executors* v. *Commissioners of Inland Revenue* 31 TC 1). However (and this is what is relevant when it becomes necessary to consider *Congreve* v. *Commissioners of Inland Revenue* [1948] 1 All ER 948) there might well be situations in which numerous persons, beneficiaries under a trust, might justly be considered to have "rights, etc.": and moreover, since the deletion of the reference to "rights, etc." by the Act of 1969, s 33, all actual and potential beneficiaries (viz. all 29 to 32) under this settlement may have "power to enjoy" within one or more of the definitions of that expression contained in subs (5). More generally, and apart from the provisions of this particular settlement, there may be cases in which some beneficiaries have "power to enjoy" within one paragraph of subs (5) and other beneficiaries have "power to enjoy" within other paragraphs. The total of the

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(1) 30 TC 163.

A cases may be very large. On the Revenue's contention each and every one of such beneficiaries if resident in the United Kingdom is liable to income and surtax in respect of the whole income of the trustees. On this broad analysis of the two subsections how then is an assessment to income/surtax to be made? The subsections give no more indication than that "that income" (subs (1)) or "any income" (subs (2)), i.e. any income of the foreign trustees, is to be B deemed the income of an individual: they give no guidance or indication whatever as to what is to be done if there is more than one individual to whom either subsection may apply.

The contention of the Revenue is that in such cases they have a discretion which enables them to assess one or more or all of the individuals in such sums as they think fit: the only limitation upon this discretion is, they say, that C the total income (of the foreign trustees) may not be assessed more than once. This is a remarkable contention. Let us consider first some of the practical consequences, if it is correct. (1) It is open to the Revenue to select one or more of the beneficiaries to tax and to pass over the others. (2) It is open to the Revenue to apportion the tax between several beneficiaries according to any method they think fit—and this without any possibility of appeal, none being D provided for. (3) The liability of individual beneficiaries may depend upon when the Revenue chooses to make its assessment. Thus, if assessments had been made in 1962–63, or in 1963–64, the income of those years would have been apportioned between selected beneficiaries. On the Revenue's method, these would have been the recipients of capital sums in 1962–63. This having been done, the income of those years could not subsequently have been E apportioned to other beneficiaries. But by deferring assessments until after 1966–67, the Revenue has been able to impose liability in respect of the income of 1963–64 upon fresh entrants, viz. Mrs. Payne and Mrs. Baddeley, who received capital sums in 1966. How does this square with the principle that income tax is an annual tax, that a taxpayer is entitled to know what tax is claimed against him? In principle a taxpayer who has made a completely F correct return is entitled to be taxed on the basis of it and not to have his liability determined by the choice of the Revenue when to make its assessment. I repeat what I have already said, that the question is not as to the correctness of the overall assessments upon all the respondents in all the selected years, but as to the correctness of, for example, the assessment upon Mrs. Payne in respect of 1963–64. (4) The Revenue is entitled to continue the process of discretionary G assessment so long as the settlement endures. It may adhere to its present system, or change it: it may take into account changes in facts (for example, the appearance of new entrants into the class, or new recipients) or it may not. No beneficiary has any means of challenging their decisions. These are some of the consequences, in this case, and applied to these beneficiaries, of the Revenue's contention: they are frightening enough. But there are more fundamental H objections, in principle, to the whole proposition.

Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined. A proposition that whether a subject is to be taxed or not, or, if he is, the amount of his liability, is to be decided (even though within a limit) by an administrative body represents a radical I departure from constitutional principle. It may be that the Revenue could persuade Parliament to enact such a proposition in such terms that the courts would have to give effect to it: but, unless it has done so, the courts, acting on constitutional principles, not only should not, but cannot, validate it.

The Revenue's contentions to the contrary, however moderate and persuasive their presentation by Mr. Nolan, fail to support the proposition. They say that the income tax legislation gives them a general administrative discretion as to the execution of the Acts, and they refer to particular instances of which one is s 115(2) of the Act of 1970 (power to decide period of assessment). The Judge described the comparison of such limited discretions with that now contended for as "laughable". Less genially, I agree. More generally, they say that s 412 imposes a liability upon each and every beneficiary for tax in respect of the whole income of the foreign transferees: that there is no duty upon the Commissioners to collect the whole of this from any one beneficiary, that they are entitled, so long as they do not exceed the total, to collect from selected beneficiaries an amount decided upon by themselves.

My Lords, I must reject this proposition. When Parliament imposes a tax, it is the duty of the Commissioners to assess and levy it upon and from those who are liable by law. Of course they may, indeed should, act with administrative commonsense. To expend a large amount of taxpayer's money in collecting, or attempting to collect, small sums would be an exercise in futility: and no one is going to complain if they bring humanity to bear in hard cases. I accept also that they cannot, in the absence of clear power, tax any given income more than once. But all of this falls far short of saying that so long as they do not exceed a maximum they can decide that beneficiary A is to bear so much tax and no more, or that beneficiary B is to bear no tax. This would be taxation by self-asserted administrative discretion and not by law. As the Judge well said[1] [1979] Ch 177, 197: "One should be taxed by law, and not be untaxed by concession." The fact in the present case is that Parliament has laid down no basis on which tax can be apportioned where there are numerous discretionary beneficiaries. This was clearly seen by the special commissioners: they say in the supplemental Case stated on 27 January 1978[2]:

> "Apportionment of the 'deemed' income according to the quantum of the respective beneficial interests has much to commend it, but (as we noticed in paragraph 12 of our original decision) section 412 does not so provide. We recognise that apportionment may be impossible in the case of some of the discretionary beneficiaries whose expectancy may be insignificant. Various methods of apportionment were canvassed before us, the merits of each differing according to the circumstances. In our view, in default of a method prescribed by the section, and we can find none, it is for the Board in exercise of their powers in the execution of the Acts to decide on the appropriate apportionment."

It is interesting to compare this passage, and what Parliament has *not* done in the present context, with what it *has* done in another. There is power, as is well known, to apportion for purposes of surtax (or higher rates of income tax) income of "close companies" to shareholders, or "participators", including in some cases persons entitled to secure that income or assets will be applied for their benefit. But, here, Parliament has expressly conferred the power to apportion, has laid down principles according to which the apportionment is to be made, has defined the period for which assessments are to be made, and has allowed for appeals—all this in a detailed and precise manner (see Act of 1970, ss 296ff.—derived from the Finance Act 1965—and Finance Act 1972, Sch 16). The contrast between this legislation and the present is striking.

(1) Page 544 *ante*. (2) Pages 548–9 *ante*.

A The Commissioners have, I gladly accept, done their best to devise a system which is workable and reasonably fair. But whatever system they might devise lacks any legal basis. I must regard this case therefore as one in which Parliament has attempted to impose a tax, but in which it has failed, in the case of discretionary beneficiaries, to lay down any basis on which it can be assessed or levied. In the absence of any such basis the tax must fail. That this must B be the result was correctly perceived by Macnaghten J. in *Lord Herbert* v. *Commissioners of Inland Revenue* [1943] 1 KB 288—a decision based upon the Act of 1938, s 38. The learned Judge there used these words, at page 291(1):

> "It seems to me fantastic to suppose that Parliament has conferred upon the inspectors of taxes, or even on the special commissioners, the power to choose whether A, or B, or C should be liable to income tax or C surtax, as the case might be."

My Lords, this brings me to *Congreve* v. *Commissioners of Inland Revenue*(2) [1948] 1 All ER 948 itself. Can a decision which involves the consequences which I have described be acceptable? I must say at once that I cannot accept Mr. Potter's argument that the proposition that s 412 applies to cases where the person sought to be taxed was not him/herself a transferor D was not a *ratio decidendi* of that case. He certainly gets some support for the proposition that the case was decided on a different ground from the headnote to All England Law Report:

> "An individual can, within the meaning of section 18 of the Finance Act 1936, be said to acquire rights 'by means of' a transfer of assets though the transfer is effected neither by the individual nor by his agent, but by a E company, the whole or greater part of the share capital of which is held by or on behalf of that individual."

However, that is the limit of his comfort for the headnote is certainly incomplete. It is clear, on consideration of the facts, elaborate it is true but susceptible of analysis, and from the judgments, that it was argued that Mrs. Congreve could not be taxed in respect of assets transferred by her father. F The judgments in the Court of Appeal and in this House unambiguously reject this contention and the fact that they accepted an alternative argument to the effect that in any case Mrs. Congreve had organised or engineered transfers by her father does not prevent their rejection of the contention from being a *ratio decidendi*. Indeed not only was it a ratio, it was the main ratio. It was followed, as such, in the subsequent cases of *Bambridge* v. *Commissioners of Inland* G *Revenue*(3) [1955] 1 WLR 1329 and *Philippi* v. *Commissioners of Inland Revenue*(4) [1971] 1 WLR 1272. So the issue cannot be avoided whether this ratio is correct. The result of the preceding argument is that, if *Congreve* is correct in this respect, a result is produced, in the case of discretionary trusts, which is arbitrary, unjust, and in my opinion unconstitutional. That must cast doubt on the decision. For it is a well accepted principle that if one interpreta- H tion of an Act of Parliament produces such a result, but another avoids it, the latter is to be preferred.

There are undoubtedly two possible interpretations of s 412, particularly having regard to the preamble. The first is to regard it as having a limited effect: to be directed against persons who transfer assets abroad; who by means of such transfers avoid tax, and who yet manage when resident in the United I Kingdom to obtain or to be in a position to obtain benefits from those assets.

(1) 25 TC 93, at p 99. (2) 30 TC 163. (3) 36 TC 313. (4) 47 TC 75.

For myself I regard this as being the natural meaning of the section. This avoids all the difficulties discussed above. No difficulty arises from cases of multiple transferors. The second is to give the whole section an extended meaning, so as to embrace all persons, born or unborn, who in any way may benefit from assets transferred abroad by others. This is or follows from the *Congreve*[1] interpretation. This I regard as a possible but less natural meaning of the section. Apart from linguistic considerations there are other arguments. I mention two. 1. One much used by the Revenue is that the section is a penal section. But this cuts both ways. In a case such as *Lord Howard de Walden* v. *Commissioners of Inland Revenue*[2] [1942] 1 KB 389 this argument has much force. The transferor in that case, who derived a comparatively small benefit from the transferred assets, was taxed in respect of the whole income. It was an entirely valid argument, lucidly explained by Lord Greene M.R., in support of so severe a liability, to say that the section was penal and meant to deter transfers abroad. In such a context his metaphor of burnt fingers is completely apposite. But the argument turns the other way when so draconian a tax ("astonishingly severe" were Mr. Nolan's words) is sought to be imposed upon persons who had no hand in the transfer, who may never benefit from it, who cannot escape from it, who remain under liability so long as they live or the settlement lasts. In relation to such persons equity and principle suggests that Parliament intended no such thing—or at least cannot be assumed from the veiled language used to have intended any such thing. To penalise is one thing, to visit the sins of the transferor on future generations is quite another. 2. There is the reference to avoiding tax: prevention of avoidance is the stated objective. But there may be many cases, of which this is one, in which no tax is avoided by the person sought to be charged. If this settlement had been made in England with English trustees, not a penny of tax could, at the relevant time, have been levied on any of the beneficiaries. The settlement would be a classic accumulating settlement with power to pay capital sums, accepted at the time as not attracting any tax. This seems to show that the mischief at which the section was directed was a more limited one.

My Lords, these and other arguments, together with the linguistic, persuade me that the better interpretation of the section is not that accepted in *Congreve* v. *Commissioners of Inland Revenue* [1948] 1 All ER 948 but is one limiting its operation and charging effect to the transferors of assets. We now have to face the fact that this House decided otherwise, unanimously, and affirming the Court of Appeal. That was 30 years ago, the decision has been followed in reported cases (*Bambridge* v. *Commissioners of Inland Revenue*[3] [1955] 1 WLR 1329, *Philippi* v. *Commissioners of Inland Revenue*[4] [1971] 1 WLR 1272) and no doubt many persons have been taxed on the basis of it, without resistance. I have reflected with anxiety whether this House ought, within the principles which should guide the exercise of the power taken in 1966 [*Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234], to depart from it. I bear in mind that the decision was one of interpretation of a taxing Act: that the interpretation accepted was—I say with all respect—a tenable one: that this House ought not to sanction attempts to obtain reversals of decisions deliberately reached however attractive to their successors another view may appear to be. But on the other side—and this must be a rare situation—it can now be seen, as it certainly was not seen in 1949, that the consequences of the interpretation then accepted must lead, in relation to a large class of settlements and in particular where subs (2) might be invoked (it was not considered in *Congreve*), to a situation involving results which are arbitrary, potentially unjust, and fundamentally unconstitutional. If these had been seen

(1) 30 TC 163. (2) 25 TC 121. (3) 36 TC 313. (4) 47 TC 75.

A in 1949—within the ambit of proper argument they could not reasonably have been seen—I cannot believe that the eminent Lords who decided the case would have been willing to ascribe to Parliament an intention to produce such results. The alternative which is supported by the language is to suppose that the section was intended by Parliament as a limited section, attacking, with penal consequences, those who removed assets abroad so as to gain B tax advantages while residing in the United Kingdom and not a section representing such a departure from principle, yet without any prescribed mechanism to operate it, as the alternative can now be seen to involve.

It may be said, and I believe that some of your Lordships share this opinion, that to limit the section so as to relate only to transferors of assets is to emasculate it, or to open up a wide gap in its application. But is this so? Let C us consider some of the earlier pronouncements as to its purpose. In *Latilla* v. *Commissioners of Inland Revenue* [1942] 1 KB 299 Lord Greene M.R. after quoting the preamble said, at page 303(1):

> "It is notorious that before the passing of this legislation [i.e. the Finance Act 1936, section 18] individuals who were minded to enjoy their income without bearing the appropriate burden of British taxation were D able to do so by transferring assets productive of income to a non-resident person or company by whom the income was retained abroad so as not to incur taxation here. The money representing the income was then by means of one or other of several well-known expedients transferred to this country as capital."

He affirmed this statement of the purpose of the section in *Lord Howard de* E *Walden* v. *Commissioners of Inland Revenue* 25 TC 121, 132. Macnaghten J. at first instance, at pp 128–129, had given his analysis of the section which brings out very clearly that it must be the transferor who acquires rights (cf. also *Kanga and Palkhivala, The Law and Practice of Income Tax* 7th edn (1976), page 725, on the corresponding Indian Section). The pronouncements of Lord Greene were made in December 1941—i.e. just before the settlement was F executed. When *Latilla* came before this House [1943] AC 377 Viscount Simon L.C. opened his speech with these words, at page 381(2):

> "My Lords, of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income G without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are 'entitled' to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of H ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is, of course, to increase *pro tanto* the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres. Another consequence is that the Legislature has made amendments to our Income Tax code which aim at nullifying the effective- I ness of such schemes."

(1) 25 TC 107, at p 115. (2) *Ibid,* at p 117.

So we have a clear, identifiable and substantial mischief against which the section, as I would now construe it, was certainly directed. Then are we to suppose that the section must also have been directed against cases where a person transfers assets abroad for the benefit of a child or grandchild: and is it incredible that Parliament should not have covered that case? A

My Lords, to extend so penal a section so as to catch future generations is not merely something which logically follows from penalising transferors themselves, but is something which appears to me to introduce a new dimension—indeed an innovation in our tax law. Are we to deduce from an evident intention to tax (and penalise) transferors of assets one to visit their offence upon their children—or their grandchildren? Surely such an extension, which would certainly have attracted debate, if not criticism, in Parliament, would have been spelled out and not left to be deduced from such cryptic words as have been used. I find in the section, if directed at transferors, and benefits taken by them, an ample and powerful anti-avoidance instrument and I feel not only no need, but a great reluctance, in view of the wording used, to extend it against any beneficiary, child, or grandchild, or descendant. I recognise that there is always the possibility of "overkill", Parliament itself may not have consciously intended to go beyond the transferor, yet words may have been used which are so wide as to do so. Such cases exist in modern fiscal legislation (cf. *Commissioners of Inland Revenue* v. *Cleary*(1) [1968] AC 766). But then I think that the courts, if they are satisfied that the words used, on one interpretation, go so far as to create extreme injustices and departure from fiscal propriety, are well entitled to take another interpretation which does not do this. And in this case, the other interpretation can be found without straining words or writing anything in. B C D E

My Lords, the discretion conferred by the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 is a general one. We should exercise it sparingly and try to keep it governed by stated principles. But the fact that the circumstances of one particular case cannot be brought precisely within the formulae used in others, of a different character, should not be fatal to its exercise—or the discretion would become ossified. I regard this case as one where a previous decision has been given on facts of a particular type without consideration being given (and there is no shred of criticism in saying this) to the possible consequences in a wider type of situation. Of course it is generally true that, when a decision of principle is given, the fact that those who gave it did not have every possible situation in mind does not prevent the decision being applied to new and unforeseen facts. The doctrine of precedent and the interest of certainty require that it should be. But if, as I believe to be the case here, extension of a limited decision to totally different situations involves a new dimension which itself embraces administrative and constitutional difficulties of a high degree, I think that this House ought to use its discretion to refuse the extension. The only choice is then between overruling the previous decision so far as the principal ratio is concerned or confining it to its, or similar, facts. F G H

My Lords, we have not, I hope, in recent years become so habituated to fiscal severities or to "overkill" sections as to be insensitive to those proprieties which were so eloquently stressed by Walton J. in his judgments. It is respect for these and for the fabric of our fiscal law which persuade me that *Congreve* v. *Commissioners of Inland Revenue*(2) [1948] 1 All ER 948, as to its principal ratio and the following cases, should be departed from or overruled and the I

(1) 44 TC 399. (2) 30 TC 163.

A section interpreted as applying only where the person sought to be charged made, or, may be, was associated with, the transfer. If your Lordships do not follow me so far, then, in view of the consequences which would result from the extension of *Congreve*(1) into a case where there are discretionary beneficiaries, I would hold that it cannot be applied to such a case, that no method for levying the tax in such cases has been prescribed by Parliament, that this gap cannot B be filled by administrative decision and that the tax and the assessments of it fail.

I would dismiss the appeals and allow the cross-appeals.

Viscount Dilhorne—My Lords, in these consolidated appeals the respondent Ronald Arthur Vestey is the son of Sir Edmund Vestey Bt. The respondent Edmund Hoyle Vestey is Ronald's son and the respondents J. R. Baddeley and C James C. Payne are Ronald's sons-in-law. The respondents Lord Vestey and Mark William Vestey are great-grandsons of the first Lord Vestey. By a settlement dated 25 March 1942, Sir Edmund Vestey and the first Lord Vestey conveyed a large number of properties outside the United Kingdom to trustees and on 26 March 1942, the trustees leased the trust property to Union Cold Storage Ltd. for 21 years at an annual rent of £960,000. By a further lease D dated 10 April 1963, the trust property was again leased to that company at that rent. The trustees of the settlement, who have at all times been resident out of the United Kingdom, also held all the shares in three companies, in two as subscribers for their shares and in the third, the Commercial Insurance Corporation Ltd., by purchasing the shares. Under the settlement the trustees were to receive the income of the properties conveyed to them and of property E representing the same during a prescribed period and to invest it so as to form a capital fund, called the rental fund. During the prescribed term the income of the rental fund was to be divided into two moieties and held on the trusts applicable to what were called Edmund's fund and Samuel's fund. From and after the end of the prescribed term the trustees were to divide the rental fund into two moieties, Edmund's fund and Samuel's fund and hold them on the F trusts declared with regard thereto. The settlement provided that the trustees might be directed by "Edmund's manager", who was the respondent Ronald Arthur Vestey, to accumulate for such period or periods within the period specified in the deed, the whole or any part of the income of Edmund's fund and that subject to the power of accumulation and to other provisions of the deed the trustees should hold the income upon trust for Ronald Arthur Vestey and G his issue or, if no issue of his should be living, for the issue of Sir Edmund Vestey in such amounts or shares as Edmund's manager might direct. Similar provisions were made with regard to Samuel's fund and Samuel's manager was, until his death in 1944, William Howarth Vestey, the grandson of the first Lord Vestey. He was followed as Samuel's manager by Mr. Brown and then in 1966 the third Lord Vestey was appointed to that office. On 30 August 1942, H Samuel's manager directed the trustees to accumulate the whole of the income of Samuel's fund by investing it. On 14 September 1942, a similar direction was given by Edmund's manager in relation to the income of Edmund's fund. The settlement gave Edmund's manager power within the specified period to direct the trustees to appropriate and realise capital and to pay it to Ronald Arthur Vestey and his issue and in default to the issue of Sir Edmund Vestey in such I shares and such manner as Edmund's manager might direct. A similar power to direct the trustees to distribute capital as he might direct among the issue of the first Lord Vestey was given to Samuel's manager. In the exercise of these powers the trustees were directed to distribute and did distribute between the

(1) 30 TC 163.

respondents Ronald Arthur Vestey, Edmund Hoyle Vestey, Lord Vestey and Mark Vestey and also Mrs. Payne and Mrs. Baddeley, daughters of Ronald Arthur Vestey, the sum of £2,608,000 on various dates between October 1962 and November 1966. A

The Revenue then raised assessments on the six respondents. It is not necessary to state in detail the amount of each assessment. Two examples will suffice. Ronald Arthur Vestey received a total of £365,000 from the trustees, £215,000 on 29 October 1962, and £150,000 on 18 November 1964. He was consequently assessed to income tax and surtax for the years 1963–64, 1964–65, 1965–66 and 1966–67 amounting to £888,500. Mr. Baddeley, as the husband of Mrs. Baddeley who received £100,000 on 2 May 1966, was in consequence of that assessed to tax for 1963–64 in the sum of £62,088.71, for 1964–65 in the sum of £64,818.14, in 1965–66 in the sum of £84,667.75. In none of those years had Mrs. Baddeley received anything from the trustees. For 1966–67 Mr. Baddeley was assessed in the sum of £62,547.35. So in consequence of the receipt by his wife of £100,000 in 1966, he was assessed to tax in the sum of £274,121.95. B C

The respondents appealed from these assessments to the special commissioners without success. They then appealed to the High Court and Walton J. allowed their appeals and remitted the cases to the special commissioners for them to consider whether the assessments were justified under s 412(1) of the Income Tax Act 1952. They had been made under s 412(2). The special commissioners concluded that the assessments were justified under s 412(1) and the respondents' appeal from that decision was heard by Walton J. who allowed their appeals. The Revenue now appeal direct to this House from Walton J.'s decisions by virtue of s 12 of the Administration of Justice Act 1969. D E

Section 412 commences with what has been called a preamble. That and what is contained in subs (1) of that section was first enacted by the Finance Act 1936, s 18. Subsection (2) was added by the Finance Act 1938, s 28. These parts of section 412 read as follows:

> "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows:—(1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of this Act. (2) Where, whether before or after any such transfer, such an individual receives or is entitled to receive any capital sum the payment whereof is in any way connected with the transfer or any associated operation, any income which, by virtue or in consequence of the transfer, either alone or in conjunction with associated operations, has become the income of a person resident or domiciled out of the United Kingdom shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be the income of that individual for all the purposes of this Act." F G H I

A The respondents contended that these provisions only applied where the taxpayer assessed had made the transfer of assets by virtue or in consequence of which income became payable to a person resident or domiciled out of the United Kingdom or where he had caused such a transfer to be made. This argument was put forward without success in *Congreve* v. *Commissioners of Inland Revenue* 30 TC 163. The respondents now contend that that decision B of this House should be distinguished and, alternatively, if it cannot be distinguished, should now be reviewed and not followed. The facts of that case were very complicated. It will suffice to say that Mr. Glasgow, Mrs. Congreve's father, had prior to the enactment of the Act of 1936 transferred assets to a foreign company. Mrs. Congreve had done so too and it was not disputed that she had acquired rights by virtue of which she had power to enjoy income C payable to a number of foreign companies. Lord Simonds in his speech with which the other members of the House agreed posed the question, at page 203:

> ". . . whether the transfer of assets, upon which either alone or in conjunction with associated operations the liability is founded, must be (as the appellants contend) a transfer effected by Mrs. Congreve or her D agent or may be (as the respondents contend) effected by anyone, father, friend, or company in which she has an interest great or small, so long as the result is reached that she has power to enjoy the relevant income."

Lord Simonds, at page 204, said that he did not know what better words could have been used in the section if the Legislature intended to define its purpose as covering a transfer of assets by A by means of which B avoided liability to E tax. He regarded the language of the section as plain and said, at page 205:

> "If there has been such a transfer as is mentioned in the introductory words, and if an individual has by means of such transfer (either alone or in conjunction with associated operations) acquired the rights referred to in the section, then the prescribed consequences follow."

This was in my view clearly the *ratio decidendi* of the House in this case. It was F also the *ratio decidendi* of the Court of Appeal where the judgment of the Court was given by Cohen L.J. Both this House and the Court of Appeal clearly rejected the contention that the section only applied to the individual who had by himself or through an agent made such a transfer. I can see no ground for distinguishing that case from this, so unless the House is prepared to hold that that case was wrongly decided, the appellants must in my opinion succeed on G this issue.

Cohen L.J. with whose judgment Lord Simonds agreed on all points treated the words "such an individual" in subss (1) and (2) as meaning an individual ordinarily resident in the United Kingdom. Their meaning does not appear to have been debated in the House. A possible meaning appears to me an individual ordinarily resident who has sought to avoid liability to income H tax by means of a transfer of assets abroad. If that was their meaning, then the scope of s 412 is limited. If, on the other hand, the words just mean an individual ordinarily resident in the United Kingdom, the decision of this House in *Congreve* v. *Commissioners of Inland Revenue* 30 TC 163 was I think right.

Lord Simonds in the course of his speech did not refer to subs (8) of the I section. It states, *inter alia*: "For the purposes of this section—(*a*) a reference to an individual shall be deemed to include the wife or husband of the individual". These words have considerable significance and importance if

"such an individual" means an individual ordinarily resident in the United Kingdom who has sought to avoid income tax by the transfer of assets abroad. If the decision in *Congreve*[1] is right, it is not easy to attach significance to them. Mr. Nolan suggested that they might have been inserted to cover a case where a husband and wife jointly but not separately had control of a company. I find it difficult to accept that this provision was inserted by Parliament to meet that situation. I think it is much more likely that they were inserted to secure that the wife or the husband of the transferor was brought within the scope of the section and I consequently regard this provision as an indication that by "such an individual" is meant an individual who has sought to avoid tax by the transfer of assets abroad.

In *Congreve* the House did not have to consider, and so far as one can see did not when construing the section consider, the operation of subss (1) and (2) when there was more than one individual who had acquired rights giving power to enjoy income of a person resident or domiciled abroad, and more than one individual had received or was entitled to receive a capital sum connected with the transfer of assets abroad. Walton J. [1979] Ch 177, 184, when considering subs (2), said that if its provisions were taken literally, the income of the person resident or domiciled abroad was to be deemed without limit of time to be the income of each individual who received or was entitled to receive such a capital sum[2] "so that the Crown is, at the end of the day, entitled to multiple tax, the multiplier being the number of different appointments made". He refused to believe that Parliament can ever have so intended, and, relying on a passage from Lord Loreburn L.C.'s speech in *Drummond* v. *Collins*[3] [1915] AC 1011, he thought he was entitled to treat subs (2) as so amended as to secure that the individual who received or was entitled to receive the capital sum was taxable only to the extent to which the capital sum comprised income which by virtue of a transfer of assets had become the income of a foreigner. Such a radical alteration of the plain language of this part of the subsection is one that in my opinion can only be made by Parliament. Mr. Potter for the respondents suggested another amendment of the subsection. If made, I am not at all sure that it would work as he desired but again such an alteration as he proposed could in my view be made by Parliament alone.

In *Commissioners of Inland Revenue* v. *Hinchy*[4] [1960] AC 748 where the Revenue contended that Mr. Hinchy was liable under s 25(3) of the Income Tax Act 1952 to pay a penalty of treble the whole tax with which he ought to be charged for the relevant year for failing to disclose in his return the receipt of £32 19*s*. 9*d*. in interest, Lord Reid, at page 767, gave instances of that penalty being "grossly and extravagantly disproportionate to the offences" and said:

> "Difficulties and extravagant results of this kind caused Diplock J. and the Court of Appeal to search for an interpretation which would yield a more just result. What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the appellants' contention. But we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences, and however strongly we may suspect that this was not the real intention of Parliament."

He concluded that the words were not capable of a more limited construction.

(1) 30 TC 163. (2) Page 533 *ante*. (3) 6 TC 525. (4) 38 TC 625, at p 652.

A My Lords, I see no escape from the conclusion, if *Congreve* v. *Commissioners of Inland Revenue* 30 TC 163 was rightly decided, that each individual who receives or is entitled to receive a capital sum of the character referred to in subs (2) must be deemed to have the income of the foreigner with the result, as Walton J. [1979] Ch 177, 184, said(1) "that the Crown is, at the end of the day, entitled to multiple tax". If *Congreve* is right, subs (1) would produce the B same result if a number of individuals had acquired rights giving them power to enjoy a part of the income of a foreigner. I share Walton J.'s view that Parliament cannot have intended that a person, it might be unborn at the time of the transfer of assets, should be chargeable to tax on the whole of the income of the foreigner if he acquired rights giving him power to enjoy part of that income or received or was entitled to receive a capital sum coming within C subs (2) and without limit of time or that the Revenue should be able to recover multiple tax if there were a number of such individuals. None of these consequences would arise if the persons deemed to have the income of the non-resident were the individuals who had sought to avoid income tax and, by virtue of subs (8)(*a*), his wife or her husband. It would not be unjust that they should be chargeable to income tax on the income enjoyed by the non-resident D in consequence of the individual's transfer of assets abroad to avoid tax. Further, the omission to make any provision in the section when, if *Congreve* is right, a number of individuals have to be deemed to have the income of the non-resident is, I think, very significant.

The choice lies between the section having a limited application, applying only to the individual who has sought to avoid income tax and his or her spouse E and a wide application to all individuals who have rights bringing them within subs (1) or who have received a capital sum within subs (2), however innocent of tax avoidance an individual might be and without regard to the amount which he might have power to enjoy or which he has received or is entitled to receive as a capital sum. The limited application would leave, it is said, "a yawning gap". Persons who transfer assets abroad may do so for the benefit F of their families and not for their own benefit. With this construction their descendants would not come within the section. Gaps when they are found in our tax laws are usually speedily filled. The wider application is productive of such manifest injustices that in my view Parliament cannot have intended it. I have therefore come to the conclusion that the decision in *Congreve* 30 TC 163 on this question was wrong, though the actual decision of the case can be G upheld on the alternative ground stated by Cohen L.J. in his judgment.

The Revenue has not in this case sought to assess each respondent on the whole of the income of the non-resident trustees. They have apportioned each year that income in proportion to the capital sum received by each individual between October 1962 and November 1966, so, if the Revenue are right, the extent of Mr. Baddeley's liability to tax depended on the amounts received by H the others. In their case the Revenue say that it has always been their practice to apportion the income between the individuals concerned in what seems the most appropriate manner. Although an individual has the right to appeal against an assessment made on him, this right is worthless if the amount of his assessment depends solely on the discretion of the Revenue. "This practice", it was said, "may be justified either on the ground that the section does impose I multiple liability, but that the" Revenue "are not required, as a matter of law,

(1) Page 533 *ante*.

and ought not as a matter of proper administration, to recover tax on the income more than once, or on the ground . . . that the" Revenue "are not entitled to tax the same income more than once." A

In the course of his judgment in relation to subs (1) Walton J. said [1979] Ch 198, 213 that the Crown had submitted that(1), "if the conditions of the section were satisfied then the taxpayer was chargeable in respect of the whole of the income of the non-resident . . . and that none the less because there might also be somebody else who was in precisely the same situation." This, if the decision in *Congreve* was right, must be so. Has the Revenue then any right or power to mitigate the gross injustice that results? I think not. The section is mandatory. It says that the income of the non-resident "shall . . . be deemed to be income of that individual for all the purposes of this Act". The income of each individual to whom the section applies must be deemed to include the income of the non-resident. There is no question of the income of any individual being taxed more than once. On this view the consequences to each individual may be even worse than they are to the respondents in this case and in my opinion the Revenue has no power to override the clear provisions of this section. B C

I now turn to the question whether, if as I think the decision of this House in *Congreve* 30 TC 163 was wrong, it should not now be followed. That case was decided 31 years ago. It was followed and not questioned in *Bambridge* v. *Commissioners of Inland Revenue*(2) [1954] 1 WLR 1460; [1955] 1 WLR 1329, and it does not appear to have been questioned in any subsequent case. D

In *Reg.* v. *National Insurance Commissioner,* ex parte *Hudson* [1972] AC 944 the decision of this House in *Reg.* v. *Deputy Industrial Injuries Commissioner,* ex parte *Amalgamated Engineering Union,* In re *Dowling* [1967] 1 AC 725 was challenged and the question whether it should be overruled was considered by a committee of seven, four of whom came to the conclusion that the case had been wrongly decided but four of whom held that it should not be overruled, my noble and learned friends Lord Wilberforce, Lord Diplock and I thinking that it should be. Lord Reid said, at page 966, that in his opinion E F

> "the typical case for reconsidering an old decision is where some broad issue is involved, and that it should only be in rare cases that we should reconsider questions of construction of statutes or other documents. In very many cases it cannot be said positively that one construction is right and the other wrong. Construction so often depends on weighing one consideration against another. Much may depend on one's approach. If more attention is paid to meticulous examination of the language used in the statute the result may be different from that reached by paying more attention to the apparent object of the statute so as to adopt that meaning of the words under consideration which best accord with it. Holding these views, I am firmly of opinion that *Dowling's* case ought not to be reconsidered. No broad issue of justice or public policy is involved nor is any question of legal principle. The issue is simply the proper construction of complicated provisions in a statute. There must be a large number of decisions of this House of this character. Possibly some of your Lordships may think the decision in *Dowling's* case more wrong than most of them. But a decision to reconsider *Dowling's* case would I think encourage those who would like to see others of such decisions reversed to think that litigation for that purpose might be worth while and would have a rather far-reaching tendency to impair existing certainty." G H I

(1) page 560 *ante*. (2) 36 TC 313.

A Lord Morris of Borth-y-Gest thought it wholly inappropriate not to treat *Dowling's* case([1]) as a binding authority. "It was", he said, at page 973, "essentially a decision which involved questions of construction of the statutory provisions." Lord Pearson pointed out, at page 996, that in *Dowling's* case there were conflicting views and that each of them was tenable, and said, at pages 996–7:

B "If a tenable view taken by a majority in the first appeal could be overruled by a majority preferring another tenable view in a second appeal, then the original tenable view could be restored by a majority preferring it in a third appeal. Finality of decision would be utterly lost."

Lord Simon of Glaisdale, while thinking the decision in *Dowling's* case wrong, thought that it would be wrong to depart from it for a number of C reasons, one of which was, at page 1024([2]):

"A variation of view on a matter of statutory construction—so much a matter of impression—would, I should have thought, rarely provide a suitable occasion—by itself, that is to say, for it would be different if it were convincingly shown that a previous construction, clearly demonstrated to be wrong, was causing administrative difficulties or D individual injustice."

My Lords, it is clear that our power to depart from previous decisions is one that should rarely be exercised. None of their Lordships in *Reg.* v. *National Insurance Commissioner,* ex parte *Hudson* [1972] AC 944 said that it should never be exercised in relation to the construction of a statute but the passages from the speeches which I have cited indicate that in such cases it should E be exercised very rarely indeed. Here the choice is not between a literal construction and what is now not infrequently called a purposive construction. Here, as Walton J. showed, the construction placed on the section in *Congreve* v. *Commissioners of Inland Revenue* 30 TC 163, can be productive of very great injustice to persons like Mr. Baddeley and many others. I would myself be reluctant to assert that any decision of this House on a question of law was not F a tenable view, and when this House has reconsidered a previous decision, there is always the possibility, remote though I think it is, that in a further appeal the first decision would be restored. Indeed where a decision on construction has been reconsidered, I would have thought that the possibility of this House reconsidering it again was very remote indeed. Is this one of those very rare cases in which it would be right to depart from the construction placed G on the subsection in *Congreve*? At one time I thought not and that it should be left to the Legislature to remedy the injustice but on further consideration I have come to the conclusion that it is. There is no indication in the judgments in *Congreve* or in the speech of Lord Simonds that in the course of that litigation any consideration was given to subs (8)(*a*) or to the fact that the construction this House accepted meant that the income of the non-resident was to be H deemed the income of as many individuals as had rights giving them power to enjoy any income of the non-resident or as had received any capital sum, however small, coming within subs (2). If these matters had been adverted to, it is, I think, inconceivable that Lord Simonds would not have referred to them in his speech. It is these matters which have led me to think that the decision in *Congreve* was wrong, and if these matters had been brought to the attention of I the House in that case, it might well be that a different conclusion would then

([1]) [1976] 1 AC 725. ([2]) [1972] AC 944.

have been reached. In my opinion the decision in *Congreve* should be overruled with the consequence that none of the assessments in the present case should be upheld. A

If, however, a majority of your Lordships take a different view and hold that despite the injustice that can ensue that decision should be followed, in my view the assessments made on Mr. Baddeley for the years 1963–64, 1964–65 and 1965–66 should in any event be discharged. While the income of the non-resident trustees would be deemed to be income of his wife on her receipt of the £100,000 on 2 May 1966, in that and subsequent financial years, I see nothing in subs (2) which gives it retroactive effect. It does not provide that the income of the non-resident in any year before a person receives or is entitled to receive is to be deemed that person's income. Assessments totalling £449,782 were made on him for those three years. Mr. Payne is in the same position as Mr. Baddeley as his wife received £100,000 on the same date and in my view the assessments made on him for those years should also be discharged. B C

Mr. Potter for the respondents contended that the capital sums received were not within subs (4) associated operations as those sums originated from the accumulations of income derived from accumulations of income made by the trustees. That subsection is in very wide terms and reads as follows: D

> "For the purposes of this section, 'an associated operation' means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets," E

This submission was rejected by Walton J.(1) [1979] Ch 177, 186–7, and I think rightly for the reasons he gives. I would, however, point out that, whether or not the distribution of capital was an associated operation, a capital sum which comes within subs (2) is one which is "in any way connected with the transfer or any associated operation". In my opinion the capital sums in this case were clearly so connected. F

Mr. Potter also contended that the income of the three companies in which the non-resident trustees held all the shares was not to be regarded as the income of the non-resident trustees. The Revenue conceded that the income of the Commercial Insurance Corporation Ltd. was not to be treated as the income of the trustees as they had purchased all the shares but I see no ground for not treating the income of the two companies, the shares in which were subscribed for by the trustees, as part of their income. Mr. Potter did not pursue the point he took in relation to the Hon. Mark Vestey before Walton J. and on which he failed. G

I now turn, on the basis that *Congreve* 30 TC 163, is followed, to the Revenue's alternative claim under subs (1). Section 412 was amended by s 33 of the Finance Act 1969 to read as follows: "(1) Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy . . ." The effect of this amendment was to make it unnecessary for the Revenue to establish that the individual had acquired any rights. It sufficed, to bring him within the subsection, to establish that he had "power to enjoy". Mr. Potter contended that no rights giving a power to enjoy H I

(1) Page 535 *ante*.

A had been acquired and that there was no power to enjoy. Walton J. [1979] Ch 198, 206, held, again in my opinion rightly, that[1] "none of these discretionary beneficiaries had any 'right' to anything at all which could possibly bring the subsection into play prior to the Finance Act 1969". I need not repeat the reasons he gave for that conclusion with which I agree. Before the second hearing before him assessments for the year 1968–69 were added to those B under consideration at the first hearing by agreement between the parties in order to obtain a decision on the effect of the amendment of s 412.

"Power to enjoy" is given a very wide meaning by subs (5). So far as material that subsection reads as follows:

> "An individual shall, for the purposes of this section, be deemed to have power to enjoy income of a person resident or domiciled out of the C United Kingdom if—. . . (*c*) the individual receives or is entitled to receive, at any time, any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income; or (*d*) the individual has power, by means of the exercise of any D power of appointment or power of revocation or otherwise, to obtain for himself, whether with or without the consent of any other person, the beneficial enjoyment of the income, or may, in the event of the exercise of any power vested in any other person, become entitled to the beneficial enjoyment of the income . . ."

Subsection (8)(*c*) provides that "benefit" includes a payment of any kind.

E I can see no ground for holding that the capital sums received were not provided "out of the income of the trustees or out of moneys available" for that purpose by reason of the effect or successive effects of the associated operations nor do I see any ground for holding that when Edmund's manager and Samuel's manager exercised the power vested in them of directing the trustees to make the capital payments, the recipients of the capital sums did not F become entitled to the beneficial enjoyment of the income. In my view (*c*) and (*d*) apply. So, in my opinion, if *Congreve* 30 TC 163, is followed, the assessment for the years 1963–64, 1964–65, 1965–66 and 1966–67 cannot be sustained under subs (1) but the assessments for 1968–69 can be sustained under that subsection as amended. It is common ground that an individual cannot be assessed under subs (1) and also under subs (2) though the assessments made G under s 412 may be justified under either subsection.

My Lords, in this complicated case at least one thing is clear and that is the urgent need for the reconsideration by Parliament of the terms of s 412 as amended (now re-enacted by s 478 of the Income and Corporation Taxes Act 1970). If the conclusion I have reached as to the construction of the section is accepted, then there is indeed a gap to be filled for then the section only applies H to the individual who has sought to avoid tax and to his or her spouse and others who may benefit from the tax avoidance will not be penalised even though they participated in the tax avoidance. I need not dilate on the injustice which may be suffered by a number of individuals if the *Congreve* construction is applied. They would not I think have grounds for complaint if they were only assessed to tax on the sums they received or were entitled to receive or I had power to enjoy though a distinction might be drawn between those who

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(1) page 554 *ante*.

participated in the tax avoidance and those who did not. The former category might continue to be liable to be assessed to tax on the whole income of the non-resident. Consideration of the penalty provisions in s 25 of the Act of 1952 in *Commissioners of Inland Revenue* v. *Hinchy*[1] [1960] AC 748 led to the law being changed in the next Finance Act. I hope that, in consequence of the light now thrown on s 412, that section may equally speedily be amended. In my opinion it certainly should be. A B

For the reasons I have stated, in my view the appeals should be dismissed with costs and the cross-appeals allowed with costs.

Lord Salmon—My Lords, I agree so completely with everything stated in the luminous speech of my noble and learned friend Lord Wilberforce that I find it impossible to add anything. I would dismiss the appeals and allow the cross-appeals. C

Lord Edmund-Davies—My Lords, these appeals and cross-appeals arise from assessments to income tax and surtax made upon each of the respondents under s 412 of the Income Tax Act 1952, which contained provisions formerly in s 18 of the Finance Act 1936. They were some (but not all) of the potential beneficiaries under a discretionary settlement of 25 March 1952, the nature of which has been helpfully summarised in the speeches of my noble and learned friends, Lord Wilberforce and Viscount Dilhorne. The assessments were made on the basis that s 412 deemed the income of the non-resident trustees of that settlement to be the income of *each* respondent for all the purposes of the Income Tax Acts. None of the respondents was, either directly or indirectly, a settlor of the settlement. The primary point of substance is whether the Commissioners of Inland Revenue can, as they assert, apply s 412 to a person or persons other than the individual who made the transfer contemplated by the settlement. The point can best be dealt with by asking two questions: (1) Was *Congreve* v. *Commissioners of Inland Revenue*[2] [1948] 1 All ER 948 correctly decided by this House? (2) Even if it was wrong, should your Lordships nevertheless follow it? D E

By way of a preface, reference should first be had to the earlier decision in *Lord Howard de Walden* v. *Commissioners of Inland Revenue* [1942] 1 KB 389; 25 TC 121 which, like *Congreve,* turned on s 18 of the Act of 1936, but which, unlike *Congreve* and the instant case, related only to the liability to tax of the actual transferor of assets to foreign companies and did not deal with the position of later beneficiaries under the settlement. Upholding Macnaghten J.'s finding that such a transferor was liable to be assessed to income tax and surtax, Lord Greene M.R. said in his extemporary judgment, at pages 396–7[3]: F G

> "If, as it seems to us, the language of the section clearly does not limit the income of the non-resident in respect of which the taxpayer is charged to the actual benefit which he draws from the income of the non-resident—a construction, be it observed, which would largely defeat the expressed purpose of the section—it is illegitimate to force on that language a strained construction merely because it may otherwise lead to a result which to some minds may appear to be unjust. But . . . we are not prepared to say that it is necessarily as unjust as [the taxpayer's counsel] contends. The section is a penal one, and its consequences, whatever they may be, are intended to be an effective deterrent which will put a stop to H I

(1) 38 TC 625. (2) 30 TC 163. (3) 25 TC 121, at p 134.

A practices which the legislature considers to be against the public interest. For years a battle of manoeuvre has been waged between the legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. . . . It scarcely lies in the mouth of *the taxpayer who plays with fire to complain of burnt fingers.*"

And, again speaking of the transferor himself, Lord Greene M.R. added at B page 398([1]): ". . . the father will be taxed on the companies' income *because he is the person against whom the deterrent action of the section is directed.*" (Emphasis added in both citations.) The actual decision in *Lord Howard de Walden* turned on the *amount* of the assessments appealed against, which were based on the view that the *whole* income of the foreign companies were, under s 18, to be deemed to be the transferor's income for the purposes of the Income C Tax Acts. Notwithstanding that the transferor himself received and enjoyed far less, the Court of Appeal held that the whole income was to be deemed his, since the companies' income was traceable to the assets he had transferred. The decision has been criticised, notably by Buckley L.J. who described it in *Lord Chetwode* v. *Commissioners of Inland Revenue*([2]) [1976 1 WLR 310, 328, as "extremely harsh" and expressed difficulty in accepting that the construction of D s 18 had received adequate consideration. And in the instant case Walton J. [1979] Ch 198, 215, regarded it as "wrong," but added, at pages 215, 217([3]):

"I do not see how I can escape the straitjacket . . . Standing *Lord Howard de Walden* v. *Inland Revenue Commissioners* [1942] 1 K.B. 389, my own fundamental conception of the rule of law is deeply offended. The only alternative is for the Crown to tax all who could possibly under any E circumstances be recipients of any sliver of income upon the whole of that income—a suggestion equally as offensive. Being bound by that case I am, unhappily, in no position to right a clearly perceived wrong."

But, although I confess to entertaining considerable sympathy with those views, we are not presently concerned to determine the correctness of the *Lord Howard de Walden* decision. Right or wrong, its present importance lies F in the fact that it was within the framework of that case that *Congreve* v. *Commissioners of Inland Revenue*([4]) was considered, both the Court of Appeal [1947] 1 All ER 168 and the House of Lords [1948] 1 All ER 948 citing it with apparent approval. The primary holding in the latter case was that s 18 applied if the transfer was procured by the taxpayer, even though not actually executed by him. So far, so good. But more important for present purposes was the G further holding that s 18 was *not* directed solely against such a taxpayer, Cohen L.J. saying [1947] 1 All ER 168, 172([5]):

"We do not think the words 'by means of' [in the preamble to section 412] connote activity by the individual concerned . . . [The words] are fully satisfied if the avoidance of tax is effected through the instrumentality of the transfer by whosoever it is executed."

H Any doubt as to the ambit of those words was removed in the House of Lords, Lord Simonds saying [1948] 1 All ER 948, 952–3([6]):

"My Lords, on this question I agree at all points with the unanimous judgment of the Court of Appeal which was delivered by Cohen L.J. The preamble or introductory words of the section which state its purpose do not, in my view, assist the contention, which was developed on its

([1]) 25 TC 121, at pp 134–5. ([2]) 51 TC 647, at p 677. ([3]) Pages 562 and 563 *ante*.
([4]) 30 TC 163. ([5]) *Ibid*, at p 196. ([6]) *Ibid*, at pp 204–5.

> operative words, that the avoidance by an individual of liability to tax must be achieved by means of a transfer of assets effected by that individual. They are, on the contrary, in the widest possible terms, and I do not know what better words could be used if the legislature intended to define its purpose as covering a transfer of assets by A, by means of which B avoided liability to tax . . . If there has been such a transfer as is mentioned in the introductory words, and if an individual has by means of such transfer (either alone or in conjunction with associated operations) acquired the rights referred to in the section, then the prescribed consequences follow."

A B

Your Lordships were invited to hold that these passages were merely *obiter dicta* and, as such, need not now be applied. But it is an invitation that, for my part, I find it impossible to accept. On the contrary, they appear to me to contain the true *ratio decidendi* of both courts. There is accordingly no escape from the problem of whether it can and should now be departed from, and this is particularly so when regard is had to its application by this House in *Bambridge* v. *Commissioners of Inland Revenue*(1) [1955] 1 WLR 1329 and by the Court of Appeal in *Philippi* v. *Commissioners of Inland Revenue*(2) [1971] 1 WLR 1272.

C D

My Lords, the correctness of the general proposition enunciated in *Congreve*(3) [1947] 1 All ER 168; [1948] 1 All ER 948 can be tested by applying it to facts which, while markedly different from those which were there being considered, may (as the Inland Revenue Commissioners contend) nevertheless be regarded as falling completely within its ambit. Although *Congreve* dealt with the tax liability of a single beneficiary of a settlement giving rise to the transfer of assets abroad, the appellants submit it applies with full force to the instant case of multiple beneficiaries, none of whom played any part in the transfer. The astounding consequences of assessing some (but not all) of them in accordance with that submission were condemned in understandably strong language by Walton J., and they have been closely considered in the speeches of my noble and learned friends Lord Wilberforce and Viscount Dilhorne. So startling and unattractive do I find them that I gladly abstain from covering the same ground. Instead, I contend myself with recalling that learned Counsel for the appellants informed your Lordships at one stage: "We accept that the result of applying *Congreve* to the taxpayers here may be disastrous", while, at another stage, he submitted that a strict application of s 412 would have entitled them to assess a single beneficiary on the basis of the *total* income of the settlement in the year of apportionment of the capital sums, and this regardless of the amount of benefit actually received by him. The Commissioners never went as far as to do that, but one solitary example should serve to illustrate the breathtaking implications of even a modified application of their basic contention. In 1966–67 Mrs. Baddeley, one of the beneficiaries, received a capital sum of £100,000 from Edmund's fund; as a result, her husband was assessed in the following amounts of surtax and income tax:

E F G H

	Income Tax £	*Surtax* £
1963–64 (nothing received)	20,013.71	42,075
1964–65 (,, ,,)	21,100.14	43,718
1965–66 (,, ,,)	22,777.91	61,889.85
1966–67 (£100,000 received)	21,416.86	41,130.50.

I

(1) 36 TC 313. (2) 47 TC 75. (3) 30 TC 163.

A In the result, arising out of the receipt of one capital sum of £100,000, Mr. Baddeley suffered a claim of £274,121.97. And that is not the end of the story, for the appellants contended that, even so, they had exercised a "dispensing" power in claiming no more, since by strict entitlement they could have assessed the Baddeleys on the basis of the whole trust income of some millions of pounds.

B My Lords, such boldness has no connection with Lord Greene's view that a taxpayer who plays with fire has no right to complain if his fingers get burnt. The truth is that the strict application of *Congreve*(1) [1948] 1 All ER 948 to the facts of the present case leads to such extraordinary conclusions that the appellants have found themselves compelled to temper the wind to the (comparatively) shorn lamb. This procedure has been attacked as highly C questionable, but, invoking the provision in s 5(2) of the Act of 1952, that they "may do all such acts as may be deemed necessary and expedient for raising, collecting, receiving and accounting for the [income] tax *in the like and as full and ample a manner* as they are authorised to do with relation to any other duties under their care and management", the appellants claim to exercise dispensing powers and to make "extra-statutory concessions" in suitable cases. D They submit that they have done no more than exercise those powers in the instant case by apportioning "the estimated 'foreign income' for each year . . . in the proportions in which the appointees had benefited, in the aggregate, by actually receiving accumulated income". Indeed, they added that in the present case they have done no more than their predecessors did in *Corbett's Executrices* v. *Commissioners of Inland Revenue*(2) [1943] 2 All ER E 218 and in *Bambridge*(3) [1955] 1 WLR 1329, and that "*sub silentio* such apportionments were approved by the court in both cases".

My Lords, it is surely high time to consider the basis of this claim by the executive to make such extra-statutory concessions. It is, of course, well-known that published lists of concessions have existed for many years. The first was in 1944, though in practice they have existed in one form or F another for a much longer period. But, beneficient and relatively harmless though such concessions may have been in most cases, it is difficult to reconcile them with the view expressed by Earl Loreburn in *Drummond* v. *Collins*(4) [1915] AC 1011, 1018, that:

> "Lord Cairns long ago said that 'if the person sought to be taxed comes within the letter of the law, he must be taxed.' And though there G have been cases in which the letter of the law has been disregarded in view of other statutory language, I think it can be done only in case of necessity. It must be a necessary interpretation."

It has recently been pointed out in an article to which I am considerably indebted (David W. Williams, "Extra Statutory Concessions", 1979 British Tax Review 137) that Sir Stafford Cripps said in 1949 that they had come into H existence "without any particular legal authority under any Act of Parliament but by the Inland Revenue under my authority" (466 H.C. Deb., 6 July 1949, col. 2267). And, despite the reliance sometimes placed upon the Income and Corporation Taxes Act 1970, s 115(2), the Taxes Management Act 1970, s 1, and the Inland Revenue Regulation Act 1890, s 1, the fact is that there exists *no* statutory support for the assessment procedure adopted in the present case.

(1) 30 TC 163. (2) 25 TC 305. (3) 36 TC 313. (4) 6 TC 525, at p 539.

And, even were there some statutory or other basis for the published list of concessions, Walton J. [1979] Ch 198, 204, made the important point that(1): A

> ". . . they do represent a *published* code, which applies indifferently to all those who fall, or who can bring themselves, within its scope. What is claimed by the Crown now is something radically different. There is *no* published code, and no necessity for the treatment of all those who are in consimili casu alike. In one case the Crown can remit one-third, in another one-half, and in yet another case the whole, of the tax properly payable, at its own sweet will and pleasure. If this is indeed so, we are back to the days of the Star Chamber. Again, I want to make it crystal clear that nobody is suggesting that the Crown has, or indeed ever would, so utilise the powers which it claims to bring about unjust results; . . . The root of the evil is that it claims that it has, in fact, the right to do so." B C

Judicial comment regarding extra-statutory concessions has been mixed. Speaking "in no spirit of criticism" Donovan L.J. observed in *F.S. Securities Ltd.* v. *Commissioners of Inland Revenue*(2) [1963] 1 WLR 1223, 1233: "This is a difficult code to administer, and practical considerations no doubt justify at times some departure from strict law for the common convenience of the Revenue and the taxpayer." Even Lord Upjohn spoke with two voices. In 1968 he said in *Commissioners of Inland Revenue* v. *Bates*(3) [1968] AC 483, 516: D

> "The Commissioners, . . . realising the monstrous result of giving effect to the true construction of the section, have in fact worked out what they consider to be an equitable way of operating it which seems to them to result in a fair system of taxation. I am quite unable to understand upon what principle they can properly do so . . ." E

Yet in the following year he said in *Commissioners of Inland Revenue* v. *Korner*(4) [1969] 1 WLR 554, 558, of an unpublished concession: "This practice is very old, works great justice between the Crown and the subject and I trust will never be disturbed." Among the critics was Viscount Radcliffe, who "never understood the procedure of extra-statutory concessions [when] at least the door of Parliament is opened every year for adjustment of the tax code" (*Commissioners of Inland Revenue* v. *Frere*(5) [1965] AC 402, 429), and in another case Lord Wilberforce, in rejecting a concession, observed that "administrative moderation . . . is . . . no real substitute for legislative clarity and precision" (*Commissioners of Inland Revenue* v. *Bates*(6) [1968] AC 483, 521). And, my Lords, it should above all be remembered that none other than the Bill of Rights 1688 declared: F G

> "1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal. 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it has been assumed and exercised of late, is illegal."

Wholly in line with such authoritative declarations were the observations of Scott L.J. in *Absalom* v. *Talbot*(7) [1943] 1 All ER 589, 598, that: H

> "No judicial countenance can or ought to be given in matters of taxation to any system of extra-legal concessions. Amongst other reasons, it exposes Revenue officials to temptation, which is wrong, even in the case

(1) Page 552 *ante*. (2) 41 TC 666, at p 683. (3) 44 TC 225, at p 268.
(4) 45 TC 287, at p 297. (5) 42 TC 125, at p 154. (6) 44 TC 225, at p 272.
(7) 26 TC 166, at p 181.

A of a service like the Inland Revenue, characterised by a wonderfully high sense of honour. *The fact that such extra-legal concessions have to be made to avoid unjust hardships is conclusive that there is something wrong with the legislation.*" (Emphasis added.)

But the alternative explanation, my Lords, may in the instant case be that the fault lies not in s 412 of the Act of 1952, but in the way in which it (like its B forerunner, s 18 of the Act of 1936) has been interpreted. In my judgment, the words "such an individual" appearing in subss (1) and (2) hark back to the opening words of the preamble, namely to individuals whose purpose is the avoidance of liability to tax, and do *not* refer simply to any individual "ordinarily resident in the United Kingdom". Indeed, as the noble and learned Lord, Viscount Dilhorne, has observed, if the latter, restricted interpretation C is to be adopted it is not easy to see why subs (8) of s 412 provided that: "For the purposes of this section—(*a*) a reference to an individual shall be deemed to include the wife or husband of the individual." As was submitted in the respondents' printed case: "[Subsection (8)(*a*)] has a positive and important function if the [respondents] . . . are correct; but otherwise is superfluous." And, indeed, Walton J.(1) [1979] Ch 177, 183, had himself expressed the view D that "the provisions of subs (8)(*a*) . . . do not otherwise make good sense". It follows that in my judgment the extension of s 412 by the judgment of this House in *Congreve*(2) [1948] 1 All ER 948 to beneficiaries wholly disconnected with the original transferor or transferors was erroneous.

Even so, my Lords, ought we now to depart from it? It has stood for 30 years and, as previously observed, it has been followed in this House. But if it E be permitted to stand, we have the deplorable situation that the Inland Revenue Commissioners can capriciously select which of several beneficiaries they are going to tax, and may equally capriciously decide the basis upon which they are going to be assessed. And it is said that all this is perfectly lawful even though the afflicted taxpayer has *no* means of challenging his assessment. The noble and learned Lord, Viscount Dilhorne, has analysed in some detail the F circumstances in which this House, by a majority, refused in *Reg.* v. *National Insurance Commissioner,* ex parte *Hudson* [1972] AC 944 to overrule a five-year-old decision, Lord Reid saying, at page 966:

> ". . . I am firmly of opinion that *Dowling's* case [*Reg.* v. *Deputy Industrial Injuries Commissioner,* ex parte *Amalgamated Engineering Union,* In re *Dowling* [1967] 1 AC 725] ought not to be reconsidered. No broad issue of G injustice or public policy is involved nor is any question of legal principle. The issue is simply the proper construction of complicated provisions in a statute. There must be a large number of decisions of this House of this character."

I have also in mind the earlier observation of Lord Reid, at page 966, that "it should only be in rare cases that we should reconsider questions of H construction of statutes or other documents", and, like others of your Lordships, I was minded at one time to conclude that, despite the strong adverse view I had formed about the decision in *Congreve* [1948] 1 All ER 948, this House ought not now to overrule it. But there can be no absolute veto against overruling decisions turning on the construction of statutes or other documents—or, indeed, any other type of decision. We can now see I the startling and unacceptable consequences of *Congreve* when applied to

(1) Page 532 *ante*. (2) 30 TC 163.

circumstances never contemplated when that case was being considered. So remarkable are they, and so disturbing are the unconstitutional devices now resorted to by the Inland Revenue Commissioners, that I am forced to the conclusion that the interests, not only of the respondents but of the public at large alike, demand that the claim of the executive in this matter must be challenged and rejected. The appellants take their stand upon *Congreve*(1) and claim that while that decision remains the devices they have resorted to may continue. My Lords, they must not, and I judge that in these circumstances the appellants themselves leave us with no alternative but to overrule *Congreve.* I accordingly concur in dismissing the appeals and allowing the cross-appeals.

Lord Keith of Kinkel—My Lords, I agree with the views expressed in the speeches of my noble and learned friends Lord Wilberforce and Viscount Dilhorne, which I have had the opportunity of considering in draft.

The important issues in these appeals are whether the principal ground for the decision of this House in *Congreve* v. *Commissioners of Inland Revenue* [1948] 1 All ER 948 was erroneous, and, if so, whether the decision, in so far as it proceeded upon that ground, should now be departed from. The ground in question consisted in a clear ruling upon the proper construction of s 412 of the Income Tax Act 1952, and was thus stated by Lord Simonds, at page 952(2):

> "The preamble or introductory words of the section which state its purpose do not, in my view, assist the contention, which was developed on its operative words, that the avoidance by an individual of liability to tax must be achieved by means of a transfer of assets effected by that individual. They are, on the contrary, in the widest possible terms, and I do not know what better words could be used if the legislature intended to define its purpose as covering a transfer of assets by A, by means of which B avoided liability to tax."

In the result, transfers of assets by the taxpayer's father were held to involve her in liability under the section. The House also accepted an argument that in any event certain transfers had been organised or brought about by the taxpayer herself, but this ground, though capable of supporting the correctness of the actual decision on liability to tax, was plainly a subsidiary one.

I have arrived at the firm opinion that the principal ground of decision in *Congreve* was indeed erroneous. I consider that the natural and intended meaning of the words "such an individual" in s 412(1) is that they indicate not merely an individual ordinarily resident in the United Kingdom, but an individual so resident who has sought to avoid liability to income tax by means of such transfers of assets as are mentioned in the preamble. Further, this meaning gives a sensible content, which would otherwise be lacking, to the provision in subs (8)(*a*) that reference to an individual shall be deemed to include the husband or wife of the individual. Finally, the consequences which follow from attributing the wider meaning to the words, when that meaning is applied to a numerous class of beneficiaries under a discretionary trust, are so dramatically unjust, as the facts of the present case illustrate, that I cannot think it to have been intended by Parliament. These consequences have been examined in depth in the speeches of my noble and learned friends, and need no repetition. So it is necessary to consider whether this is one of these rare cases where it would be proper for this House, acting under the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, to depart from one of its

(1) 30 TC 163. (2) *Ibid,* at p 204.

A own previous decisions. In my opinion it is. The decision was one upon a matter of statutory construction. It turned upon a view which was a tenable one, regarded from the purely linguistic angle, although no attempt was made in the speech of Lord Simonds to account for the presence in s 412 of subs (8)(*a*), which may not have been drawn to their Lordships' attention. But the implications of that view, as now revealed in the instant appeals, were not B present to the minds of their Lordships. A consideration of these implications must, in my opinion, lead to the conclusion that the view taken is not tenable, and would not have been so regarded at the time had their Lordships had the opportunity of such consideration. For the reasons fully developed in the speeches of my noble and learned friends, these implications are of the greatest importance from the point of view of constitutional propriety and the proper C administration of revenue law. In my opinion they involve broad issues of justice and public policy, such as were mentioned by Lord Reid in *Reg.* v. *National Insurance Commissioner,* ex parte *Hudson* [1972] AC 944, 966, the character of which makes it not only proper but necessary to depart from the earlier decision.

Accordingly, I too would dismiss the appeals and allow the cross-appeals.

D *Crown's appeals dismissed, with costs; taxpayers' cross-appeals allowed, with costs.*

[Solicitors:—Speechly, Bircham & Co.; Solicitor of Inland Revenue.]

Appendix to Lord Wilberforce's Opinion
Agreed figures for income tax & surtax 1963–64 to 1966–67 *inclusive on basis of liability on*

	1963–64				1964	
	Income tax		*Surtax*		*Income tax*	
	Share of gross amount £	Assessed £	Share of gross amount £	Assessed £	Share of gross amount £	Assessed £
Beneficiaries of Edmund's Fund						
Mr. Ronald Arthur Vestey	193,623	193,623	307,147	307,147	203,894	203,894
Mr. Edmund Hoyle Vestey	488,037	448,037	774,180	774,180	513,925	513,925
Mrs. Jane McLean Baddeley, assessed on her husband Mr. J. R. Baddeley	53,047	53,047	84,150	84,150	55,861	55,861
Mrs. Margaret Payne, assessed on her husband Mr. J. G. Payne	53,047	53,047	84,150	84,150	55,861	55,861
Total number of potential beneficiaries of Edmund's Fund alive at any time during year		(16)				(18)
Beneficiaries of Samuel's Fund						
Samuel, 3rd Lord Vestey.	489,628		776,704		515,601	
Reduced because of non-residence for part year		461,535		748,611		
Eliminated because of non-residence for whole year						—
Hon. Mark William Vestey.	106,095	106,095	168,300	168,300	111,723	111,723
Reduced because of non-residence for part year						
Eliminated because of non-residence for whole year						
Total number of potential beneficiaries of Samuel's Fund alive at any time during year		(13)				(14)
Total Gross Amount	1,383,477	1,355,384	2,194,631	2,166,538	1,456,865	941,264

whole of trustee's income

–65		1965–66						1966–67	
Surtax		*Income tax*		*Surtax*		*Income tax*		*Surtax*	
Share of gross amount	Assessed	Share of gross amount	Assessed	Share of gross amount	Assessed	Share of gross amount	Assessed	Share of gross amount	Assessed
£	£	£	£	£	£	£	£	£	£
319,143	319,143	207,176	207,176	410,721	410,721	196,416	196,416	300,252	300,252
804,415	804,415	522,197	522,197	1,035,243	1,035,243	495,077	495,077	756,801	756,801
87,436	87,436	56,761	56,761	112,527	112,527	53,813	53,813	82,261	82,261
87,436	87,436	56,761	56,761	112,527	112,527	53,813	53,813	82,261	82,261
			(18)				(18)		
807,038		523,900		1,038,619		496,691		759,269	
							360,611		623,189
	—		—		—				
174,873	174,873	113,521		225,053		107,625		164,522	
			77,754		189,286				
							—		—
			(14)				(14)		
2,280,341	1,473,303	1,480,316	920,649	2,934,690	1,860,304	1,403,435	1,159,730	2,145,366	1,844,764

Printed in the UK by HMSO Press, Manchester
Dd 736068 C53 3/84 (501626)