HIGH COURT OF JUSTICE (CHANCERY DIVISION)—8TH JULY, 1963

COURT OF APPEAL—18TH, 19TH, 22ND, 25TH AND 29TH NOVEMBER, 1963

HOUSE OF LORDS—2ND, 3RD, 4TH AND 8TH JUNE, AND 6TH JULY, 1964

Commissioners of Inland Revenue

v.

De Vigier[1]

Surtax—Settlement—Settlor's wife a trustee—Sums advanced by her to trustees and subsequently repaid—Whether sums paid by trustees by way of repayment of loan—Income Tax Act, 1952 (15 & 16 *Geo.* VI & 1 *Eliz.* II, *c.* 10), *Section* 408.

The Respondent's wife was a trustee of a settlement executed by him in favour of his children, the trust fund whereof included shares in A Ltd. In September and October, 1957, *she advanced* £7,000 *to the trustees to enable them to acquire further shares in A Ltd. On 29th May and 7th August*, 1958, *the trustees repaid to her* £2,500 *and* £4,500 *respectively out of the income of the trust.*

The Respondent was assessed to Surtax for the year 1958–59 *on the footing that the sums so paid to his wife were paid by way of repayment of loans, and were therefore " capital sums " within the meaning of Section* 408, *Income Tax Act*, 1952. *On appeal, the Respondent contended that the sums made available by his wife to the trustees were not loans. The Special Commissioners upheld this contention.*

Held, *that the payments by the trustees to the Respondent's wife were repayments of a loan.*

CASE

Stated under the Income Tax Act, 1952, Sections 229(4) and 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 9th October and 18th December, 1961, Mr. W. A. De Vigier (hereinafter called " the Appellant ") appealed against an additional assessment to Surtax made upon him for the year 1958–59 in the sum of £12,174.

2. The question for our determination was whether certain payments made to the wife of the Appellant were sums paid to her by way of repayment of loans within the meaning of Section 408(7)(i), Income Tax Act, 1952, and assessable to Surtax upon the Appellant under the provisions of Section 408 of that Act.

3. Evidence was given before us by Mr. Leslie Richard Wetton, the managing clerk to Simmonds, Church, Rackham & Co., solicitors. The facts found by us are set out in paragraph 4 below.

[1] Reported (H.L.) [1964] 1 W.L.R. 1073; 108 S.J. 617; [1964] 2 All E.R. 907; 235 L.T. Jo. 414.

4. (1) By a trust deed dated 24th January, 1952, the Appellant executed a settlement in favour of his children. A copy of the said trust deed, marked " 1 ", is attached to and forms part of this Case[1]. Subject to a discretionary power to pay or apply income for the maintenance, education or benefit of the beneficiaries, the trustees of the settlement were required to accumulate the income arising under the settlement. The trustees of the settlement were the Appellant's wife, Mrs. B. A. De Vigier, and Mr. C. F. Simmonds, solicitor, a partner in Simmonds, Church, Rackham & Co.

(2) The Appellant was a director of Acrow (Engineers), Ltd, and included in the assets forming part of the trust estate were shares in that company. On 2nd August, 1957, the trustees of the settlement drew a cheque on their bank account for £2,550 in favour of the Appellant's wife, being the purchase price of 1,000 ordinary shares in Acrow (Engineers), Ltd, bought from Mrs. De Vigier at a price of 50*s.* per share. This cheque for £2,550 was debited to the trustees' bank account on 4th October, 1957. As shareholders in Acrow (Engineers), Ltd., the trustees of the settlement became entitled, by reason of a " rights " issue, to subscribe for 2,994 non-voting A ordinary shares in that company at a price of £1 per share. The trustees exercised their right to subscribe for these shares and issued a cheque for £2,994 drawn on their bank account on 25th September, 1957, in payment for the shares. The cheque was debited to the trustees' bank account on 1st October, 1957. On 1st October, 1957, the trustees drew a cheque in favour of a firm of stockbrokers for £1,040 3*s.* 6*d.* being the purchase price of 500 ordinary shares in Acrow (Engineers), Ltd, bought by them on the Stock Exchange. This cheque was debited to the trustees' bank account on 19th October, 1957. All the shares in Acrow (Engineers), Ltd, referred to above were acquired by the trustees of the settlement in pursuance of their power to invest the income arising under the trust.

(3) On 25th September, 1957, the Appellant's wife drew a cheque for £6,000 in favour of the trustees of the settlement and this was credited to the bank account of the trustees on that date. Immediately prior to the crediting of the sum of £6,000 the credit balance on that bank account was £140. On 14th October, 1957, the Appellant's wife drew a cheque for £1,000 in favour of the trustees of the settlement and this was credited to the trustees' bank account on that date. On 29th May and 7th August, 1958, the trustees of the settlement drew cheques of £2,500 and £4,500 respectively, both in favour of the Appellant's wife. These cheques were debited to the trustees' bank account on 11th June and 18th August respectively. The sums of £6,000 and £1,000 were advanced by the Appellant's wife to the trustees of the settlement to enable them to acquire the shares in Acrow (Engineers), Ltd, referred to in paragraph 4(2) above. The total advance of £7,000 made by the Appellant's wife was repaid by the cheques of £2,500 and £4,500 drawn by the trustees on 29th May and 7th August, 1958. The income of the trust estate consisting of royalties and dividends was credited to the trustees' bank account and was used for purchasing further investments. The repayments totalling £7,000 made to the Appellant's wife were paid out of such income credited to the trustees' bank account.

5. It was conceded at the hearing before us that under the provisions of Section 405, Income Tax Act, 1952, so long as the £7,000 advanced by the Appellant's wife to the trustees of the settlement remained outstanding, the Appellant had an interest in the income arising under the settlement from the investments purchased with such £7,000, and accordingly that such income, *viz.*, £156 in the year 1957–58 and £200 in the year 1958–59 was to be treated as the income of the Appellant.

[1] Not included in the present print.

6. It was contended on behalf of the Appellant that:

(1) the sums of £6,000 and £1,000 made available by the Appellant's wife to the trustees of the settlement were not loans;

(2) the repayments of the sums so made available were not sums paid by way of repayment of loans so as to make them capital sums within the meaning of Sub-section (7) of Section 408, Income Tax Act, 1952;

(3) accordingly no part of the income arising under the settlement was to be treated as income of the Appellant under the provisions of Sub-section (1) of the said Section 408.

7. It was contended on behalf of the Commissioners of Inland Revenue that the sums totalling £7,000, advanced by the Appellant's wife to the trustees of the settlement, were loans, and accordingly that the repayments of the sums so advanced were capital sums within the meaning of Sub-section (7) of the said Section 408, with the result that liability arose on the Appellant under Sub-section (1) of that Section.

8. We were referred to the following cases:

Potts' Executors v. *Commissioners of Inland Revenue*, 32 T.C. 211.

Darke v. *Williamson* (1858), 25 Beav. 622.

In re *Pumfrey* (1882), 22 Ch.D. 255.

Commissioners of Inland Revenue v. *Wesleyan and General Assurance Society*, 30 T.C. 11.

9. We, the Commissioners who heard the appeal, decided to allow it.

We held on the authority of In re *Pumfrey* that the sums totalling £7,000 advanced to the trustees of the settlement by Mrs. De Vigier were not loans made by her to herself and her co-trustee. They were sums made available to the trustees to enable them to make purchases for the trust estate and Mrs. De Vigier was only entitled to be indemnified by the trustees in respect of these sums. There was no relationship of lender and borrower.

Having regard to the *dicta* in the House of Lords in *Potts' Executors* v. *Commissioners of Inland Revenue* on the construction of the words in Sub-section (7) of Section 408, we held that, on the facts of this case, the sums made available to the trustees were not loans in the ordinary meaning of that word, and that the repayment of those advances was not repayment of loans.

10. The representative of the Commissioners of Inland Revenue immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1952, Sections 229(4) and 64, which Case we have stated and do sign accordingly.

11. The question of law is whether on the facts found by us our decision was correct.

W. E. Bradley
N. F. Rowe
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.

1st November, 1962.

. The case came before Wilberforce, J., in the Chancery Division on 8th July, 1963, when judgment was given in favour of the Crown, with costs.

Mr. R. W. Goff, Q.C., Mr. E. Blanshard Stamp and Mr. J. Raymond Phillips appeared as Counsel for the Crown, and Mr. C. N. Beattie, Q.C., and Mr. J. H. Silberrad for the taxpayer.

Wilberforce, J.—This is an appeal by way of Case Stated against a decision of the Special Commissioners in favour of the taxpayer. The case arises out of a trust deed which was in fact a settlement made on 24th January, 1952, by Mr. De Vigier, as settlor. The trustees of that settlement were his wife, Mrs. De Vigier, and Mr. Simmonds, a solicitor. The trusts of the settlement, very briefly stated, were that there was a discretionary power to pay or apply income for the maintenance and education or benefit of the settlor's children, the children themselves taking a contingent interest on attaining the age of 25; and there was an obligation for the trustees to accumulate the income arising under the settlement insofar as not applied. The subject-matter of the settlement was certain patent rights, but the trustees had power to invest any money requiring investment in an unrestricted manner.

The facts which gave rise to the present claim are, shortly stated, that in the year 1957 Mrs. De Vigier made available (if I may use a colourless expression for the moment) to the trustees certain sums of money totalling £7,000. Those sums of money, as the Special Commissioners have found, were for the purpose of enabling the trustees to acquire certain shares in a company, called Acrow (Engineers), Ltd, of which Mr. De Vigier was a director. The trustees did in fact spend a sum of £6,584 3*s.* 6*d.* in acquiring those shares. On two later dates, namely on 29th May, 1958, and 7th August, 1958, the trustees made payments to Mrs. De Vigier, in the first instance of £2,500, and in the second instance of £4,500, totalling therefore the £7,000 which she had made available; and it is in respect of those two payments that the present claim arises. The Special Commissioners have in fact made an additional assessment on Mr. De Vigier in a sum of £12,174 for the purposes of Surtax, which sum represents the figure of £7,000 grossed up by the appropriate Income Tax.

That assessment is based upon Section 408 of the Income Tax Act, 1952, which provides for the charging to Surtax of capital sums paid directly or indirectly in any relevant year by the trustees of a settlement. It applies not only to payments made to a settlor but also to payments made to the wife or husband of a settlor; and the relevant provision under which the charge has been made is Sub-section (7)(i), in which it is said: " 'capital sum' means any sum paid by way of loan or repayment of a loan ". The Special Commissioners have come to the conclusion that the sum of £7,000 repaid to Mrs. De Vigier in the two instalments I have mentioned was not paid by way of repayment of a loan, and they accordingly discharged the assessment. The question is whether that decision is right.

Now it seems to me I must approach the matter in two stages. In the first place, I must consider the nature of the payments made to the trustees and of the repayments made by them on the footing that the payments were made by a third person who might be the settlor or his wife but not by a trustee of the settlement. Secondly, I have to consider whether any difference is caused by the fact that in this case the person who made the advances and to whom the repayments were made, namely Mrs. De Vigier, was a trustee of the settlement.

(Wilberforce, J.)

Looking at the facts which are set out in the Case Stated, paragraph 4, it seems that there is a certain connection, but not a very close connection, between the payments made by the trustees in respect of the Acrow shares and the payments made by Mrs. De Vigier to the trustees. The relevant dates are these. The first payment made by the trustees was a payment of £2,550 which was in respect of 1,000 shares bought from Mrs. De Vigier, which payment was charged to their account on 4th October, 1957, although the cheque which they had written for that sum was dated some months earlier. The second payment made by the trustees was for a sum of £2,994 in respect of a rights issue of shares in the same company, which amount was debited to the trustees' account on 1st October, 1957. That has to be correlated with the first payment made by Mrs. De Vigier which was for a sum of £6,000 credited to the trustees' bank account on 25th September, 1957, i.e. on the same day as the payment for the rights issue was arranged, but in each case slightly before the relevant sums were debited to the trustees' bank account. So that although the payments made to the trustees add up to £5,544, and the payment made by Mrs. De Vigier was £6,000, it seems pretty clear that those two sums and the payments were closely connected one with the other. Then the next payment by the trustees was on 19th October, 1957, and was for £1,040 3*s.* 6*d.* That was in respect of a purchase of further shares in the same company on the Stock Exchange and has to be related to the second payment by Mrs. De Vigier which was for £1,000 paid to the trustees on 14th October, 1957, again not an exact coincidence of amount or date but at any rate a fairly close approximation in either case.

So those being the dates and the amounts of payments, one asks this question: would, apart from the character of Mrs. De Vigier, those payments by her have been regarded as payments to trustees by way of loan? It has been held by the House of Lords in *Potts' Executors* v. *Commissioners of Inland Revenue*, 32 T.C. 211, that the word " loan " in the Section must be given its ordinary meaning, and it does seem to me that, that being so, it is difficult to avoid the conclusion that the nature of the payments made in order to enable the trustees to acquire the shares in question was that of a loan. It is difficult indeed to see what other character could be imparted to the payments. One should add to the dates and amounts which I have already mentioned the fact which may also not be without materiality, namely, that the payments in of £6,000 and £1,000 were payments made to the trustees into their banking account. This is not a case where the person providing the money made a payment direct to the vendor of the shares, a type of transaction which might be capable of being described as otherwise than a transaction of loan. But these payments were made to the trustees and for a certain purpose, and it seems to me that one cannot regard them as payments otherwise than by way of loan. Then as regards the repayment, again it seems to me difficult to say that the repayments which were made of £2,500 and £4,500 could be regarded as having any other character than that of repayments of a loan.

So that up to this point, and treating the case upon the hypothesis that the advances or payments had been made by an outsider, or for that matter by the settlor himself, I should without any difficulty come to the conclusion that this was a case of loan and repayment of loan. However, one has to take account of the fact that in this case the payments were made to, and the repayments were accepted by, a person who was a trustee of the settlement, and it is necessary to consider whether that makes any difference to the character of the payments made. The Special Commissioners evidently thought that it did,

because they decided, following the decision in In re *Pumfrey* (1882), 22 Ch. D. 255, that the payments were not loans made to Mrs. De Vigier and her co-trustee; they were payments made available to the trustees to enable them to make purchases for the trust estate which only gave rise, so they held, to a right to indemnity by the trustees in respect of the sums in question; and they held that there was no relationship of lender and borrower. They come to that conclusion upon the authority of In re *Pumfrey*, and it is necessary to examine that case with some care.

The position there was this, that there was a settlement and a power in it for the trustees to invest all or any part of the trust estate in the purchase of lands. Subsequent to the execution of the settlement the husband, who was a party to it and whose consent was required, requested the trustees to exercise the power in question and to purchase a particular estate called " Riverside ". The resources of the trust were not sufficient to pay for the house in question and there was a deficiency of some £449. At one time it was contemplated that the husband would provide that money, but it later turned out he could not do so and so it was decided that the trustees should borrow the amount required. Accordingly, one of the trustees, a Mr. Charles Pumfrey, acting it appears with the concurrence of his co-trustees, did borrow from the bank the sum of £449 necessary to complete the transaction, and he signed a memorandum undertaking to place in their hands the title deeds relating to the property, and at a later date he did in fact do so. The bank failed to get any repayment and Charles Pumfrey died, and the action was brought by the bank against the personal representative of Charles Pumfrey, the surviving trustee and the husband, claiming that they had a lien on the purchase property for the principal and interest of their loan in priority to the trusts of the settlement; and also asking for sale or foreclosure and for the administration of Pumfrey's estate. Kay, J., first of all came to the conclusion that the bank knew they were dealing with a trustee and therefore could not have a claim as legal mortgagees without notice. On the other hand, he held that a trustee who bona fide advances money for the purposes of a trust estate has a right to be indemnified. He came to the conclusion, therefore, that Charles Pumfrey had a right to indemnity against the trust estate, that the bank had a right to stand in Charles Pumfrey's place as against the trust estate, but that the rights of the beneficiaries must come first, and consequently that the bank's claim through Charles Pumfrey could not take priority over the claims of the beneficiaries and that, in effect, it would only be given effect to if the value of the trust estate was sufficient not only to make up what had been spent out of the trust estate but also the additional amount provided by the bank.

Now it seems to me important to understand in relation to that case that that transaction was quite a different type of transaction from that which we have here. That was really a case of a purchase of property into which there was put not only trust assets but certain assets for which a trustee had made himself personally liable by personal borrowing. It was, in other words, a case of a contributory purchase. There was never any question there of the trustee Charles Pumfrey being personally repaid out of the assets or income of the trust. What was held was that he could in due course get his money out of the property subject to the paramount claim of the trust estate itself, but there was no question raised here of any loan by Pumfrey nor was there any attempt to make Pumfrey and his co-trustees personally liable. Indeed it is to be noted that one of the trustees who had been a party to the original loan from the bank—or rather his estate, because he had died—was not joined

(Wilberforce, J.)

in the action. So it seems to me that that case is not directly applicable here because it was only concerned with a remedy which a third party, namely, the bank, might have against the trust fund, and the question whether there was a loan by any person for which that person might be personally liable was never considered in the case at all. It follows from that that In re *Pumfrey*[1] is no authority upon which it would be possible or indeed proper to decide the present case.

But nevertheless one has to consider whether by analogy or extension from that case the position of Mrs. De Vigier here is not different from that of an ordinary third person lending money to trustees. The way the argument is put is this, that when you are dealing with relationships between one trustee and the other trustees you are not in the field of lender and borrower at all and the rights of the persons concerned cannot be decided in the same way as they can when any other person lends money to another. You are faced with the necessity of dealing with the matter in equity and of taking the trust accounts. In other words, it would not be possible for Mrs. De Vigier to bring an action for recovery of her money that she had placed at the disposal of the trustees without an enquiry being made into the accounts of the trust. For example, it is said that it might have turned out to be the case that the shares in Acrow, Ltd, had fallen in value before the time when the trustees had decided to repay Mrs. De Vigier's advance, and in that case it is said it would have been impossible for Mrs. De Vigier to recover the whole amount advanced by her, and she would only have been able to recover an amount related to the then value of the investments acquired. An analogy was invoked of the partnership cases which establish the principle that it is not possible for one partner to sue his co-partners in respect of a loan made during the continuance of the partnership. The only remedy is for the partnership accounts to be inquired into and then the Courts have regard to the whole relationship of partnership, to the claims of outside lenders, and so on. Now it seems to me, important and relevant though those considerations are, they do not really help me in deciding this particular case. It may well be, if I may express an opinion about it, that, had Mrs. De Vigier had to take steps against her co-trustee to recover the amount which she had made available to the trust, there might have been invoked against her considerations relating to her position as trustee which might have affected her claim. That might be so or not, but that does not seem to me to throw any light upon the legal character of either of the original advances which she made to the trust or the true nature of the repayment which was made. In fact she did place money at the disposal of herself and her co-trustee, and in fact she and her co-trustee repaid the amount so advanced. And the fact, if it be a fact, that in certain circumstances, different from those which I have to consider, there might have been some defence or objection which might have resulted in her having back a smaller sum than that which she had put into the trust, does not in my judgment enable me to say either that it was not a loan or that the later transaction was not a repayment of a loan.

It seems to me there is no other character which can fairly be placed upon those transactions. It seems to me that the Commissioners misunderstood, or at any rate misapplied, the decision in In re *Pumfrey* when they held that on that authority it was right to conclude that Mrs. De Vigier had nothing but a right to be indemnified out of the trust assets; and in my view, although it may be that she had a right to be indemnified out of the trust assets subject to any equitable defence to her claim, there was at no time any reason why she should

[1] (1882), 22 Ch. D. 255.

not recover the amount of her loan, and in any event, the trustees did repay the loan.

I come to the conclusion that the Crown are right and therefore I must allow the appeal.

Mr. R. W. Goff.—Then, my Lord, I ask that the appeal be allowed with costs; and, my Lord, I respectfully submit the proper Order be that the matter be remitted to the Special Commissioners with a declaration that the sums totalling £7,000 advanced by the Respondent's wife were loans, and accordingly that the repayments of the sums so advanced were capital sums within Section 408(7) and that the assessment be adjusted accordingly.

Wilberforce, J.—Is that the right way to do it, or can it not just be sent back to them for assessment?

Mr. Goff.—I understand that the Court of Appeal has said there ought to be a declaration and that is why we have asked for the Order in that form.

Wilberforce, J.—Very well, I will make a declaration. Is it necessary to send it back to the Commissioners, as the figure is fixed?

Mr. Goff.—It does have to go back, though no doubt the parties will agree the figures, which I think speak for themselves.

Wilberforce, J.—Is there any objection to that, Mr. Beattie?

Mr. C. N. Beattie.—No, my Lord, no objection.

Wilberforce, J.—Very well, the Crown must have the costs.

The taxpayer having appealed against the above decision, the case came before the Court of Appeal (Lord Denning, M.R., and Russell and Donovan, L.JJ.) on 18th, 19th, 22nd and 25th November, 1963, when judgment was reserved. On 29th November, 1963, judgment was given unanimously in favour of the Crown, with costs.

Mr. C. N. Beattie, Q.C., and Mr. J. H. Silberrad appeared as Counsel for the taxpayer, and Mr. W. A. Bagnall, Q.C., Mr. E. Blanshard Stamp and Mr. J. Raymond Phillips for the Crown.

Lord Denning, M.R.—I will ask Russell, L.J., to deliver the first judgment in this case.

Russell, L.J.—The settlement in this case was made by Mr. De Vigier in 1952 on his children, and at all material times the income was subject to a trust for accumulation and addition to capital. The trustees were and are his wife and a solicitor. The question is whether two payments totalling £7,000 made by the trustees to the wife were sums paid to her by them by way of repayment of a loan. If so, they are, by Section 408 of the Income Tax Act, 1952, required to be treated for all the purposes of the Act as the income of the settlor. Wilberforce, J., reversing the decision of the Special Commissioners, decided that these were sums so paid, and the settlor has appealed.

(Russell, L.J.)

The trustees, and no doubt the settlor, were minded in 1957 to acquire for the trust shares in a company called Acrow, with which the settlor was connected, and in connection with which there was to be a rights issue. The sequence of events was as follows. (1) 2nd August, 1957, the trustees drew a cheque on their bank account in favour of the wife for £2,550, the price of the purchase from her of 1,000 such shares. This was not presented until 4th October, 1957. (2) 25th September, 1957, the trustees drew a cheque on their account for £2,994 in subscription for the rights issue. This was met on 1st October, 1957. (3) On the same day, the wife drew a cheque on her private account in favour of the trustees for £6,000, which was credited to their account the same day. At that time the trustees' account was only £140 in credit. (4) 1st October, 1957, the trustees drew a cheque for £1,040, the price of a Stock Exchange purchase of 500 more shares in Acrow. This was met on 19th October. (5) 1st October, 1957, the trustees' cheque for £2,994 for the rights issue was met. (6) 4th October, 1957, the trustees' cheque to the wife for £2,550 was met. (7) 14th October, 1957, the wife drew a cheque on her private account in favour of the trustees for £1,000, and this was credited to their account. (8) 19th October, 1957, the trustees' Stock Exchange purchase cheque for £1,040 was met. (9) In June, 1958, the trustees paid to the wife £2,500 out of their banking account. (10) In August, 1958, they similarly paid £4,500.

The Commissioners found that the two sums of £6,000 and £1,000 were " advanced " by the wife to the trustees to enable them to acquire these shares in Acrow, and that the total " advance " of £7,000 was " repaid " in the two sums of £2,500 and £4,500 from the trustee banking account. No evidence, documentary or oral—over and above the facts stated above—was produced by either the settlor, the wife or the trustees to throw any light on the character of the " advance " or of the " repayment ".

For the settlor, it was contended, at least at one stage in the argument, that the transaction here could not be one of loan because a trustee putting his private funds with those of the trust had no absolute right of repayment, but only recourse to the trust property, and the taking of accounts might well result in his not being repaid or repaid in full. Reference was made in this connection to In re *Pumfrey* (1882), 22 Ch. D. 255. I do not propose to set out the details of that case, which is analysed in the judgment of Wilberforce, J. I am content for present purposes to assume (though it may well not be so) that the machinery in that case involved the " advance " by Charles Pumfrey into the trust funds of part of the purchase price. But, even so, the conclusion in that case, that his rights to obtain repayment were limited, does not at the same time establish that he did not lend the money.

Then it was said that plainly in the present case the inference is that in no circumstances was the solicitor to be personally liable: that he could not be sued in debt: therefore, it is said, this could not have been a loan by the wife. I am prepared to accept the inference. But the fact that the terms of a transaction negative an action for money lent, and restrict the person advancing money to particular funds, is not inconsistent with the advance being a loan: see *Mathew* v. *Blackmore* (1857), 1 H. & N. 762. Nor do I consider that the facts are any more inconsistent with a loan if the right to repayment is additionally restricted on the ground that the money is advanced to trustees who have no power to borrow for the particular purpose, as may have been the case here in relation to the purchases of Acrow shares.

In the course of reply, Counsel for the settlor was not disposed to dispute that, where a non-trustee advanced money, there could be a loan, though it

was provided that no action for money lent would lie and the right to repayment was limited. He accepted that, as between joint tenants of a house property, there could be a loan by one for repairs, for example. He also accepted that it is possible for one trustee to lend money to himself and his co-trustee, but maintained that in circumstances such as the present the proper inference (without any information other than that before us) is that the arrangement did not involve a contract of loan, but was properly described as merely a placing of her own money by the wife to the credit of the trust account in reliance upon such rights as equity might confer upon her as a result of that circumstance. But I do not think that that is the proper inference when the Court is given no information by those who know every detail of the discussions leading to the transactions. It seems to me that the proper inference is that the trustees needed money to buy these Acrow shares, especially having regard to the impending rights issue; that they had no ready money for the purpose; that they might have borrowed from a bank, but that instead it was agreed and arranged that they should borrow from the wife. I agree with the learned Judge that the payments by the wife to herself and her co-trustee must be regarded in the ordinary sense of the word as loans, and that consequently the sums paid to her by them were sums paid by way of repayment of a loan.

If so, the regrettable fiscal consequences must follow. I say " regrettable " in this case because I do not detect any device for the avoidance of tax, and it would seem that, under Section 405, income of the trust attributable to this loan while it was outstanding would be treated as income of the settlor for tax purposes. Had the money been borrowed by the trustees from the bank on the wife's guarantee, she would not have made a loan. Had she simply waited longer for payment of her own shares, and paid for the other shares acquired direct to the vendor or to the issuing company, she would not have made a loan. If she had been the sole trustee, I do not think it could have been described as a loan. In truth, this provision in Section 408 is a stop-gap against possible evasions of Section 407. As is not uncommon in taxing Statutes, the pit (to change the metaphor) dug by the Legislature is, perhaps inevitably, wide enough to catch the unwary innocent, and I think that that has happened here to the settlor and his wife. I would dismiss the appeal.

Lord Denning, M.R.—I would ask Donovan, L.J., to give his judgment next.

Donovan, L.J.—I also have come to the conclusion that the judgment of Wilberforce, J., is correct, and I would wish to add very little to it.

The Court has been handicapped in this case by an almost total lack of evidence as to the terms on which Mrs. De Vigier advanced her £7,000. We are simply told: (1) that in September, 1957, she drew a cheque for £6,000 in favour of the trustees; (2) that in October, 1957, she drew another cheque for £1,000 in favour of the trustees; (3) that in May and August, 1958, the trustees drew cheques for £2,500 and £4,500 in favour of Mrs. De Vigier; and (4) that the £7,000 was advanced by the wife to enable the trustees to buy certain shares, and that this advance was repaid by the two cheques I have just mentioned. Thus the Court does not know on what terms Mrs. De Vigier advanced the money: we simply know the purpose. The lacuna in the facts results from the decision of Mrs. De Vigier, no doubt on advice, to give no evidence.

In these circumstances, we are asked to hold that, once it is proved that money was made available by Mrs. De Vigier to herself and her co-trustee

(Donovan, L.J.)

for such a purpose, it necessarily follows, in the absence of evidence to the contrary, that the matter is not one of contract at all, and that the only proper inference to draw is that Mrs. De Vigier was content to rely for repayment upon her right to have an account taken and to be repaid to the extent only that the trust fund permitted such repayment without prejudice to the beneficiaries. If this was her only right, it is argued, then the repayment was not repayment of a loan. I do not see why this conclusion necessarily follows. But, in my opinion, the Court, in the circumstances of this case, is not obliged to draw any such inference as to Mrs. De Vigier's attitude. Had she really been content to rely upon the alleged right in equity, and on that alone, she could easily have so testified. The more probable situation is that she was promised or stipulated for repayment in full of this substantial sum like any ordinary lender, and that this state of affairs would have emerged had evidence been given. This is not to speculate in the absence of evidence. I think it is a reasonable inference from all the circumstances. On the basis of such an inference, I think the transaction is properly called one of loan and repayment of loan, and I agree that the appeal should be dismissed.

Why it was considered necessary to press the full rigour of Section 408 against the taxpayer in this case, I do not know, since on the face of it, it exhibits no sign of a tax evasion device. It is true that the Commissioners of Inland Revenue have no express discretion in the matter, but the wide terms of Section 5(1) of the Act have in the past been treated by them as sufficient. However, in the absence of knowledge, I comment no further.

Lord Denning, M.R.—I am entirely in agreement with both the judgments that have been delivered, and the appeal must therefore be dismissed.

Mr. J. Raymond Phillips.—I ask, my Lord, that the appeal should be dismissed with costs.

Mr. C. N. Beattie.—Yes, my Lord; I cannot resist that.

Lord Denning, M.R.—So be it.

Mr. Beattie.—May I make an application to your Lordships for leave to appeal to the House of Lords? I appreciate that this decision turns very much on the lack of evidence, and I can therefore see a difficulty in my way. Nevertheless, I submit that this might well turn out to be a question of law, as to whether there is only one inference to be drawn from the known facts. It is, of course, a case of great importance to the taxpayer in question; and it is, I submit, important too in relation to the position of trustees in general.

Lord Denning, M.R.—What do you say, Mr. Phillips?

Mr. Phillips.—I am not instructed, my Lord, to make any submissions to your Lordships on the application.

(*The Court conferred.*)

Lord Denning, M.R.—Mr. Beattie, we do not give leave.

Mr. Beattie.—If your Lordship pleases.

On the petition of the taxpayer, leave to appeal against the above decision was granted on 22nd January, 1964, by the Appeal Committee of the House of Lords (Lords Reid, Morris of Borth-y-Gest and Hodson).

Mr. C. N. Beattie, Q.C., and Mr. J. H. Silberrad appeared as Counsel for the taxpayer, and Mr. J. Raymond Phillips for the Crown.

The case came before the House of Lords (Lords Reid, Evershed, Guest, Pearce and Upjohn) on 2nd, 3rd, 4th and 8th June, 1964, when judgment was reserved. On 6th July, 1964, judgment was given unanimously in favour of the Crown, with costs.

Mr. C. N. Beattie, Q.C., and Mr. J. H. Silberrad appeared as Counsel for the taxpayer, and Mr. W. A. Bagnall, Q.C., Mr. E. Blanshard Stamp and Mr. J. Raymond Phillips for the Crown.

Lord Reid.—My Lords, I agree with your Lordships that there is no escape from the conclusion that this appeal must fail. There is no suggestion that either the Appellant or his wife was trying to evade tax, and the transaction which has attracted tax liability was one which would never suggest that possibility to anyone unless he was familiar with Income Tax law. But the Revenue do not and probably should not have any discretion to remit tax legally due on the ground that the innocent taxpayer has fallen into a trap.

I realise that if legislation is to be effective to forestall attempts at evasion it must often be drafted in terms so wide that it can apply to a variety of quite innocent transactions. So one can only say that it is very unwise for any one unfamiliar with Income Tax law to depart from the beaten paths of trust administration in any case where the settlement involves or provides for accumulation of income, without first obtaining an opinion from counsel experienced in Income Tax matters.

Lord Evershed.—My Lords, I must confess at once that I share the regret expressed by Russell and Donovan, L.JJ., at the end of their judgments in the Court of Appeal; for, as I feel compelled to conclude, the claim of the Crown is well founded. As Russell, L.J., observed, the financial assistance provided by Mrs. De Vigier cannot be held to involve anything in the nature of "a device for the avoidance of tax". The assistance was given for the benefit of Mrs. De Vigier's children under the trust established by her husband and I agree with the learned Lord Justice in his view that in the circumstances of the present case the pit dug by the Legislature in enacting Section 408 of the Income Tax Act, 1952, has been wide enough to catch the unwary innocent. It is also to my mind clear that, if Mrs. De Vigier had had in mind to avoid the pit, her beneficence could have taken a form which would have been successful in so doing. Thus, as regards her own 1,000 shares she could have transferred them from her own name to those of her co-trustee and herself upon terms that she would receive the purchase price out of trust income when there was sufficient of such income to provide the purchase price; and, as regards the purchase of rights arising from the Acrow company's shares and the purchase of further shares in the same company on the Stock Exchange, by means analogous to the course adopted in In re *Pumfrey* (1882), 22 Ch. D. 255. But the course in fact taken and innocently taken was otherwise. As was pointed out in the Court of Appeal, the case of *Mathew* v. *Blackmore* (1857), 1 H. & N. 762 (and there were other cases to the like effect to which your Lordships' attention was drawn) makes it clear that there may, according to

(Lord Evershed)

the ordinary and proper sense of the word, be a " loan ", though the person providing the money advanced could not in law sue for its recovery as money lent. Mr. Beattie, at the conclusion of his argument, felt compelled, as I think rightly, to abandon the point that the " arrangement "—and I use deliberately the neutral term—between Mrs. De Vigier and her co-trustee was *ultra vires*; that is, was an arrangement which was beyond their powers as trustees to make. When this concession is made and when regard is had to the effect of *Mathew* v. *Blackmore*[1] and the other cases to which I have referred, I think it impossible on the facts of this case to avoid the conclusion that the sums provided by Mrs. De Vigier in 1957 were in truth " loans " and that the payments made to her in the following year were sums

" paid by way of repayment of a loan ",

within the ordinary sense and meaning of Section 408(7)(i) of the Act of 1952. The point is in the end of all a short one, and if I do not labour it I intend no disrespect to the careful arguments addressed to the House by Mr. Beattie and Mr. Bagnall. I have had the advantage of reading the opinion written by my noble and learned friend Lord Upjohn, and express my entire concurrence with it. As I have said, the result appears to me, as it did to Russell, L.J., regrettable but I see no ground which would justify a conclusion that the Court of Appeal and Wilberforce, J., were wrong in their decisions.

I agree therefore that the appeal must be dismissed.

Lord Guest.—My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Upjohn, with which I agree.

Lord Pearce.—My Lords, Mrs. De Vigier put the bank account of the settlement in funds to the extent of £7,000 for about a year and was then repaid. As a result Mr. De Vigier as settlor is assessed on the basis that the repayment to his wife was the repayment of a loan and must therefore be regarded as an income payment of £12,174 gross by virtue of Section 408 of the Income Tax Act, 1952. The object of the Section is presumably this. A rich settlor could, without divesting himself of his capital, or losing control of it, and without committing himself to a covenant in excess of six years, get for his children the benefit of tax concessions on the income under a settlement by lending (either himself or through his wife) large sums to it temporarily. He would thus obtain a benefit which the Act does not intend him to have. If he obtains this benefit by acting in a manner to which Section 408 applies, he has to pay tax on a scale which is not regulated by, and as a rule far exceeds, any possible benefit. The Section is unsatisfactory in that it inflicts a severe loss on the unwary person who acts with no dishonest intentions and does not present much obstacle to the wary who would take care not to put himself within its jaws. In the present case Mrs. De Vigier could apparently have produced the result she wished by simply guaranteeing a bank overdraft or in other ways (see, e.g., In re *H.P.C. Productions*, [1962] Ch. 466) and she would thus have avoided this large tax burden on her husband.

I do not draw any conclusions adverse to the Appellant from the fact that Mrs. De Vigier did not give evidence. Presumably his advisers did not think that her evidence could improve his position, nor do I see how anything which she said could do so. The inferences which seem to me plain from the bare facts of the Case Stated are these. The settlement owned valuable patents and the accumulations from their fruits had been invested. From the settlor's knowledge of Acrow, Ltd, there seemed to be an opportune moment for

[1] (1857) 1 H. & N. 762.

(Lord Pearce)

acquiring its shares for the trust. Rather than let the moment pass and wait until the expected patent payments had actually been made, Mrs. De Vigier temporarily financed the purchase of shares by paying money into the trust account. When the patent payments enabled the trust account to pay her back, it did so. It is clear that the possible effect of Section 408 on this transaction did not occur to anybody, since Mrs. De Vigier quite unnecessarily (and merely, I assume, because it seemed to her a tidier transaction) included in her advance a sum of £2,550 for payment by the trust to herself—thereby increasing the Appellant's assessable income by some £4,000. It is also clear that Mrs. De Vigier was not seeking to secure, nor was she really securing to any appreciable extent, the benefit which the Section was intended to prevent.

One therefore approaches this case with an inclination to limit, if one can properly do so, the application of Section 408 to the cases which it was primarily intended to catch, and to exclude cases like the present where its application creates unfairness. But how can one do that without drawing some technical and artificial line which would defeat the whole intention of the Section? If one excludes the operation of the Section simply because this was a nebulous and casual transaction or because the trustees had no power to borrow, then every person wishing to drive through the Section, whether to secure the forbidden benefit or not, may do so by making his transaction nebulous and casual or by lending to a settlement which had no power to borrow. In my opinion, the Section was not intended to have so limited an application. I cannot accept Mr. Beattie's argument that " a loan " must be a loan that is properly made within the powers of the persons concerned, or that no loan exists or should be implied where equity will regulate the rights of the persons making and receiving the advance and will impose some more limited right of repayment. Equity can only thus regulate the rights on the basis of some agreement, expressed or implied, to repay. Otherwise equity would treat this payment as a gift by the mother to her children. Where the circumstances of a payment clearly indicate an intention by all concerned that there should be repayment, the Court can properly infer that the money was lent. The precise legal rights of the persons concerned as between one another do not destroy the nature of the transaction and make it cease to be a loan.

In re *Pumfrey* (1882), 22 Ch. D. 255, did not purport to decide that there was no loan by Charles Pumfrey to the trustees. It decided what were his rights against the trust estate in respect of an asset bought partly with his moneys. It decided those rights on equitable principles without referring to the transaction as a loan, but I see no reason to suppose that, had the Court been faced with the question, it would have decided that the advance was not a loan within the terms of a Section in the Income Tax Act. The observations in *Mathew* v. *Blackmore* (1857), 1 H. & N. 762, show that an advance may be regarded by the Court as a loan, although its repayment is restricted to particular funds. In *Boissevain* v. *Weil*, [1950] A.C. 327, an advance forbidden by law was referred to *passim* in Lord Radcliffe's opinion as a loan. And in *Green* v. *Hertzog*, [1954] 1 W.L.R. 1309, Lord Goddard, C.J., referred to a transaction as a loan by a partner to a partnership although no claim would lie for money lent.

The words " repayment of a loan " must, in my opinion, be given their ordinary meaning. It does not follow that an indemnity to which a trustee is entitled from the trust is the repayment of a loan by him. In such cases it is a question of fact whether the circumstances under which the trustee is

(Lord Pearce)

entitled to his indemnity constitute a loan. There may be borderline cases where a Court is entitled to hold that a temporary payment by a trustee into a trust account does not come within the word " loan ". In the case before us, however, I do not think it is possible so to hold. The difficulty of excluding Mrs. De Vigier's transaction from the category of loan is shown by the periphrasis necessary in argument to describe it in neutral terms, such as " putting up the money ", " making an advance " and " putting the trust account in funds ". The simplest and most natural way of describing it is that she " lent the money " or " made a temporary loan " to the trust. Either of these descriptions is fatal to the Appellant's argument.

I do not find it possible on the facts of the present case by any refinement to avoid the conclusion that the payment to Mrs. De Vigier was the repayment of a loan.

I would therefore, with some regret, dismiss the appeal.

Lord Upjohn.—My Lords, on 24th January, 1952, the Appellant executed a settlement in favour of two named children then in comparatively early infancy. The trustees were his wife, Mrs. De Vigier, and his solicitor, Mr. Simmonds. He settled certain patent rights and licences made thereunder which then constituted the trust fund and the settlement contained the widest possible power of investment in any investments as though the trustees were absolute owners. The trusts declared by the settlement were in a familiar form, that is to say, the two children respectively acquired vested interests in the trust fund on respectively attaining the age of 25 years, and until they attained the age of 21 the trustees had a discretion to apply the income or any part thereof in the maintenance of the children, and subject thereto they were directed to accumulate it.

The Appellant was a director of Acrow (Engineers), Ltd, which I shall call Acrow, and shortly after the execution of the settlement certain preference shares in Acrow were transferred to the trustees, and by 1957, when the material events occurred, the trustees had apparently invested substantial sums from accumulated income in Acrow ordinary shares. In the autumn of 1957 the trustees entered into a number of transactions. It is quite clear that they did so because Acrow were making a rights issue of shares and the trustees, probably having some inside knowledge, very sensibly desired to take advantage of this rights issue. The facts have been set out at length in the Case Stated by the Commissioners and the judgment of Wilberforce, J., and in the Court of Appeal, and I do not propose to recite them in any detail here. Suffice it to say that in August, 1957, the trustees purchased from Mrs. De Vigier some Acrow shares. In September, 1957, they subscribed for new shares in Acrow, Ltd., which, as holders of ordinary shares, they were entitled to do, and in early October, 1957, they purchased further Acrow shares on the London Stock Exchange. For these purposes they had to find nearly £6,600, but unfortunately at this time the trustees' bank account was in credit to the sum only of £140, so in September and at the beginning of October Mrs. De Vigier advanced sums aggregating £7,000, which she paid to the trustees' banking account, and out of which they discharged their obligations just mentioned. Later on, in May and August respectively, 1958, the trustees drew cheques for £2,500 and £4,500 in favour of Mrs. De Vigier, thereby repaying to her the money she had paid in the previous autumn.

That seemed a very sensible transaction. They were acquiring authorised shares and the propriety of their action could not be challenged, although

(Lord Upjohn)

it is possible that they were not in fact authorised to purchase additional shares on borrowed money. But that is a minor point. No one has suggested that the beneficiaries have thereby suffered any loss. Having regard to Sections 10(4) and 16 of the Trustee Act, 1925, they were entitled to borrow money to subscribe for the new shares to which they were entitled as holders of existing shares.

It would surprise anyone not expert in Income Tax matters to learn that this seemingly sensible capital transaction, obviously designed to overcome the temporary lack of cash in the trustees' bank account, has in fact attracted an additional assessment of Surtax upon the Appellant in the sum of £12,174, that being the grossed-up sum which, after the deduction of Income Tax at the standard rate for the year, would amount to £7,000. This, however, comes about because Section 408 of the Income Tax Act, 1952 (re-enacting the substance of similar legislation in the years 1936 and 1938) provides, omitting immaterial words, by Sub-section (1):

> " Any capital sum paid directly or indirectly in any . . . year of assessment by the trustees of a settlement . . . to the settlor shall—(*a*) to the extent to which the amount of that sum falls within the amount of income available up to the end of that year, be treated for all the purposes of this Act as the income of the settlor for that year".

Sub-section (7):

> " . . . in this section—' capital sum ' means—(i) any sum paid by way of loan or repayment of a loan ".

The Section concludes with these fatal words:

> " references to sums paid to the settlor include references to sums paid to the wife . . . of the settlor."

So it is said that there was a loan made by Mrs. De Vigier to the trustees in 1957, and in 1958 there was a repayment of that loan within that Section; as she is the wife of the settlor he is accordingly liable to Surtax thereon. That is the sole question before your Lordships. The Special Commissioners decided that the sums made available to the trustees were not loans in the ordinary meaning of that word and that the repayment of those advances was not repayment of the loans. This decision was reversed by Wilberforce, J., who held that the Crown's contention was right, and he was upheld unanimously in the Court of Appeal. Before your Lordships, Counsel for the Appellant advanced three main propositions. His first proposition was that if a trustee lends money to himself and his co-trustee his duty and his interest would conflict, and founding upon the famous observations of Lord Cranworth, L.C., in *Aberdeen Railway Company* v. *Blaikie Brothers* (1854), 1 Macq. 461, at p. 471, he submitted that any such contract would be void *ab initio* and a nullity. Counsel later abandoned this proposition for, as many subsequent authorities have made clear, the contract between a trustee and one with whom he is in a fiduciary relationship is not void but voidable. His second main point was that it was *ultra vires* for the trustees to enter into these engagements (save as to the subscription for new shares) and therefore no contract could be implied. Counsel again rightly abandoned this startling submission, for the doctrine of *ultra vires* is one which has been developed entirely as a result of the juridical concept of the limited capacity of corporations and has no application whatever to the activities of individuals. An individual who commits a breach of trust is sued for breach of trust. If any doctrine of *ultra vires* was applicable then there would have been no room for the doctrine of purchaser for value without notice. His third point was that in any event in fact there was no contract

(Lord Upjohn)

between Mrs. De Vigier and the trustees or between her and her co-trustee. She was repaid because in equity she had a right of indemnity to be reimbursed the money she advanced, and he relied strongly on In re *Pumfrey* (1882), 22 Ch. D. 255. The argument proceeds that there being no contract there could not therefore be any contract of lending, no loan and no repayment of any loan, so Section 408 did not apply.

No one gave evidence in this case. The Appellant, his solicitor or his wife could have done so had they chosen, but they did not do so. I make no criticism of them for that, but in the circumstances, before considering the submissions of law which I have outlined, it is necessary to draw inferences from the known facts. Where a trustee makes a payment of money into the trustee's account, it may be a matter of some difficulty in some cases to know whether he is making an advance upon the terms that he is to be repaid or whether he is making a gift to the trust. It must all depend on the purposes for which the payment is made and all the other circumstances of the case. Fortunately in this case I think there can be no possible doubt as to the purpose of the payments of the £7,000 into the trustees' banking account by Mrs. De Vigier. Quite plainly it was because the trustees were anxious to take advantage of the forthcoming rights issue of Acrow but unfortunately the trustees' banking account at that time only had £140 in credit. So Mrs. De Vigier paid that money to the trustees' banking account in order that the transactions that I have briefly summarised might be carried out. Quite plainly she made this payment upon the terms that she was to be repaid, and she was repaid, as it must be assumed, out of surplus income of the trust fund that became available later. Counsel for the Appellant does not shrink from this, and he accepts at once that the proper inference is that Mrs. De Vigier's payment to the trustees' banking account was upon the terms that she would be repaid later on out of the trust fund, but he insists that there was no contract. I for my part am quite unable to see why there was no contract between Mrs. De Vigier and her co-trustee when it is admittedly proper to infer that when she made the advance it was on terms that she was to be repaid out of the trust fund. No one has suggested that Mr. Simmonds was making himself personally liable to repay the sum or any part thereof. I accept at once that there was no contract of loan whereby Mrs. De Vigier looked to herself and her co-trustee to repay the loan. She looked entirely to reimbursement from the trust fund. The relevance of the case of In re *Pumfrey* is that in those circumstances equity will assist her to recover the money that she has advanced. That was a case similar in many respects to the present one. The trustees for sale were requested by the tenant for life and her husband to purchase a house. The trust fund was short of the desired purchase money by some £449. The tenant for life's husband promised to find it but he failed, and so one of the trustees, his uncle, out of the goodness of his heart, provided the money, which he did by borrowing from a bank who had full notice of the purpose for which the money was required. They could not plead successfully that they were purchasers for value without notice. The husband of the tenant for life failed entirely to pay, and so the bank attempted to foreclose upon the estate of the trustee uncle, who had by that time died. Kay, J., held that the bank stood in the shoes of the trustee, no higher, but the trustee in those circumstances was entitled to a lien on the trust fund for the amount of his advance. That was plainly right. That principle is applicable here and shows that, though Mrs. De Vigier has no action for debt against herself and her co-trustee (which would have been impossible before 1926 in any event), she is entitled to reimbursement out of surplus income of the trust fund by proceedings in equity.

(Lord Upjohn)

But the mere fact that under the old forms of pleading, in the circumstances of this case, an action of debt for return of a loan would not lie, does not prevent the transaction being properly described as a loan. Thus in *Mathew* v. *Blackmore* (1857), 1 H. & N. 762, a trustee borrowed a sum of money from another for the purposes of his trust upon the terms that he should not be personally liable but that the person who has paid the money should look only to the trust funds to be reimbursed. The action for debt failed, but nevertheless it is quite plain from the judgments that it was treated as a loan to be repaid out of the trust funds.

The ultimate question to be decided is whether the transaction which I have described is properly described as one of loan when Mrs. De Vigier advanced the money and of repayment of the loan when she received it back.

Upon this matter I do not see how it is possible to entertain any doubt. It matters not how you describe the transaction. Mrs. De Vigier made an advance of money to the trustees upon the terms that she should be repaid out of the trust fund, and that seems to me not merely colloquially, but as an accurate use of legal language, to be properly described as a loan and repayment of a loan, so that, however hard it may seem, Section 408 is applicable.

I would dismiss this appeal with costs.

Questions Put:

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and the appeal dismissed with costs.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Simmonds, Church, Rackham & Co.]
