A HIGH COURT OF JUSTICE (CHANCERY DIVISION)—29TH AND 30TH JANUARY 1969

COURT OF APPEAL—20TH, 21ST AND 22ND MAY 1969

HOUSE OF LORDS—22ND, 23RD, 27TH, 29TH AND 30TH APRIL AND 15TH JULY 1970

B ***In re* Vandervell's Trusts**
**White and Others *v.* Vandervell Trustees Ltd. and Commissioners of Inland Revenue**[1]

*Practice—Parties—Joinder—Proceedings between subjects raising issues material to income tax—Joinder of Commissioners of Inland Revenue—Income Tax Act* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.*10), *ss.* 52 *and* 64; *Income Tax Management Act* 1964 (*c.*37), *s.*5(6); *R.S.C., Ord.* 15, *r.*6(2).

C *In* 1949 *V made a settlement in favour of his issue, of which at all material times T Ltd. was trustee. In* 1958 *V gave certain shares in a company under his control to a third party, on the terms* inter alia *that the donee should grant T Ltd. an option to purchase them for* £5,000. *In October* 1961 *T Ltd. exercised the option, paying the* £5,000 *out of the funds of the settlement, and between then and January* 1965 *dividends of* £1,250,000 *gross on* D *the shares were paid to T Ltd. In January* 1965 *V executed a deed assigning any interest which he might have in the option or the shares and in the dividends thereon to T Ltd. on the trusts of the settlement. V died in March* 1967. *The House of Lords having held in* Vandervell *v.* Commissioners of Inland Revenue 43 T.C. 519; [1967] 2 A.C. 291 *that prior to its exercise the option was held by T Ltd. on a resulting trust for V, assessments to* E *surtax were made on his executors in respect of the dividends received by T Ltd. up to January* 1965. *The executors gave notice of appeal, and in May* 1968 *brought proceedings against T Ltd. by way of originating summons claiming a declaration that they were entitled to the net amount of the dividends. T Ltd. contended that V had parted with his beneficial interest in the shares (or in the dividends) before the dividends were received or, alterna-* F *tively, by the assignment of January* 1965.

*The executors (the Plaintiffs) desired to join the Commissioners of Inland Revenue as a second Defendant in the proceedings against T Ltd., and the Commissioners having consented, the Master on the executors' application made an Order in October* 1968 *under R.S.C., Ord.* 15, *r.*6(2)(*b*), *authorising the Commissioners to be so joined as a person whose presence* G *before the Court was necessary to ensure that all matters in dispute in the cause or matter might be effectually and completely determined and adjudicated upon. T Ltd. applied for the Commissioners to be struck out on the grounds* (a) *that the joinder was not authorised by Ord.* 15, *r.* 6, *and* (b) *that the Court had no jurisdiction to oust the statutory procedure for determining appeals against income tax assessments.*

(1) Reported (Ch. D.) [1969] 1 W.L.R. 437; [1969] 1 All E.R. 1056; (C.A.) [1970] Ch. 44; [1969] 3 W.L.R. 458; [1969] 3 All E.R. 496; (H.L.) [1970] 3 W.L.R. 452; [1970] 3 All E.R. 16 (*sub nom.* Vandervell Trustees Ltd. *v.* White).

Held, *that the matters in dispute between the executors and T Ltd. could be effectually and completely determined and adjudicated upon in the absence of the Commissioners of Inland Revenue and accordingly Ord.* 15, *r.*6, *did not apply.*

Per *Lord Reid: the Revenue had been joined in a number of cases in the past, and this was inexplicable if there was any technical objection under the Income Tax Acts.*

Per *Lords Morris of Borth-y-Gest and Wilberforce: either the Crown or the subject had the right to insist on the statutory procedure for dealings with disputed assessments to income tax being followed; where both consented, the question whether the Crown could be brought into litigation between subjects depended either on the consent of all parties being given or failing that upon the Rules of the Supreme Court.*

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The Commissioners of Inland Revenue having, by letter dated 9th August 1968, consented to being joined as Defendants in proceedings brought by way of originating summons by the executors of Guy Anthony Vandervell deceased, Plaintiffs, against Vandervell Trustees Ltd., Defendants, Master Heward on 23rd October 1968, on the application of the Plaintiffs, made an Order under R.S.C., Ord. 15, r.6(2)(*b*), for the Commissioners of Inland Revenue to be so joined. The first Defendant, Vandervell Trustees Ltd., issued a summons applying for the Commissioners to be struck out, and the application was adjourned into Court.

The case came before Buckley J., in the Chancery Division, on 29th and 30th January 1969, when judgment was given against the executors, allowing the application. The executors were ordered to pay the costs both of the first Defendant and of the Crown.

*B.L.Bathurst Q.C.* and *Michael Miller* for the Applicant (first Defendant), Vandervell Trustees Ltd.

*A. J. Balcombe* for the Respondents (Plaintiffs), the executors.

*J. P. Warner* for the Crown.

The following cases were cited in argument in addition to those referred to in the judgment:—*The Result* [1958] P.174 ; *Pilkington* v. *Commissioners of Inland Revenue* 40 T.C. 416 ; [1961] Ch. 466 ; [1964] A.C. 612 ; In re *Leek* [1967] Ch. 1061 ; *Attorney General* v. *Avelino Aramayo & Co.* 9 T.C. 445 ; [1925] 1 K.B.86 ; In re *Abrahams' Will Trusts* [1969] 1 Ch.463 ; *Buxton* v. *Public Trustee* (1962) 41 T.C.235.

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**Buckley J.**—By this application the first Defendants, Vandervell Trustees Ltd. (whom I will refer to as " the trustees "), seek to have the second Defendants, the Commissioners of Inland Revenue, struck out as defendants in these proceedings.

The Plaintiffs are executors of the will of the late Mr. Vandervell, and the trustees are trustees of a settlement which he created for the benefit of members of his family in the year 1949. In November 1958 Mr. Vandervell caused to be transferred to the Royal College of Surgeons a holding of 100,000 " A " ordinary shares in a company in which he was concerned called Vandervell Products Ltd., and on 1st December 1958 the Royal College of Surgeons granted an option for five years to the Trustees to acquire those shares at the price of £5,000. On 11th October 1961 the Trustees exercised the option, and

A they acquired the shares for £5,000 which was provided out of the funds subject to the trusts of the settlement of 1949. Prior to the exercise of the option certain dividends had been declared and distributed on the 100,000 "A" ordinary shares, and those dividends were paid to the Royal College of Surgeons, the then registered holders of the shares ; litigation ensued which eventually went to the House of Lords, which resulted in its being held, as I B understand it, that Mr. Vandervell had not wholly divested himself of all beneficial interest in the option in relation to the shares, with the result that he was surtaxable upon the dividends which had been paid to the Royal College of Surgeons(1). Then, the option having been exercised, the shares were transferred to the trustees, and subsequently further dividends have been declared in relation to a period between 11th October 1961, the date of the C exercise of the option, and 19th January 1965, when Mr. Vandervell executed a deed by which he assigned to the trustees all of his interest, if he had any, in the option and the shares to be held on the trusts of the 1949 settlement. During the period between the exercise of the option and the execution of that deed dividends were declared and distributed on the 100,000 "A" ordinary shares in a gross sum of over £1,250,000 and a net sum after deduction of D tax at the standard rate of more than £750,000.

In these proceedings, which were commenced by originating summons on 31st May 1968, the Plaintiffs, as executors of the will of Mr. Vandervell, who died in March 1967, seek an order that the trustees pay them the net amount of those dividends—and I think there was also a capital distribution, but that is a complication which does not give rise to any difficulties—after deduction E of the price paid by the trustees for the shares on the exercise of the option. They further seek a declaration that they are entitled to those moneys and an account of the dividends and payment of what is found on the account. Stated shortly, it is a claim by the Plaintiffs to be entitled to these dividends subject only to giving credit for the £5,000 that was paid for the shares by the Trustees. Those proceedings, as originally framed, were proceedings between F the Plaintiffs and the trustees alone, and quite appropriately framed in that way, for the claim was a claim by the Plaintiffs, representing the estate of Mr. Vandervell, against the trustees as the body which had received the dividends which the Plaintiffs claim belong to the estate of the deceased.

On 23rd October 1968 the Master on the application of the Plaintiffs authorised the addition of the Commissioners of Inland Revenue as G Defendants, and they have been added by way of amendment accordingly. It is common ground that that Order was made under R.S.C., Ord. 15, r. 6(2)(*b*). The trustees now seek to have the name of the Commissioners of Inland Revenue struck out as Defendants on the ground that they ought not to have been joined in that way. The Revenue have raised assessments on the estate of Mr. Vandervell for tax on the dividends in question. Those H assessments are under appeal, and that position is being held in suspense pending the determination of the rights of the executors and the trustees respectively in relation to the dividends.

The deed of 19th January 1965 may possibly have the effect of justifying the trustees in retaining the dividends even if at the time when they were declared the right to receive them beneficially remained in Mr. Vandervell. I It does not follow, therefore, as night follows day, if it is declared that the trustees are entitled to retain the dividends, that the estate may not be liable

(1) *See* Vandervell *v.* Commissioners of Inland Revenue 43 T.C. 519; [1967] 2 A.C. 291.

**(Buckley J.)**

to tax, for the liability to tax would have arisen when the dividends were paid and could not be put an end to by any *ex post facto* operation of the deed of 19th January 1965.

The proceedings as they were originally framed, as I say, seem to me to have been perfectly properly framed as proceedings between the executors and the trustees alone, and the Commissioners of Inland Revenue can only have been properly added as Defendants if the case is one which falls within the ambit of Ord. 15, r. 6(2), which so far as relevant for the present purpose, provides that :

> " At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application . . . (*b*) order any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon be added as a party ".

Now, I think it is clear that the Commissioners of Inland Revenue were not persons who ought to have been joined as parties when the proceedings were commenced. The claim put forward and the relief sought in the summons raise issues which can perfectly well be determined between the Plaintiffs and the trustees without the presence of the Commissioners of Inland Revenue. The outcome of the dispute between the Plaintiffs and the trustees may have fiscal consequences. The liability to tax of the estate of Mr. Vandervell may be affected by the result of the investigation of those matters, but the relief sought is relief which could perfectly properly be sought in proceedings in which the only parties were the executors and the trustees. Therefore, I do not think that it can be said that the Commissioners of Inland Revenue were persons " who ought to have been joined as a party " to the proceedings. Are they then persons " whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined "? The matters which have to be determined are the question whether, having regard to the history of the transactions I have mentioned earlier in this judgment, the trustees are bound to pay a certain sum or sums to the Plaintiffs. Those are issues which, it seems to me, can perfectly well be determined without the presence of the Commissioners of Inland Revenue as parties to the proceedings ; and I find it difficult to see how it can be said that their presence as parties is necessary to ensure that these matters are " effectually and completely determined ".

Much reliance has been placed by the Plaintiffs upon the decision of the Court of Appeal in *Gurtner* v. *Circuit* [1968] 2 Q.B. 587. There the plaintiff was a pedestrian who had been injured as the result of an accident involving a motor cycle which was driven by the defendant. At the time of the accident the defendant gave his name and address and produced his certificate of insurance to the police, but the police did not know and the plaintiff did not know who his insurers were. In due course the plaintiff issued a writ claiming damages for personal injuries suffered in the accident, but he was unable to serve the defendant because the defendant had gone to Canada and could not be traced, and he was unable to discover who were the defendant's insurers. Consequently there was no one upon whom the proceedings could be effectively served. Leave was obtained to effect substituted service, and the plaintiff's solicitors informed a body called the Motor Insurers' Bureau of the plaintiff's claim and asked them to try and help to

trace the defendant's insurers; but that the Bureau was unable to do. The Bureau was under an obligation to the Minister of Transport to make good to the plaintiff any sum for which he got judgment against the defendant but was unable in fact to recover. That was an obligation which did not arise directly between the plaintiff and the Bureau but arose out of an agreement between the Bureau and the Minister which the Minister was in a position to compel the Bureau to implement. The result was, as Lord Denning pointed out in the course of his judgment, that unless the Bureau was to be allowed to contest the claim the whole thing would have gone by default. The Bureau would have been bound to meet the judgment and foot the bill although it had had no opportunity of resisting the claim or attempting to confine the damages in any way. In those circumstances the Bureau applied to be made a defendant in the proceedings. At pages 595–6, Lord Denning M.R. said this:

> "It seems to me that when two parties are in dispute in an action at law, and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute to 'be effectually and completely determined and adjudicated upon' between all those directly concerned in the outcome. I would apply this proposition to the present case. If the Motor Insurers' Bureau are not allowed to come in as defendants what will happen? The order for substituted service will go unchallenged. The service on the defendant Circuit"

—that was the name of the defendant—

> "will be good, even though he knows nothing of the proceedings. He will not enter an appearance. The plaintiff will sign judgment in default of appearance. The judgment will be for damages to be assessed. The master will assess the damages with no one to oppose. The judgment will be completed for the ascertained sum. The defendant will not pay it. Then the plaintiff will be able to come down on the Motor Insurers' Bureau and call upon them to pay because they have made a solemn agreement that they will pay. They made an agreement with the Minister of Transport on June 17, 1946, by clause 1 of which they agreed that if a judgment for an injured person against a motorist is not satisfied in full within seven days, the Motor Insurers' Bureau will pay the amount of the judgment to the injured person . . . It is thus apparent that the Motor Insurers' Bureau are vitally concerned in the outcome of the action. They are directly affected, not only in their legal rights, but also in their pocket. They ought to be allowed to come in as defendants. It would be most unjust if they were bound to stand idly by watching the plaintiff get judgment against the defendant without saying a word when they are the people who have to foot the bill."

Diplock L.J. in his judgment said (at page 601):

> "The bureau is plainly not 'a person who ought to have been joined as a party'. The action is perfectly well constituted without it. The question is whether, within the meaning of the rule, the bureau is 'a person . . . whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon'."

**(Buckley J.)**

Then he goes on to explain why he thought in natural justice that it was right that the Bureau should be made a defendant. On page 602 at the foot he said :

> " Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff upon the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained."

He pointed out at the foot of page 603 that the case was an unique one. He said :

> " Nothing that I have said is intended necessarily to have any wider application than to this unique legal situation resulting from the Minister's contract with the bureau. I prefer to decide other cases on their own different facts when they arise."

Now, it has been said in the present case that the decision of the issues between the Plaintiffs and the trustees will affect the Commissioners of Inland Revenue in their pocket because if the trustees succeed in their claim to be entitled to retain the dividends it may be that the liability of the estate to tax in respect of these dividends will disappear ; and, therefore, it is said, this is a matter in which the Commissioners of Inland Revenue have an important interest affecting their pocket and it is desirable that they should be heard in these proceedings and that the judgment should be binding upon them. But the position seems to me very different in the present case from the position in *Gurtner* v. *Circuit*[1] because there the whole point of the case was that there was no one to fight the plaintiff's claim unless the Bureau was allowed to do so, and the Bureau was the body that was going to have to meet the claim eventually. In the present case, however, there are the Plaintiffs themselves who are concerned to dispute the case put forward by the trustees, and the interests of the Plaintiffs and the Inland Revenue go hand in hand except so far as the matter may be affected *ex post facto* by the deed of 19th January 1965, which, as I have pointed out, may have the result of leaving the estate liable for tax although the trustees are entitled to retain the dividends. But apart from that aspect of the matter the Plaintiffs and the Inland Revenue have an identical interest ; and in those circumstances I do not think that it can be said that the presence of the Inland Revenue before the Court is necessary to ensure that all matters in dispute in the cause or matter may be " effectually and completely determined and adjudicated upon ", and unless that can be said the case is not one which falls within the ambit of the rule at all.

The trustees have objected to the presence of the Commissioners of Inland Revenue as Defendants on three grounds : first, that the addition of a party will increase the costs of the proceedings ; second, that the presence of the Inland Revenue as a party wil expose the trustees' witnessess to double cross-examination—cross-examination not only by the Plaintiffs but also by the Commissioners of Inland Revenue ; and, third, that if the trustees are successful they will be at risk of an appeal not only by the Plaintiffs but, if the Plaintiffs should not choose to appeal, they would be at risk of an appeal by the Commissioners of Inland Revenue. It is on those grounds that the trustees say that they ought not to be compelled to acquiesce in having the Commissioners of Inland Revenue joined as co-defendants with them in the proceedings. Unless there were grounds upon which the Master could

(1) [1968] 2 Q.B. 587.

properly have made the Order joining the Commissioners under Ord. 15, r. 6 (2)(*b*), the Order was one which I think he ought not to have made. For the reasons which I have endeavoured to indicate I do not think that this is a case which does fall within the terms of the rule, and I think the Order ought not to have been made.

I would like to emphasise that nothing which I say has any application to a case in which the Commissioners of Inland Revenue are joined initially as parties in the proceedings and nobody objects to their being there. There are occasions, I have no doubt, when it is very convenient that matters, maybe questions of construction or other questions connected with rights to property, the decision of which will have fiscal consequences, should be decided in proceedings in which the Commissioners are there, can be heard by the Court and will be bound by the Order of the Court ; and where the Commissioners are joined and nobody objects I do not want it to be supposed that anything I have said in this judgment indicates that such a course is to be deprecated in any way. But I do not think it is right that the Defendants should be compelled to have the Commissioners joined as co-defendants with them when they do not wish it and if the circumstances are not such as to give the Court effective jurisdiction to make the Order adding the Commissioners.

There have been a number of cases in which the Court has indicated the convenience of having the Commissioners present when questions of these sorts arise. I have been referred to In re *Midwood's Settlement* [1968] Ch. 238 and to a case of Harman J.'s, *Cornwell* v. *Barry* (1955) 36 T.C. 268. There is another case in the Court of Appeal where some observations are made on this sort of subject, *Asher* v. *London Film Productions Ltd.* [1944] 1 K.B. 133, and there has been a recent decision of Donaldson J.'s, at present unreported, in a case called *Westminster Bank Executor and Trustee Co. (Channel Islands) Ltd.* v. *National Bank of Greece S.A.*[1] In those cases the Courts indicated that it might often be convenient to have the Commissioners of Inland Revenue present in proceedings where questions are raised the solution of which may result in fiscal consequences which are of importance to the Revenue. But although there may be great convenience in that course in some cases, I think there is substance in the grounds which the Defendants here rely upon for saying that it would be unfortunate if the Commissioners were to continue as Defendants in these proceedings, on the grounds that I have already indicated. Accordingly, I think they are perfectly entitled to stand upon their rights and say, as they do say, and I think say rightly, that in fact there was no proper basis justifying the Master in making the Order adding the Commissioners of Inland Revenue as Defendants. Accordingly on this summons I will say that, notwithstanding the Order of 24th October 1968, the Commissioners of Inland Revenue should be struck out as Defendants to these proceedings.

**Bathurst Q.C.**—I am much obliged to your Lordship. Then, the question of costs arises. I submit to your Lordship that this trouble has been brought about by the Plaintiffs' attempt to bring the Revenue in, an attempt which your Lordship has now decided has failed, and that they should pay the costs.

**Balcombe**—Will your Lordship hear me on costs?

**Buckley J.**—Yes.

(1) To be published later in this volume.

**Balcombe**—First of all, will your Lordship give me leave to appeal? This is an interlocutory matter, as your Lordship knows, and in my submission it raises points of substance on which I am asking for leave to appeal. That is my first application.

**Buckley J.**—Yes, I give you leave to appeal, Mr. Balcombe.

**Balcombe**—If your Lordship pleases. On the question of costs, I accept, of course, that my clients must pay the costs in this Court before your Lordship. Costs must follow the event here.

**Buckley J.**—Yes.

**Balcombe**—Without indulging in any semantic niceties about what is meant by "consent", I do not think it is suggested that the Trustee Company, the first Defendant, at any time raised any overt objection to the course we proposed, and when we went before the Master and got the Order of 24th October 1968 it was done without any opposition on their part. In those circumstances it would be quite wrong, in my submission—

**Buckley J.**—I gather from what I have seen that it was not a consent order in any sense, but there was not any effective opposition.

**Balcombe**—My Lord, that is as I understand it. As I was going to say, no Counsel went before the Master on that occasion. Unfortunately, the managing clerk of those instructing me, who did go, is ill at the moment. My instructions are, and I think I read this out yesterday: "The Master inquired of the representative of the solicitors instructing my learned friend whether he had any observations to make, whereupon he said that he had none"—no observations—"but asked that the usual consequences should follow, namely that the costs of and occasioned by the amendment should be his in any event."

**Buckley J.**—I do not think it was strictly a consent order, but it was an Order that was not resisted.

**Balcombe**—It was not opposed, exactly. Therefore, My Lord, we incurred those costs, and the costs of this summons at any rate up to this Court were incurred because of the way it was handled.

**Buckley J.**—I do not think any suggestion has been made that you should be ordered to pay any costs other than the costs of this present application.

**Bathurst Q.C.**—That is all I am asking.

**Balcombe**—In this Court, my Lord. The Master reserved the costs of the summons before him to your Lordship because both my learned friend Mr. Miller and I, and I think my learned friend Mr. Warner also, said we wanted the matter dealt with by the Judge. So your Lordship has to deal with two sets of costs: one of this hearing before your Lordship, and the other of the hearing before the Master.

**Buckley J.**—That is, the hearing before the Master of this summons to strike out?

**Balcombe**—Yes, of this summons to strike out. I say we should have the costs before the Master because this application before the Master was necessitated by the change of heart on the part of the Defendants. A course to which they had previously had no objection they changed their minds about and went back before the Master, and they have succeeded, as it now transpires, in persuading your Lordship that the Master had no jurisdiction to make the Order, to which they had not originally objected. Therefore, my Lord, at any rate up to the hearing before the Master, the costs were incurred because of this change of heart. I submit to your

Lordship that we should have the costs before the Master and also the costs thrown away, as it now turns out, on the first summons.

**Buckley J.**—Well, I do not know what happened about the costs of the first summons.

**Balcombe**—I have told your Lordship, because, as I have said, the Order the Master made, and we have got his note, is "costs of and occasioned by the amendment to be the Defendants' in any event", which of course is the normal course where the Plaintiffs come and ask for an amendment—they get the costs. So they got the costs of the amendment, to which they were not objecting. They then have a change of heart and go back to the Master. As I have said, I accept that the costs before your Lordship must be theirs—there is no question of argument there—but in my submission, because all these costs have been thrown away unnecessarily by this change of heart, it would be right that the Defendants should pay the costs of the first summons before the Master and of this summons before the Master in any event.

**Buckley J.**—The costs of the first summons before the Master are not before me, are they? That has been dealt with, surely?

**Balcombe**—That is, I think, strictly correct, but I think your Lordship could make an Order.

**Bathurst Q.C.**—I understand that the Master made an Order that the costs of the first summons should be costs in the cause. That has been dealt with, and your Lordship is not concerned with that.

**Balcombe**—It has been dealt with; your Lordship is quite right.

**Buckley J.**—I think that all I shall do is to say that the Plaintiffs shall pay the Defendants' costs of this summons—all their costs of this summons.

**Balcombe**—Including the costs before the Master, my Lord?

**Buckley J.**—Yes.

**Balcombe**—Your Lordship is not accepting my submission that the costs of this summons before the Master should not follow the event?

**Buckley J.**—I do not see why they should not follow the event just as much as the rest of the costs of this summons.

**Balcombe**—For the very good reason that I endeavoured to persuade your Lordship that this summons would not have been necessitated at all had it not been for what I call the change of heart on the part of the Defendants. If they had wanted to take the point they have now taken before the Master on the first summons they could have done so. They did not. Therefore there is an extra set of costs incurred unnecessarily because of their change of heart. I quite accept that, the Defendants having come to your Lordship and succeeded, we should have to pay those costs, but it is quite wrong, in my submission, for us to have to pay the costs before the Master when the Defendants have changed their mind in the interval between the two hearings before the Master.

**Buckley J.**—The order I shall make is that the Plaintiffs should pay the Defendants' costs of this summons.

**Balcombe**—If your Lordship pleases.

**Warner**—My Lord, does that mean both Defendants? The position is a little unusual here. As your Lordship knows, our position was basically one of neutrality. We were brought here with our consent but not for our benefit. The purpose, as my friend Mr. Balcombe told your Lordship, was that we should be bound by the Order of the Court and by the judgment and

that is for the Plaintiffs' benefit. In my submission we ought not to suffer costs for trying to be helpful. A

**Buckley J.**—I do not see why you should suffer costs, I agree.

**Warner**—If your Lordship pleases.

**Buckley J.**—Mr. Balcombe, you have not addressed me at all on the Revenue's costs. What about those? Have you any submission about that?

**Balcombe**—My Lord, I would repeat the same submissions about those that I made to your Lordship. Having said that, I must say, I have not brought the Revenue here as such. I have been very grateful for my learned friend Mr. Warner's assistance. B

**Buckley J.**—You are responsible for their being here since you got them added as parties in the first instance.

**Balcombe**—That is so, but there is no *lis* between them and me. C

**Buckley J.**—No. I think the answer is that the order extends to the costs of both Defendants.

**Warner**—I am much obliged, my Lord. There is one matter which I raise with the utmost diffidence. Your Lordship said in the course of your judgment that the liability for tax arose when the dividends were declared. I think strictly it is when they are paid. D

**Buckley J.**—That is the sort of matter which you know a great deal more about than I do, Mr. Warner, and if I was in error, I am sorry. But the point remains the same ; of course, they have been paid.

**Warner**—Yes, they have. It makes no difference, but people pick out sentences in judgments and then cite them.

**Buckley J.**—The liability for tax depends on payment rather than declaration of dividend, but the point is that the dividends were paid before the confirmatory deed was executed. E

**Warner**—Certainly, my Lord. It makes absolutely no difference, but it was just that I was apprehensive that somebody might in a later case pick out this sentence in your Lordship's judgment as authority for tax being paid on dividends when declared. F

**Balcombe**—Do I understand, my Lord, that I pay the costs of the Defendants in any event? Your Lordship appreciates that there is a difference between payment of costs and payment of costs in any event in an interlocutory matter. An order for payment of costs in any event means that costs are taken into account in the final reckoning. On the other hand, an order for payment of costs has the effect of an immediate order for taxation, which would not be right in this type of case. G

**Buckley J.**—" In any event " I should have thought was right. I thought it worked the other way round, but perhaps you are right. I thought that if you said " in any event " you were liable to be taxed straightaway.

**Balcombe**—No, this was cleared up in the Court of Appeal about a year ago. I hope I am right, and perhaps the learned Registrar will correct me if I am wrong, but I think that an order for costs means immediate taxation and an order for costs in any event means that they have to be paid by the defendants in any event but not until final taxation. H

**Buckley J.**—I do not think there should be a separate taxation. " In any event ", if that is the right thing to say.

**Balcombe**—My Lord, I am obliged. I

A The executors having appealed against the above decision, the case came before the Court of Appeal (Lord Denning M.R. and Sachs and Karminski L.JJ.) on 20th, 21st and 22nd May 1969, when judgment was given unanimously in favour of the executors, reversing the Order to strike out the Commissioners of Inland Revenue. Vandervell Trustees Ltd. was ordered to pay the costs both of the executors and of the Crown.

B *A. J. Balcombe Q.C.* and *J. M. Chadwick* for the Respondents to the summons (Plaintiffs), the executors.

*B. L. Bathurst Q.C.* and *Michael Miller* for the Applicant (first Defendant), Vandervell Trustees Ltd.

*J. P. Warner* for the Crown.

The following cases were cited in argument in addition to those C referred to in the judgments:—*Buxton* v. *Public Trustee* (1962) 41 T.C.235; In re *Abrahams' Will Trusts* [1969] 1 Ch.463; *The Result* [1958] P.174; *Marsh* v. *Marsh* [1945] A.C.271; In re *Midwood's Settlement* [1968] Ch.238; *Moser* v. *Marsden* [1892] 1 Ch.487; *Soul* v. *Marchant* (1962) 40 T.C.508.

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**Lord Denning M.R.**—Twenty years ago, in 1949, the late Mr. Vandervell made a settlement on trust for his children and descendants. The trustees D were a company now known as Vandervell Trustees Ltd. Ten years later, in November 1958, Mr. Vandervell transferred 100,000 "A" ordinary shares in a company of his called Vandervell Products Ltd. to the Royal College of Surgeons. A day or two later, on 1st December 1958, the Royal College of Surgeons gave Vandervell Trustees Ltd. an option to purchase those 100,000 shares for £5,000. The option was not exercised at the time by E the trustees. During the next two or three years, from 1958 to 1961, the dividends on those 100,000 shares were received by the Royal College of Surgeons. These dividends came to £250,000. On 11th October 1961 Vandervell Trustees Ltd. exercised the option. They paid £5,000 to the Royal College of Surgeons, and the shares were transferred to Vandervell Trustees Ltd. Thenceforward for the next four years, from 1961 till 1965, the F dividends were paid to Vandervell Trustees Ltd. They came to £1,250,000 gross, before tax. In 1965 Mr. Vandervell executed a deed by which he assigned any interest which he might have in the option or the shares to Vandervell Trustees Ltd. upon trust for the children under the settlement which he had arranged as far back as 1949. Then on 10th March 1967 Mr. Vandervell died.

G There has been litigation as to who was beneficially entitled to this option from 1958 to 1961. The House of Lords decided that there was a resulting trust in favour of Mr. Vandervell himself. The case, *Vandervell* v. *Commissioners of Inland Revenue,* is reported in [1967] 2 A.C. 291(1). The Revenue say that that decision governs the position subsequent to 1961 until 1965: so that Mr. Vandervell himself was entitled beneficially to the dividends which were H paid to the trustees between 1961 and 1965. They came to £1,250,000. The Revenue say that Mr. Vandervell was liable to pay surtax on that £1,250,000: and, now that he has died, the executors should pay it. But Vandervell Trustees Ltd. claim that these £1,250,000 were their dividends. They were received by them from 1961 to 1965. They held them as trustees, they say, for the children, and they, the trustees, are not liable to I pay surtax.

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(1) 43 T.C. 519.

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Those issues have resulted in two separate sets of proceedings against the executors: on the one hand, the Revenue claim against the executors for surtax on the dividends of £1,250,000, on the ground that they belonged to Mr. Vandervell. They have made an assessment on the executors: and the executors are appealing against it. On the other hand, the Vandervell Trustees Ltd. claim that, as between them and the executors, the dividends belong to the Vandervell Trustees Ltd. The executors have issued an originating summons in Chancery so as to determine to whom the dividends belong. So Mr. Vandervell's executors are being shot at by two marksmen. They are being shot at by the Revenue for surtax on the basis that the dividends belong to Mr. Vandervell. And they are being shot at by the Vandervell Trustees Ltd. on the basis that the dividends belong to Vandervell Trustees. It is plain that there ought not to be two separate proceedings running alongside one another in which the selfsame issue is involved. If they go along separately neither contestant would be bound by the other decision. The Revenue would not be bound by a decision as between the executors and Vandervell Trustees; and the Vandervell Trustees would not be bound by the decision as between the Revenue and the executors. If each of those proceedings were allowed to go on separately, it is quite possible that there might be different results. In order to avoid any such situation, the executors of Mr. Vandervell in this originating summons have made an application for the Commissioners of Inland Revenue to be joined as defendants, so that they may be bound by the decision and so that it may be decided between the three persons concerned as to whether the dividends belonged to Mr. Vandervell and hence to his executors, or whether they belonged to the trustees.

The first question is whether or not the Court has any jurisdiction to entertain this application. As long ago as 1944 Lord Greene M.R. in *Asher* v. *London Film Productions Ltd.* [1944] 1 K.B. 133 expressed the view that the Crown could not be brought in and he regretted it. He said, at page 137:

> "I have often thought that in cases of this kind it is extremely inconvenient that the Crown (which is vitally interested) cannot, under the existing procedure, be made a party, or otherwise appear.'

And in the recent case of *Westminster Bank Executor and Trustee Co. (Channel Islands) Ltd.* v. *National Bank of Greece S.A.*[1] (which we had before us a day or two ago) Donaldson J. expressed the same view. He thought there was no machinery by which the Revenue could be joined in a proceeding between subjects, however just and convenient it might be. A great deal of water has passed beneath the bridges since 1944. There have been several instances where the Commissioners of Inland Revenue have been joined and no objection taken. In 1947 the House of Lords themselves in *Riches* v. *Westminster Bank Ltd.*[2] [1947] A.C. 390, at page 394, invited the Commissioners of Inland Revenue to come in if they wanted to contest the matters which might affect them: thus showing that they regarded it as being perfectly proper. In In re *Pilkington's Will Trusts*[3] [1961] Ch. 466 it was very necessary and desirable that the case for the Revenue should be put forward. The Court of Appeal, on the motion of the plaintiffs, ordered the Commissioners of Inland Revenue to be added as parties: see page 469.

(1) [1970] 1 Q.B. 256, C.A.; to be published later in this volume.
(2) 28 T.C. 159. (3) 40 T.C. 416.

A They were so added, and themselves appealed. There is also In re *Leek* [1967] Ch. 1061 ; [1969] 1 or I Ch. 563 and four or five other cases in which by consent the Commissioners have been added as parties. The reason is because it is so obviously the just and convenient course.

It is apparent, therefore, that the inconvenience noted by Lord Greene in 1944 has been remedied. The joinder is permitted by the Rules of the B Supreme Court. Ord. 15, r. 6 (so far as material) says that:

> " At any stage of the proceedings in any cause or matter, the Court may, on such terms as it thinks just, and either of its own motion or on application, . . . order any person . . . whose presence before the Court is necessary to ensure that all matters in dispute in the cause or the matter may be effectually completely determined and adjudicated upon C be added as a party ".

Those words should be given a liberal construction. Lord Esher M.R. said as much in *Byrne* v. *Brown* (1889) 22 Q.B.D. 657, at page 666:

> " One of the chief objects of the Judicature Acts was to secure that, wherever a Court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the D forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it, and determine the rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same ; it is sufficient if the main evidence, and the main inquiry, will be the same, and the Court then has power to bring in the E new parties, and to adjudicate in one proceeding upon the rights of all the parties before it."

That wide interpretation was adopted and applied by this Court in the recent case of *Gurtner* v. *Circuit* [1968] 2 Q.B. 587. I know that there have been cases at first instance (such as *Amon* v. *Raphael Tuck & Sons Ltd.* [1956] 1 Q.B. 357 and *Fire Auto and Marine Insurance Co. Ltd.* v. *Greene* [1964] F 2 Q.B. 687) where the rule has been given a narrow interpretation. But that narrow interpretation should no longer be relied upon. We will in this Court give the rule a wide interpretation so as to enable any party to be joined whenever it is just and convenient to do so. It would be a disgrace to the law that there should be two parallel proceedings in which the selfsame issue was raised, leading to different and inconsistent results. It would be G a disgrace in this very case if the Special Commissioners should come to one result and a Judge in the Chancery Division should come to another result as to who was entitled to these dividends. Such different and inconsistent results are to be deplored and avoided. It can be done by bringing all parties before the Court so as to have the issue finally decided between all of them and so that all be bound.

H Mr. Bathurst pressed another point before us. He said that under the Income Tax Act 1952 there is a prescribed procedure for the recovery of surtax, namely, by s. 229 of that Act. It is by assessment, by appeal, by Case Stated to the Court, and so forth. He said that there is no jurisdiction in the Court to allow any other procedure, even by consent. He relied particularly on *Barraclough* v. *Brown* [1897] A.C. 615. All I would say—and I have I had occasion to say it before—is that that case depended entirely on the construction of a particular Statute. It is of no general application. The general rule is that the jurisdiction of the Courts of law is never to be excluded except by very clear words. That appears from *Pyx Granite Co. Ltd.* v.

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*Ministry of Housing and Local Government* [1958] 1 Q.B. 554, at page 567; [1960] A.C. 260. It is true that in *Argosam Finance Co. Ltd.* v. *Oxby*[1] [1965] Ch. 390 we struck out an originating summons which asked for a declaration as to income tax liability: but that was because of the special circumstances of that case. It was an abuse of the process of the Court. That does not apply to the present case. I am clearly of opinion that, at any rate where the Commissioners of Inland Revenue consent, the Court has jurisdiction to decide questions as to liability to tax without going through the procedure of the Income Tax Acts: and it can authorise the Commissioners, with their consent, to be added as parties to existing proceedings whenever it is desirable to decide tax matters so as to bind all concerned. This is supported by *Attorney-General* v. *Avelino Aramayo & Co.*[2] [1925] 1 K.B. 86, where Bankes L. J., at page 101[3], drew the parallel of a foreigner who voluntarily submits to the jurisdiction.

I say nothing as to what the position would be if the Commissioners did not consent. But I am not to be taken as saying that the Court would have no jurisdiction. The Court may have jurisdiction even without their consent, for the rule is wide enough to permit it. Suffice it that here the Commissioners of Inland Revenue consent to be joined. The taxpayers—the executors of Mr. Vandervell—want them to be joined. It is true that Vandervell Trustees Ltd. do not agree, and indeed firmly object. But their objection should be overruled. The just and convenient course is for the issue—to whom do these dividends belong—to be decided by the Courts in one proceeding. That can be done by joining the Commissioners of Inland Revenue as parties. It is to be noted that no relief is specifically claimed against them. But the importance of joining them is that they will be bound by the result. For instance, if Vandervell Trustees Ltd. won the case, the Revenue could not afterwards come down on the executors for surtax. I would allow the appeal accordingly, and allow a joinder.

**Sachs L.J.**—I start my approach to the issues raised upon this appeal by recording that I too respectfully adopt that of my Lord, the Master of the Rolls, and of Lord Esher M.R. in *Byrne* v. *Brown* (1889) 22 Q.B.D. 657, at page 666, as to the necessity of adopting a broad view of the construction of Ord. 15, rr. 4 and 6. I would venture to add that Lord Esher in the course of his judgment also said:

> "Another great object was to diminish the cost of litigation. That being so, the Court ought to give the largest construction to those rules in order to carry out as far as possible the two objects I have mentioned."

It seems to me that anything that will diminish a multiplicity of actions is something which will diminish the cost of litigation: accordingly that factor should be taken into account when construing the above rules. It follows, of course, that I respectfully differ from so much of the judgment of Devlin J. in *Amon* v. *Raphael Tuck & Sons Ltd.* [1956] 1 Q.B. 357 as would tend to a narrow construction.

In the instant case the same issues arise as between the Plaintiffs and the Defendants, on the one hand, and the Plaintiffs and the Inland Revenue, on the other. As regards the Plaintiffs and the Inland Revenue, the issues affect the Plaintiffs' liability as executors in three matters: the first, surtax

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(1) 42 T.C. 86. (2) 9 T.C. 445. (3) *Ibid.*, at p. 491.

A payable by the deceased ; the second, estate duty payable in respect of the deceased's estate ; and, thirdly, to a smaller extent, a matter of stamp duty. It would indeed be no tribute to our legal system if those issues could not be determined in the course of a single set of proceedings as between the Plaintiffs, the Defendants and the Revenue. As regards estate duty I understand that any question of liability as between the Plaintiffs and the Inland B Revenue can in the normal course of events be determined by process commenced in the Chancery Division, neither the subject nor the Crown being bound to adopt some special code of procedure. Thus taking the estate duty position on its own to start with, to my mind none of the reasons advanced by the Vandervell Trustees Ltd. (whom I will call " the trustees ") seem to me to establish that the Court has no jurisdiction to order that the C Inland Revenue be joined as a defendant. I adopt in that behalf the reasoning of my Lord, the Master of the Rolls. As regards the question whether had there only been a surtax issue between the Plaintiffs and the Inland Revenue this Court could follow the same principles there has been raised a special point. This relates to the effect of those provisions of the Income Tax Act 1952, and in particular ss. 229 and 64, which set out a code of procedure for D determining the subject's liability. That those provisions form a special code of their own is of course clear. Under that code the subject has the right to have questions of fact determined by the Commissioners: questions of law come up to these Courts but under a prescribed route. That the subject and the Crown can waive their rights to the benefits of such a code and agree to be bound by a decision of the same Courts when the problem reaches E the Courts by another route seems to me to be plain, though Mr. Bathurst, relying on *Barraclough* v. *Brown*(1), contested that proposition. In short, the statutory code in this case does not preclude the parties agreeing to a different procedure, and it is indeed for the Courts to welcome that different procedure when it provides a short cut through a multiplicity of proceedings. It follows accordingly that the course adopted in In re *Pilkington's Will Trusts*(2) and in F In re *Leek*(3) was fully justified.

I must now pause for a moment to deal with the question of *Barraclough's* case, on which so much reliance was placed by the trustees. It not only concerns a very particular Statute but it came to be decided by the House of Lords in a very curious way. The undertakers of the Navigation of the Rivers Aire and Calder issued a writ seeking to recover expenses incurred G in removing a sunken vessel. Their claim in essence depended not on common law but on certain Statutes which provided a remedy recoverable only in a Magistrate's Court. No declarations were claimed. The defendant owners alleged the sinking was due to the negligence of the undertakers: they also raised the point of law that, as their ownership had been abandoned before action brought, the undertakers had no right against them. Without dealing H with the issue of negligence, an order was none the less made for the point of law to be determined—a course to which apparently the plaintiffs did not object. The result, of course, was that, negligence being still in dispute and the remedy being exclusively a matter for a Magistrate's Court, the point of law was really hypothetical so far as the High Court was concerned. So the plaintiffs were seeking from the High Court either to obtain a remedy I which the Magistrate's Court alone could give or, if a declaration were to be claimed (which was not the case on the pleadings), that declaration would

(1) [1897] A.C. 615. (2) 40 T.C. 416; [1961] Ch. 466. (3) [1967] Ch. 1061; [1969] 1 Ch. 563.

**(Sachs L.J.)**

be on a hypothetical point which might never have arisen if the remedy was sought in the proper Court. Mathew J. decided the point of law against the undertakers, and on appeal by them the Court of Appeal affirmed his decision. When, however, the matter came before the House of Lords the jurisdiction point was raised by their Lordships during the submissions on behalf of the undertakers. (The owners were not called upon.) Turning to the speech of Lord Herschell, he says, [1897] A.C., at the top of page 620:

> "I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

That refers to the fact that the case was one in which the remedy was being pursued in the wrong Court. There are indeed strong statements in the speeches to the effect that even a declaration could not in any event have been sought: to my mind, however, they should be construed bearing in mind the basis of the facts in that particular case, where, incidentally, the declaration then being sought was hypothetical. For my part, I agree with my Lord, the Master of the Rolls, that it was a very strong case on a particular Statute and should not be applied to the case now before us. To use the phrase employed by Lords Simonds in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] A.C. 260, at page 286, "circuity is not necessary" here.

Now I return to procedure adopted by consent in the *Pilkington*(1) and *Leek*(2) cases; the fact that this is justified and indeed commendable does not mean that procedure differing from that laid down by the Income Tax Act code can be forced on the subject so as to deprive him of the benefits of that code. Thus, at any rate when facts are in issue and ought to be normally determined by the Commissioners, there can be no question of the subject being compelled under the provisions of Ord. 15, r. 6, or otherwise to forgo that benefit. The right of the subject to a decision of a designated tribunal was recently restated, albeit in very different circumstances, in *Blaise* v. *Blaise* [1969] P.54, at page 63, in the terms "that when the legislature has designated a particular tribunal, such as a jury or magistrates, to determine a case, the appellate court must not debar the litigant from having that tribunal's determination". That statement flowed from an examination of the case of *Bray* v. *Ford* [1896] A.C. 44 and the speech therein of Lord Watson, who referred to the constitutional and legal rights of litigants. In the instant case, however, Mr. Warner, upon being pressed on this point, was able to assure the Court that so far as surtax was concerned there was no issue that the trustees could take to the Commissioners. Moreover, Mr. Bathurst at no stage in his careful submissions suggested that there was a point which he wished to take or should take to the Commissioners in relation to surtax. Accordingly there is nothing as regards the instant case in the existence of this special code of procedure to prevent the Court exercising its discretion if it thinks fit under Ord, 15, r. 6, to order a joinder.

Turning finally to the question of discretion, each of the factors put forward by Mr. Bathurst naturally require to be given consideration and due weight—not least that raised as to the incidence of extra costs and the possibility that the presence of the Inland Revenue might lead to additional appeals. Points which might on other sets of facts result in an order for joinder being refused, or only being granted on special conditions, do not seem to me to

(1) 40 T.C. 416. (2) [1967] Ch. 1061; [1969] 1 Ch. 563.

A weigh sufficiently in this particular case to prevent the joinder being ordered. I have in mind, *inter alia,* that there may be other cases where relatively small sums are involved. Here, however, the sums involved are of real magnitude, and the costs which may flow from the litigation recede in importance compared with the advantages gained by the joinder which is sought by the Plaintiffs. In any event the Courts have a discretion as regards costs, B and would and should exercise it with great care in framing Orders relating to the subsequent costs of this type of litigation so as to ensure that the unwilling party to a joinder is not unnecessarily penalised. In the facts of this case it appears to me that the Order striking out the second Defendants should be reversed and the appeal allowed.

**Karminski L.J.**—I agree and only desire to add a very few observations C of my own. First of all, I would like to look once more at the operative rule, namely Ord 15, r. 6(2)(*b*), which lays down the test that it is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined. I would like to emphasise my respectful concurrence with all that has fallen from my Lord, the Master of the Rolls, about the need for a liberal construction of those words. If all the facts and D the necessary law relevant to those facts are before the Court in a dispute, whether it be of a tax matter or any other issue in litigation, it seems to me that not only is it convenient but it is necessary to ensure that the Court is likely to arrive at a correct conclusion. If that is too ambitious a test, to be less likely to be led into error. In my view, therefore, applying either test, it seems to me abundantly clear here that it is desirable and indeed E necessary that the Inland Revenue should be parties to this litigation.

The only other matter that I would touch on is to express again my complete and respectful agreement with what Sachs L.J. has said about the relevance of *Barraclough* v. *Brown*[1] to this case. The history of that case he has already described and how the matter apparently was raised by their Lordships themselves in the House of Lords in the course of argument F by eminent Counsel who appeared there for the appellant. The point there depended on the construction of a special Statute—that is on the construction of s. 47 of the Aire and Calder Navigation Act 1889, which dealt with the removal of obstructions in narrow waters by the harbour or river authority concerned. The section is one which I venture to think is quite common in special Acts of this kind, and is no doubt designed to effect G the immediate removal of wrecks without having recourse to litigation by the authority to determine liability arising from negligence or otherwise, in order to resume at the earliest moment navigation in narrow waters. But I have obtained no help, in spite of Mr. Bathurst's careful argument, in applying what their Lordships said in that case to the facts and the issues before us in this appeal.

H I agree that this appeal must be allowed.

**Balcombe Q.C.**—Your Lordships will allow the appeal. I ask for the Plaintiffs that they be paid their costs in any event on this application. The application was, of course, the Defendant's application to strike out the Revenue. That came first before the Master, who made no Order as to costs and said it should be decided by the Judge, because they wanted to I take it to the Judge. The learned Judge made an Order that the Plaintiffs should pay the costs both of Vandervell and the Revenue both before the

(1) [1897] A.C. 615.

**(Balcombe Q.C.)**

Master and the Court of first instance. What I am asking your Lordships to say is that the Defendant, Vandervell Trustees Ltd., should in any event pay the Plaintiffs' costs of this appeal and the application in the High Court and before the Master. The notice of appeal also asks that they shall pay the costs of the Revenue. It is not for me to argue the case for the Revenue, but that was included in the appeal, because we were under a duty at that stage to pay their costs and we wanted to get rid of that Order. My learned friend Mr. Warner will make any application he thinks fit.

**Lord Denning M.R.**—Mr. Warner, you said you were neutral. Are you being neutral about costs too?

**Warner**—I am afraid not, my Lord. As I told Buckley J., we were brought here with our consent, but not for our benefit: it was for the benefit of the Plaintiffs really, so that we should be bound by the Order of the Court, as your Lordships have held. It is right that we should be Respondents to this appeal, but in my respectful submission it would not be right that our reasonableness should cost us money.

**Lord Denning M.R.**—You want costs against one or the other, do you?

**Warner**—If your Lordship pleases. I think the proper Order would be an Order against Mr. Bathurst's clients.

**Lord Denning M.R.**—We will see what Mr. Bathurst has to say.

**Bathurst Q.C.**—If your Lordship pleases. I cannot, of course, resist an Order for costs as far as the Plaintiffs' costs are concerned ; but I would say this. At my learned friend's invitation Buckley J. made an Order for costs in any event, which apparently has the result of making them not payable. I take it that any Order your Lordships make against me will be costs in any event. So far as the Revenue are concerned, as your Lordships see, they are brought here and your Lordships hold that they remain here for the express purpose of assisting the Plaintiffs ; and in my submission, if the Revenue are asking for costs against somebody, it ought to be costs against my learned friend. Before I sit down, may I say this? This is a case of considerable importance, quite apart from the difficulties in this case which I have pointed out to your Lordships, which the defendant Trustees will be in if the Revenue remain. It is a matter of the widest implication, because, as I have pointed out to your Lordships, the Revenue might come in in almost any dispute about property, and I would therefore ask your Lordships in this case to give leave to appeal to the House of Lords.

*(The Court conferred.)*

**Lord Denning M.R.**—The appeal will be allowed. The Order of Buckley J. will be discharged. The application to strike out the Commissioners is dismissed, so that the Commissioners will remain Defendants to this action. As to the costs, Vandervell Trustees Ltd. are to pay the costs of the Plaintiffs, the executors, and of the Commissioners of Inland Revenue here and in the proceedings below, including the Master, in any event. We do not give leave to appeal to the House of Lords.

Vandervell Trustees Ltd. having obtained leave from the Appeal Committee of the House of Lords to appeal against the above decision, the case came before the House of Lords (Lords Reid and Morris of Borth-y-Gest, Viscount Dilhorne and Lords Wilberforce and Diplock) on 22nd, 23rd, 27th, 29th and 30th April 1970, when judgment was reserved. On 15th July 1970 judgment was given unanimously against the executors, with costs, striking out the Commissioners of Inland Revenue as a Defendant in the action. No Order was made as to the Crown's costs in the House of Lords and the Court of Appeal.

*Viscount Bledisloe* (*B. L. Bathurst*) *Q.C.* and *Michael Miller* for the Applicant (first Defendant), Vandervell Trustees Ltd.

*A. J. Balcombe Q.C.* and *J. M. Chadwick* for the Respondents (Plaintiffs), the executors.

*J. P. Warner* for the Crown.

The following cases were cited in argument in addition to those referred to in the speeches:— *Barras* v. *Aberdeen Steam Trawling & Fishing Co. Ltd.* [1933] A.C. 402 ; *Moser* v. *Marsden* [1892] 1 Ch. 48 ; In re *Al-Fin Corporation's Patent* [1970] Ch. 160 ; *Westminster Bank Executor and Trustee Co. (Channel Is.) Ltd.* v. *National Bank of Greece S.A.* [1] [1970] 1 Q.B. 256 ; *Montgomery* v. *Foy, Morgan & Co.* [1895] 2 Q.B. 321 ; *Bentley Motors* (1931) *Ltd.* v. *Lagonda Ltd.* [1945] 2 All E.R. 211 ; *McCheane* v. *Gyles* (*No.* 2) [1902] 1 Ch. 911 ; *Fire, Auto and Marine Insurance Co. Ltd.* v. *Greene* [1964] 2 Q.B. 687 ; *The Result* [1958] P. 174 ; *Attorney General* v. *Avelino Aramayo & Co.* 9 T.C. 445 ; [1925] 1 K.B. 86 ; *Gurtner* v. *Circuit* [1968] 2 Q.B. 587 ; *Byrne* v. *Brown* (1889) 22 Q.B.D. 657 ; In re *Sassoon* [1933] Ch. 858 ; *Commissioners of Inland Revenue* v. *Raphael* [1935] A.C. 96 ; *Cornwell* v. *Barry* (1955) 36 T.C. 268 ; In re *Midwood's Settlement* [1968] Ch. 238 ; In re *Hooper's 1949 Settlement* (1955) 34 A.T.C. 3 ; In re *Gestetner Settlement* [1953] Ch. 672 ; *Caffoor* v. *Commissioner of Income Tax, Colombo* [1961] A.C. 584 ; *Commissioners of Inland Revenue* v. *Sneath* 17 T.C. 149 ; [1932] 2 K.B. 362 ; *Special Commissioners of Income Tax* v. *Linsleys* (*Established 1894*) *Ltd.* 37 T.C. 677 ; [1958] A.C. 569 ; *Moore* v. *Gamgee* (1890) 25 Q.B.D. 244 ; In re *Abrahams' Will Trusts* [1969] 1 Ch. 463 ; In re *Barnato* [1949] Ch. 258 ; *Buxton* v. *Public Trustee* (1962) 41 T. C. 235 ; *Dyson* v. *Attorney General* [1911] 1 K.B. 410 ; *Esquimault and Nanaimo Railway Co.* v. *Wilson* [1920] A.C. 358 ; in re *Park* [1970] 1 W.L.R. 626.

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**Lord Reid**—My Lords, this case raises a general question of procedure which is of considerable importance. I can state the question in general terms. The Revenue claim surtax on certain income from A on the ground that it was his income. A third party B asserts that this income was his income. So the single issue to be decided is whose income it was when it accrued. It appears to me to be obvious that both justice and convenience require that this issue should be decided in proceedings to which all three, the Crown, A and B, are parties so that all shall be bound by the decision. But the Appellants maintain that all three parties cannot be joined in the same proceedings: the question between the Crown and A must be decided by the Special Commissioners and the question between A and B must be decided by the Court. This would not only require unnecessary duplication of litigation and expense, but it might cause serious injustice. There is no

[1] To be published later in this volume.

**(Lord Reid)**

appeal from the Special Commissioners on questions of fact, so if the ownership of the income depends on questions of fact there may be conflicting decisions both of which are final. A may be left in the position that by reason of the decision of the Commissioners he has to pay the tax, but by reason of the decision of the Court he cannot get the money in respect of which the tax is due. The Crown do not support the Appellant's argument. Quite properly they are not willing to accept as final in all cases the decision in an action between A and B to which they are not parties, because that action may be of a " friendly " character and the case for A may not have been properly developed. But they are willing at least in most cases to be joined as parties in such an action so that they can see that A's case is properly presented. They agree that they will then be bound by the decision. This has in fact been done in a number of cases, but if the Appellants' main argument is correct I think this practice must now cease.

The Appellants' first argument was based on jurisdicton. It is trite law that the consent of parties cannot give jurisdiction where there is none, and that even where the parties consent it is *pars judicis* to intervene and refuse to act where there is is no jurisdiction. It is quite true that only the Commissioners have any right or jurisdiction to alter an assessment to tax. But here there is no question of altering an assessment. What is sought is the determination by the Court of a question which, if not already decided, the Commissioners would have to decide before they could decide whether or not the assessment should stand. Cases may easily arise in which a Court clearly has to decide such a question as between the Revenue and the taxpayer. If after a man's death the Revenue claim from his executors both surtax and estate duty on the ground that certain property belonged to him and that income from it which had accrued before his death was his income, then as regards estate duty that issue must be decided by the Court. Then the question would arise whether the Commissioners in dealing with the surtax assessment are bound to accept the Court's decision as *res judicata.* So the real question is not one of jurisdiction. It is whether the Commissioners are subject to the ordinary rule of law of *res judicata.* I know of no other instance where a tribunal exercising functions of a judicial character is not so bound, and I find it incredible that Parliament can have intended to make an exception in this case. Of course if the relevant statutory words are incapable of any other construction then we must give them that construction. But if there is any other possible construction I would adopt it.

The relevant provision is s. 52(5) of the Income Tax Act 1952, as amended by s. 12 of the Income Tax Management Act 1964. Section 52(5) provides that, if it appears to the majority of the Commissioners " by examination of the appellant on oath or affirmation or by other lawful evidence " that the appellant is overcharged by any assessment, the Commissioners shall abate or reduce the assessment accordingly. This provision in substantially the same form goes back to the early days of income tax. I can see nothing in it which requires or permits the Commissioners to disregard a decision of the Court. The question is what is the proper construction of " other lawful evidence ". If that phrase is given a narrow meaning then the Commissioners are bound not only to disregard decisions of the Court but they are also bound to disregard agreements between the Revenue and the taxpayer: they must be satisfied by evidence that the assessment is wrong. But I see no difficulty in interpreting " lawful evidence " as including both a decision of the Court which creates *res judicata* and an

A agreement between the Revenue and the taxpayer as to some matter which the Commissioners would have had to decide if there had been no agreement. If the taxpayer produces to the Commissioners either such a decision or such an agreement—I can see no difference between the two—then the Commissioners must accept that. I find it quite impossible to suppose that Parliament could have intended otherwise. This enactment originally applied to
B the General Commissioners, who were busy men acting under a sense of public duty, and it would have been absurd to require them to undertake such an unnecessary task and to prevent the taxpayer and the Revenue from acting in a reasonable manner. I find it equally impossible to suppose that the Commissioners were given a discretion to accept or reject a decision of the Court or an agreement as they might see fit. I have, therefore, no
C hesitation in holding that the Commissioners are bound to treat as *res judicata* any decision of a competent Court to which the Crown was a party on any issue which may come before them.

I am fortified in my view by what was said in *Asher* v. *London Film Productions Ltd.* [1944] K.B. 133 and the sequel to that case. Lord Greene M.R. said (at page 137):

D

> "I have often thought that in cases of this kind it is extremely inconvenient that the Crown (which is vitally interested) cannot, under the existing procedure, be made a party, or otherwise appear. The result is that the Crown is technically not bound by any decision which may be pronounced in its absence. . . I venture to suggest that the Inland Revenue authorities might usefully consider approaching the
> E Rule Committee with a view to obtaining the enactment of a rule under which they could receive notice of litigation of this kind and be given a right to attend and put forward any argument or facts they thought right. The corollary would be that they would be bound by the decision and the whole matter would be cleared up between everybody concerned."

F Discussions took place, and since then in one way or another the Revenue have appeared in a number of cases. No one at any stage seems to have had any idea that there was any technical objection owing to the nature of the duties or powers of the Special Commissioners or the phraseology of the Income Tax Management Act. I find this so strange as to be inexplicable if it is not competent to make a rule of court bringing in the Revenue and
G so preventing the same issue from being raised again before the Special Commissioners.

So I turn to the second question in this appeal—whether the existing Rules of Court are wide enough in their terms to warrant the course that has been taken in this case. Here I am under the disadvantage that I am not familiar with the practical operation of the English Rules of Court.
H Treating the matter as an ordinary question of construction I would have been inclined to agree with the decision of the Court of Appeal. But if your Lordships think otherwise I am not prepared to dissent on this matter, and this would be a sufficient ground for allowing this appeal.

**Lord Morris of Borth-y-Gest**—My Lords, although the submissions in this case have ranged extensively the decision can rest upon a consideration
I of the rule which is applicable. In agreement with Buckley J., I do not think that this is a case which falls within R.S.C., Ord. 15, r. 6 (2)(*b*). It is not suggested that the Commissioners of Inland Revenue "ought to have been joined as a party". The only question is whether their presence before the Court is "necessary"—i.e. necessary "to ensure that all matters in dispute

**(Lord Morris of Borth-y-Gest)**

in the cause or matter may be effectually and completely determined and adjudicated upon ". I do not think that any process of giving a wide or liberal interpretation to the rule can be employed to alter it or to give it an enlarged meaning which, on a fair and reasonable interpretation, it does not bear.

As the executors have for the three years in question been served with notices of assessment to surtax (in respect of which they have pending appeals), they are naturally concerned to ensure that if they have to pay surtax they will have the income to which it relates. So in their action against the trustees the effective claim is for payment of the net sums which the trustees received. The trustees say that the late Mr. Vandervell was never beneficially entitled to those sums, and apart from this they rely on the terms and effect of the deed of 19th January 1965. The " matters in dispute in the cause or matter " are the matters in dispute between the executors and the trustees. Their resolution calls for the application of legal principles to certain transactions and documents—the details of which do not appear to be in issue. It does not seem to me that the Crown if present before the Court could make any contribution to the determination or adjudication of the matters in dispute. If it wished to present argument that favoured the executors and which was adverse to the trustees it could add nothing to what could be said by those representing the executors. No question of revenue law is raised in the action. The Crown does not assert any claim to the sums in question. It does not ask for any relief against either party. It did not seek to be joined. It could do nothing to ensure that the matters in dispute in the action brought by the executors against the trustees are " effectually and completely " determined. The matters in dispute between the executors and the trustees can be effectively and completely determined and adjudicated upon in the absence of the Crown. It follows in my view that its presence was not shown to be " necessary ".

As, in my view, the wording of the rule is clear, I have not derived help from a consideration of cases decided in reference to situations and circumstances which much differ from those of the present case. If the presence of the Crown were necessary to ensure effectual and complete determination and adjudication of the matters in dispute between the executors and the trustees it would be open to the Court of its own motion and on such terms as it thought just to order the Crown to be added as a Defendant. In the situation of the present case I can see no reason at all why the Court would contemplate such action. In circumstances where the Court might act there is no provision making consent necessary before a party is added as a defendant. The Crown, however, takes its stand that it is only with its consent that it could be joined in the proceedings. If the matter is tested by considering the provisions of Ord. 15, r. 4, and its supposition of separate actions being brought against two defendants giving rise to some common questions of law or fact, I cannot contemplate an action being brought by the executors against the Crown claiming a declaration that the trustees held the shares during the relevant period in trust for Mr. Vandervell. As, in my view, the rule, rationally applied, cannot support the joinder of the Crown I would allow the appeal. If some new and enlarged procedure on lines adumbrated by Lord Greene M.R. in *Asher* v. *London Film Productions Ltd.* [1944] K.B. 133 were thought to be desirable it would be for Parliament to devise and adopt it. On the wider issues as to jurisdiction

**(Lord Morris of Borth-y-Gest)**

A I am in agreement with the conclusions of my noble and learned friend Lord Wilberforce, whose speech I have had the advantage of reading in advance.

**Viscount Dilhorne**—My Lords, the executors of the late Mr. Vandervell, the first, second and third Respondents, claim from the Appellants, Vandervell Trustees Ltd., dividends received by the Appellants on shares in Vandervell
B Products Ltd. between 11th October 1961 and 19th January 1965. The dividends amounted to £1,256,458 gross and £765,016 after deduction of income tax.

In 1959 Mr. Vandervell transferred to the Royal College of Surgeons 100,000 "A" shares in Vandervell Products Ltd. On 1st December 1958 the College gave the Appellants an option to purchase the shares for £5,000.
C That option was exercised on 11th October 1961. On 19th January 1965 Mr. Vandervell executed a deed which recited that doubts had arisen as to whether he had divested himself absolutely of all interests in the shares, and by which he, *inter alia,* assigned and released to the Appellants such rights as he might have to or in the dividends from those shares. He had been assessed to surtax on the dividends received by the College on the
D ground that he had not absolutely divested himself of them. Those assessments were upheld in this House : *Vandervell* v. *Commissioners of Inland Revenue*[1] [1967] 2 A.C. 291. Assessments were made on his estate for surtax in respect of the dividends received by the trustees after the exercise of the option and prior to the deed of 19th January 1965, and notices of appeal against those assessments have been given.

E In this action the executors contend that during that period the Appellants held the shares on trust for Mr. Vandervell and that they are consequently entitled to the dividends which the Appellants refuse to pay to them. If the shares were held on trust for Mr. Vandervell, then there would be liability to surtax on the dividends but it does not follow that there is no surtax liability if they were not so held. If property or any income therefrom is
F or will or may become payable to him or applicable for his benefit in any circumstances, a settlor such as Mr. Vandervell is not to be deemed to have divested himself absolutely of that property : Income Tax Act 1952, s. 415 (2). If it is held in the action that Mr. Vandervell was entitled to the beneficial interest in the shares prior to 19th January 1965 presumably the executors will not dispute liability to surtax and the appeals will be abandoned,
G for it would be very odd if the executors sought to contend before the Special Commissioners the contrary to their contention in the action. If it is held in the action that he was not so entitled, it does not follow that there is no surtax liability. If the Commissioners of Inland Revenue are a party to the action, they would be bound by the decisions reached in the action and not able to contend on the hearing of the appeals that Mr.
H Vandervell had a beneficial interest in the shares if it was held in the action that he had not ; but it would still be open to the Crown to contend that, even though he had no beneficial interest, he still had not divested himself absolutely of all interest in the shares and dividends. It is not, therefore, in my opinion accurate to say that the issues to be determined in the appeals are bound to be the same as those in the action.

I If the Crown were made a party, then it would be in the interest of the Crown to support the executors' claim. If that failed at first instance they might appeal though the executors might be prepared to accept the

(1) 43 T.C. 519.

**(Viscount Dilhorne)**

decision. They might pursue the appeal to this House. The Appellants would be faced with a very different opponent. Instead of having to fight the executors alone, they would find aligned against them a government department with all its resources. And if the Appellants ultimately succeeded in the action that would not necessarily dispose of the surtax liability, for they might succeed on the ground that the deed of 19th January 1965 entitled them to the dividends they had received, and if it were held that Mr. Vandervell did not have the beneficial interest in the shares the Crown, though bound by that decision if a party to the action, could still contend that he had not absolutely divested himself of all interest in the shares and the dividends. Further, by the Income Tax Act 1952, s. 52(5), to which I refer later, the duty is cast on the Commissioners to satisfy themselves that the assessment is wrong before they alter it. It would be open to them to hold that the assessments were correct even though the Crown did not so contend.

With a view to securing that the Crown is bound by the judgment in the action the executors applied for an order under R.S.C., Ord. 15, r. 6(2)(*b*), that the Commissioners of Inland Revenue should be added as defendants. The Crown consented to being joined, and on 23rd October 1968 an Order joining it was made. The Appellants then took out a summons to strike it out as defendant. That was adjourned into Court, and Buckley J. ordered that it should be struck out. The Court of Appeal (Lord Denning M.R. and Sachs and Karminski L.JJ.) reversed his decision, and the question now to be decided is whether they were right to do so.

The Appellants contend that R.S.C., Ord. 15, r. 6(2)(*b*), precludes the joinder of the Crown in this action, and also that, apart from this rule, the High Court has no jurisdiction to do so, as Parliament has entrusted exclusive jurisdiction with regard to appeals against assessments to the Special and General Commissioners. Section 5(6) of the Income Tax Management Act 1964 reads as follows:

> "After the notice of assessment has been served on the person assessed the assessment shall not be altered except in accordance with the express provisions of the Income Tax Acts."

The following sections of the Income Tax Act 1952, as amended by the Income Tax Management Act 1964, are relevant. Section 51 gives a person aggrieved by an assessment a right of appeal to the General Commissioners and, where the assessment has been made by the Commissioners of Inland Revenue, to the Special Commissioners. Section 229(4) provides that assessments in respect of surtax shall be subject to appeal to the Special Commissioners, and s. 12(1) of the Income Tax Management Act provides that s. 52 of the Income Tax Act 1952 is to apply in relation to appeals to the Special and General Comissioners under the Income Tax Acts. Section 52(5) and (6) read as follows:

> "(5) If, on an appeal, it appears to the majority of the Commissioners present at the hearing, by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is overcharged by any assessment or surcharge, the Commissioners shall abate or reduce the assessment or surcharge accordingly, but otherwise every such assessment or surcharge shall stand good. (6) If, on an appeal, it appears to the Commissioners that the person assessed or surchaged ought to be charged in an amount exceeding the amount contained in the assesment or surcharge, they shall charge him with the excess."

These provisions confer jurisdiction on the Special and General Commissioners to determine the correctness or otherwise of an assessment. Save upon Cases stated by them under s. 64 of the Income Tax Act 1964, the High Court is not given any jurisdiction with regard thereto. Tax questions may arise between subjects, as, for instance, with regard to the right to deduct income tax on making certain payments: *Asher* v. *London Film Productions Ltd.* [1944] K.B.133 ; *Riches* v. *Westminster Bank Ltd.*[1] [1947] A.C.390. In such cases the jurisdiction of the High Court cannot be doubted, but where the correctness of an assessment, and so the liability to pay income tax or surtax, is challenged, that can only, in my opinion, be decided by the Special or General Commissioners. I am, therefore, unable to agree with Lord Denning M.R. when he said in this case that, where the Commissioners of Inland Revenue consent, the High Court has jurisdiction to decide questions as to liability to tax without going through the procedure of the Income Tax Acts, and with Sachs L.J. when he said that the subject and the Crown can waive their rights to the benefit of the income tax code. In my opinion, they cannot confer jurisdiction on the High Court by waiver or by consent to adjudicate as to liability of a taxpayer to income tax or surtax, for Parliament has prescribed the method and the only method by which an assessment and the taxpayer's liability thereunder can be challenged.

If, as I think is clearly the case, the High Court has not jurisdiction to determine liability to income tax and surtax, it follows that it has not jurisdiction to make declarations with regard thereto. To do so would be to impinge upon the exclusive jurisdiction vested in the Special and General Commissioners. In *Argosam Finance Co. Ltd.* v. *Oxby*[2] [1965] Ch.390 the plaintiffs took out an originating summons with an Inspector of Taxes as defendant, asking whether dividends received from certain shares should be included at their net amount, i.e. after deduction of income tax, for the purpose of calculating their profit or loss. The Finance Act 1953, s. 15(4), provided that an objection to a claim by a taxpayer in respect of alleged trading losses was to be "heard and determined by the Commissioners . . . in like manner as . . . an appeal against assessment under Schedule D . . ." In the light of this provision Plowman J. held that he had no jurisdiction to hear the summons. On appeal, Lord Denning M.R., while not wholly agreeing with him, said, at page 423[3]:

> "If the summons had been limited to question (a)—that is, to determine whether the company was entitled to relief under s. 341—I would agree that the courts would have no jurisdiction to determine it. The question is one which is entrusted by the legislature to the exclusive province of the Commissioners, and the courts cannot entertain it."

Diplock L.J. agreed[4] that the Court had no jurisdiction with regard to that question, "for that was a matter which Parliament has exclusively confided to the jurisdiction of the Commissioners." Under s. 341 of the Income Tax Act 1952 a person who has sustained a loss in any trade, etc., can apply to the General or Special Commissioners for an adjustment of his liability by reference to the loss and to the aggregate amount of his income for that year. If the Commissioners have exclusive jurisdiction as to this, it would, indeed, be odd if they did not also have exclusive jurisdiction with regard to alteration of an assessment and liability thereunder.

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(1) 28 T.C. 159. (2) 42 T.C. 86. (3) *Ibid.*, at p. 104. (4) *Ibid.*, at p. 105.

**(Viscount Dilhorne)**

In my opinion, the Appellants' contention that the Special and General Commissioners have exclusive jurisdiction with regard to assessments and liability thereunder is well founded, but I do not think that this conclusion establishes that the High Court has not got jurisdiction to add the Commissioners of Inland Revenue as a party to a properly instituted action. Whether or not they are added they, and of course also the Special and General Commissioners, will, like everyone else, be bound by any decision reached on a question of law. If added, they will be bound by findings of fact, but the Special and General Commissioners will not be.

Whether in this case the Crown should be added, in my opinion depends upon R.S.C., Ord. 15, r.6(2)(*b*). So far as material that rule reads as follows:

> "(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either on its own motion or on application . . . (*b*) order any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon be added as a party ; but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised."

If under this rule the Crown can be added as a party, its consent to that is not a condition precedent to that being done unless it is proposed to add it as a plaintiff. Its refusal of consent would be no bar to the exercise by the High Court of its jurisdiction to add it as a defendant.

The many reported cases in which this rule has been considered were comprehensively reviewed by Devlin J. in *Amon* v. *Raphael Tuck & Sons Ltd.* [1956] 1 Q.B.357. He said, at page 361:

> "There are two views about its scope ; and authority can be cited for both. One is that it gives a wide power to the court to join any party who has a claim which relates to the subject-matter of the action . . . if it is right, it really kills any submission about jurisdiction. The court is hardly likely in the exercise of its discretion to join as a party somebody who has no claim relating to the subject-matter of the action ; and if its powers extend to joining anyone who has, the question whether a particular intervener should be joined becomes virtually one of discretion."

In this case the Court of Appeal held that there should be a wide interpretation of the rule. Lord Denning M.R. said[1]:

> "We will in this Court give the rule a wide interpretation so as to enable any party to be joined whenever it is just or convenient to do so. It would be a disgrace to the law that there should be two parallel proceedings in which the selfsame issue was raised, leading to different and inconsistent results. It would be a disgrace in this very case if the Special Commissioners should come to one result and a Judge in the Chancery Division should come to another result as to who was entitled to these dividends."

Whether this interpretation is wider than that stated by Devlin J. in the passage cited above it is not necessary to consider. My difficulty about accepting Lord Denning's wide interpretation is that it appears to me wholly unrelated to the wording of the rule. I cannot construe the language of the rule as meaning that a party can be added whenever it is just or convenient

(1) *See* page 353 *ante*.

to do so. That could have been simply stated if the rule was intended to mean that. However wide an interpretation is given, it must be an interpretation of the language used. The rule does not give power to add a party whenever it is just or convenient to do so. It gives power to do so only if he ought to have been joined as a party or if his presence is necessary for the effectual and complete determination and adjudication upon all matters in dispute in the cause or matter. It is not suggested that the Crown ought to have been joined.

All matters in dispute in the action will, it seems to me, be effectually and completely disposed of without the Crown being added as a party. Its presence is not necessary to ensure that the Court can effectually and completely determine whether Mr. Vandervell was entitled to the beneficial interest in the shares and whether, if he was, the deed operated retrospectively so as to deprive his executors of a right to the dividends paid before its execution. The rule does not provide that a party may be added on account of matters in dispute in another cause or matter. And even if it did, for the reasons I have given, it could not be said that the determination of the matters in dispute in this action would effectually and completely determine the liability to surtax. I do not regard the proceedings on the appeals against the assessments and this action as parallel proceedings, nor do I feel that it is accurate to say that the selfsame issue arises in both proceedings. On the appeals the question will be, did Mr. Vandervell wholly divest himself of all interest in the shares and the dividends? In the action the issue is who is entitled to the dividends ; and, as I have said, if the Appellants are held entitled, it does not follow that there is no liability to surtax. While there may be cases where under the rule the Crown can properly be joined as a party, this, in my opinion, is not one of them, for in my view its presence is not necessary to ensure that the matters in dispute in the action are completely and effectually determined.

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

**Lord Wilberforce**—My Lords, this appeal arises out of certain dispositions made by the late Mr. G. A. Vandervell which have already, in one aspect, been considered by this House. Considerable sums of money are involved, and the disputes with regard to them are of importance to the parties. But the appeal also raises a question, or questions, of general application: whether in a suit between subjects concerning the ownership of property the Crown, represented by the Commissioners of Inland Revenue, can be brought in as an additional defendant against the wish of one of the original parties. At the present time there are few transactions of a commercial or dispositive character which do not have tax implications for one or more of the parties to them: so to admit that when disputes as to these matters arise the Crown can be brought in, either generally or in specified cases or at the discretion of the Court, is to introduce a new dimension into litigation, which for one of the parties may have unwelcome consequences. To be faced, in addition to the selected private opponent, by the Crown with all its resources as an additional opponent, with rights of argument and appeal, may be a serious matter. It is said that this particular case is an exceptional one ; so in many respects it is, but unless some limiting criterion can be found the decision establishes a new principle, to which in turn extensions are likely to be made. So we should be sure that we are on firm ground before permitting it.

**(Lord Wilberforce)**

It is not necessary to say much about the facts. Mr. Vandervell was the controlling shareholder in a successful company, Vandervell Products Ltd. As part of a scheme for founding a chair in surgery (details can be found in *Vandervell* v. *Commissioners of Inland Revenue*[1] [1967] 2 A.C. 291) the Appellant Company, which is a trustee company and the trustee of a settlement for Mr. Vandervell's children, acquired an option to purchase 100,000 "A" shares in Vandervell Products Ltd. This option it exercised in 1961. Between 11th October 1961 and 19th January 1965 dividends on the shares, amounting to over £1.250,000 (gross), were paid to the Trustee Company. On 19th January 1965 Mr. Vandervell executed a deed assigning to the Trustee Company all his interest (if any) in the shares and in the dividends, to hold on the trusts of the children's settlement. He died in 1967: the first three Respondents are his executors. These executors now claim against the Trustee Company to be entitled to the dividends or to a sum equal in amount, contending that they belonged to Mr. Vandervell. The Trustee Company resists this claim on two main grounds: (A) that the dividends never belonged to Mr. Vandervell; (B) that in any event the deed of 1965 had the effect of transferring Mr. Vandervell's interest in them to the Trustee Company.

The resolution of this dispute will inevitably have fiscal consequences. It may involve claims for estate duty: these we are not concerned with in this appeal. We are concerned with the possible liability of the executors for surtax. The Commissioners of Inland Revenue have already assessed the executors to surtax as regards the dividends, on the ground, presumably, that Mr. Vandervell was the beneficial owner or had not divested himself of the shares during the years in question: the assessment is formally under appeal pending the present suit. If the executors succeed in showing that they are entitled to the dividends, their assessment to surtax will inevitably stand. But this is the difficulty of their situation: if they lose against the trustees and if the Crown is not bound by the decision to that effect, the executors still have to defend themselves against the assessment, and are at risk of being held liable to a large sum of surtax without having the dividends. It is to prevent this happening that they wish the Crown to be joined in this action, so as to be bound by the decision. The situation is even more difficult than this. For if they lose against the trustees only on ground B above, i.e., that Mr. Vandervell was the owner of, or interested in, the dividends up to 1965 but then disposed of them, they might still be liable for the surtax without the dividends. Joinder of the Crown cannot help them over this difficulty; it arises out of the facts of the situation. So the position is that joining the Crown may, but will not necessarily, save the executors from being assessed to surtax without having the dividends. In one event it will; in another not. But it would benefit the executors to have even this partial protection.

I must now refer to the position of the Commissioners of Inland Revenue. Their policy is not to seek to intervene in suits between subjects merely because tax consequences may arise: it was so stated to this House in *Riches* v. *Westminster Bank Ltd.*[2] [1947] A.C.390. It is not their policy to agree in advance to be bound by a decision in private litigation, nor invariably to agree to accept the consequences of a decision in private litigation, though in fact they frequently do so. They agree—and this practice goes back anyhow to 1937 (In re *Turner's Will Trusts* [1937] Ch. 15)—in

(1) 43 T.C. 519. (2) 28 T.C. 159.

A certain cases, mainly where questions of construction or law are involved, to be joined as defendants if all the parties consent to their joinder. This " consent procedure " has proved useful: it is exemplified in In re *Pilkington's Will Trusts*(1) [1961] Ch. 466 ([1964] A.C. 612), where the Crown was joined and given a right of appeal, and In re *Leek* [1967] Ch. 1061 ; [1969] 1 Ch. 563, and we were told of a number of pending cases where it is being used.
B But even in this procedure they do not agree to determination by the Court directly whether a particular liability to tax arises. They assert the right to refuse to be joined in private litigation, at any rate (and this is the field under discussion) where a question affecting a party's liability to income tax (including surtax) is concerned. The reason for this is, they submit, that a statutory code has been laid down for determining liability to this
C tax, by assessment, appeal to the Special Commissioners and, in certain circumstances, to the Courts, of the benefit of which they (and they concede the same right for the taxpayer) cannot be deprived without their consent. As regards this particular matter the Crown adopts a neutral attitude, although it has by leave lodged a printed Case to define its position.

I now come to the arguments on the appeal. The Appellants put their
D contention—that joinder ought not to be allowed—on two main grounds: first, that there is no jurisdiction in the High Court to join the Crown as defendant ; second, that if there is jurisdiction, its joinder is not permitted by the Rules of the Supreme Court. There is also formally a submission based on discretion, but that could not be pursued in this House. On the Respondents' side there is a contention based on acquiescence, but even if
E they are at liberty to take the point it has no substance in it.

The argument for lack of jurisdiction rests upon the proposition that, where the Legislature has by Statute laid down a special procedure for the determination of any question, that special procedure is the only method by which such a question can be determined ; and the ordinary jurisdiction of the courts is excluded. As regards income tax a special procedure is
F prescribed by the Income Tax Act 1952. This argument was supported by authority: *Barraclough* v. *Brown* [1897] A.C. 615 ; *Norwich Corporation* v. *Norwich Electric Tramways Co. Ltd.* [1906] 2 K.B. 119 ; *Soul* v. *Marchant* (1962) 40 T.C. 508 ; *Argosam Finance Co. Ltd.* v. *Oxby*(2) [1965] Ch. 390. The last two cases were examples where it was sought to bring directly before the High Court a tax question without the consent of the Crown. They
G do not govern the present case, where the question is incidental and the Crown consents. The first two depend on essentially the same principle, and it is sufficient to consider *Barraclough* v. *Brown*, for this illustrates sufficiently the scope and limit of the proposition. The question related to the right of undertakers to recover expenses of removing a sunken vessel in the river Ouse from the owner of the vessel. The owner was under no liability at
H common law. The undertakers' right to recover the expenses rested, and rested exclusively, on the provisions of a Statute which provided that the expenses might be recovered in a court of summary jurisdiction. The undertakers sought to obtain a declaration of liability in the High Court, but it was held that this they could not do.

" I do not think ", Lord Herschell said ([1897] A.C. at page 620),
I " the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

(1) 40 T.C. 416. (2) 42 T.C. 86.

**(Lord Wilberforce)**

The limits of this decision are obvious from these words. In order to compare—in fact to contrast—the situation under the Income Tax Acts, it is necessary to see precisely what it is that under that legislation has been made the subject of the statutory procedure. This is the validity and quantum of the assessment to tax which has been made upon the subject. It is this which, when made, is the subject of appeal to the Special Commissioners under s. 52(5) of the Income Tax Act 1952 and s. 12(5) of the Income Tax Management Act 1964; it is the assessment which cannot be altered except in accordance with the Income Tax Acts (Income Tax Management Act 1964, s. 5) and which ultimately becomes final and conclusive. All this is undoubted, and if necessary the authority of *Barraclough* v. *Brown*[1] could be invoked to show that the High Court cannot interfere with assessments. But this is not sufficient to make good the Appellants' argument. In any but the simplest cases of assessment to tax there may arise questions of fact or of law which have to be decided. The Special Commissioners can decide them. They may do so after examination of the appellant or by other lawful evidence: Income Tax Act 1952, s. 52(5). But I see no reason why, if there is consent between the taxpayer and the Revenue, these questions should not be settled by agreement, by arbitration or even by decision of the Court, whether before or after an assessment has been made, provided, of course, that it has not become final after appeal or after the time for appeal has expired. There may be questions, in form suitable for decision by the Court, which are in fact so close to the question of the assessment itself that the Court ought not to entertain them but leave them to the statutory procedure. And nothing that I have said must be taken to imply that either the Crown or the taxpayer may not be entitled to insist that a particular question, as between them, be so decided. But I find nothing in the income tax legislation to justify the comprehensive proposition for which the Appellants must contend, viz., that the High Court is absolutely excluded from a vast range of issues of a kind normally justiciable by it just because those questions arise between taxpayer and Crown and form a basis, even a necessary basis, for an income tax assessment.

I consider, therefore, that the High Court has jurisdiction to decide a question between a subject and the Crown as to the ownership of property, notwithstanding that an assessment to tax has been made, the validity of which may depend upon that ownership. From this three things follow: (1) the consent procedure as heretofore adopted is perfectly valid in appropriate cases; (2) either the Crown or the subject has the right to insist that the statutory procedure for dealing with disputed assessments to income tax (and surtax) be followed; (3) the question whether, where both Crown and subject consent, the Crown can be brought into litigation between subjects depends either upon the consent of *all* parties being given, or failing this upon the Rules of the Supreme Court.

The particular rule which has to be considered is Ord. 15, r. 6. As to this provision, though I am willing to give it a generous interpretation, I am in agreement with my noble and learned friend Lord Morris of Borth-y-Gest and with Buckley J. that it does not enable the Crown to be brought into the present litigation. That it has not this effect was perceived in 1944 by Lord Greene M.R. in *Asher* v. *London Film Productions Ltd.* [1944] 1 K.B. 133, and the view expressed in his judgment must have been confirmed by subsequent consultation with the Attorney-General which failed to provide an agreed formula. I cannot agree with the Court of Appeal that this situation, which the same Court clearly thought to exist in 1944, has in

(1) [1897] A.C. 615.

A some way altered since that time: the rule is in all essentials the same as it was then, and the only factor adduced as evidence for a change consists of the development of the consent procedure. (In re *Pilkington's Will Trusts*[1]) was such a case where the Commissioners were brought in with their consent and that of all parties: *Riches's* case[2]) where the Crown appeared as *amicus curiae*.) But I do not see how any of this can affect the B scope of the rule where no consent exists. From one point of view, it would be convenient if procedure existed for enabling the Crown to be bound by inter-subject litigation, but so long as the Crown desires to retain freedom of choice this may be difficult to achieve, and whatever change were to be made would have to ensure that the other party is not prejudiced by the joinder.

C In my opinion, the Trustee Company's objection is justified, and I would allow the appeal.

**Lord Diplock**—My Lords, between July and October 1967 the executors of the late Mr. Vandervell were served with notices of assessment to surtax for the years 1962–63, 1963–64 and 1964–65 upon dividends which had been paid to Vandervell Trustees Ltd. as trustees of a settlement made by Mr. D Vandervell in 1949. The assessments were made on the basis that the shares on which the dividends were paid were held by the trustees on a resulting trust in favour of Mr. Vandervell. The executors have given notice of appeal against the assessments.

Section 5(6) of the Income Tax Management Act 1964 provides that after notice of assessment has been served "the assessment shall not be altered E except in accordance with the express provisions of the Income Tax Acts". The only way in which an assessment can be altered under the provisions of the Income Tax Acts is by the Special Commissioners on an appeal to them by the party assessed. The powers of alteration are conferred by s. 52(5) and (6) of the Income Tax Act 1952, as amended by the Income Tax Management Act 1964 and made applicable to surtax assessments by s. F 229(4) of the Income Tax Act 1952. Section 52(5) and (6) is as follows:

> "(5) If, on an appeal, it appears to the majority of the Commissioners present at the hearing, by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is overcharged by any assessment or surcharge, the Commissioners shall abate or reduce the assessment or surcharge accordingly, but otherwise every G such assessment or surcharge shall stand good. (6) If, on any appeal, it appears to the Commissioners that the person assessed or surcharged ought to be charged in an amount exceeding the amount contained in the assessment or surcharge, they shall charge him with the excess".

The executors have not been paid the dividends. In 1968 they brought proceedings against the trustees to recover them. These were started by H originating summons but are now being continued as a witness action with pleadings. Issues of fact as well as issues of law are involved. The trustees resist the claim upon the ground that at the time the dividends were received the late Mr. Vandervell had already parted with his beneficial interest in the shares, or, if not in the shares, at any rate in the dividends declared on them. Alternatively, they say that Mr. Vandervell disposed of his interest in the I dividends in 1965 after they had been received by the trustees. If the executors recover the dividends from the trustees, or if they fail to recover because

(1) 40 T.C. 416. (2) 28 T.C. 159.

**(Lord Diplock)**

Mr. Vandervell did not dispose of his interest in them until 1965, the estate of the late Mr. Vandervell will be liable to surtax in the amounts assessed on the executors. It is only if Mr. Vandervell was not entitled to the beneficial interest in the dividends at the time when they were received by the trustees that the executors would be entitled to have the assessments to surtax reduced by the Special Commissioners. But the onus of proving this to the satisfaction of the Special Commissioners would lie upon the executors; and the Special Commissioners would not be bound by any findings of fact made by the Court in the action between the executors and the trustees. As respects any ruling by the Court upon questions of law involved, the Special Commissioners would have to follow it, but it would be open to the Commissioners of Inland Revenue (whom I will call "the Board") to appeal by way of Case Stated and to carry that appeal to an appellate Court which might not be bound by the ruling of the Court in which the proceedings between the executors and the trustees terminated.

Theoretically, therefore, there is a risk that the executors might be faced by conflicting findings of fact or law in the action between them and the trustees, on the one hand, and in the proceedings in their surtax appeal to the Special Commissioners, on the other, which might have the result of their failing to recover the dividends from the trustees on the ground that Mr. Vandervell was not beneficially entitled to them at the time they were received by the trustees, and yet also failing to have their assessment to surtax on the self-same dividends set aside, because they had not succeeded in establishing this ground to the satisfaction of the Special Commissioners or of an appellate Court on appeal by Case Stated. It is in an endeavour to eliminate this theoretical risk, which I confess I regard as minimal in the actual circumstances of the instant case, that the executors have sought, against the opposition of the trustees, to join the Board as additional defendants in their action against the trustees. The sole reason for joining the Board, who do not themselves oppose this course, is in order that the Board may be bound by any decision in the action as to who was entitled to the beneficial interest in the dividends at the time they were received by the trustees.

My Lords, it has been assumed, without any close analysis, that if the Board are made parties to the action, the Special Commissioners, who hear the executors' appeals against their surtax assessments, will be bound to give effect to any decision of the Court as to who was entitled to the beneficial interest in the dividends at the time they were received by the trustees. But a judgment in the action can only operate as an estoppel *per rem judicatam* between parties to the action; and in an action in which no express declaration of the executors' liability to surtax is sought, the only estoppel against the Board which could be relied upon would be an issue estoppel. The only effect of an issue estoppel *per rem judicatam* is to prevent the party estopped from asserting, in any subsequent civil litigation between the same parties in which the same issue arises, any claim or defence which would involve his contending that the previous decision on that issue was erroneous or his adducing evidence in support of any such contention. It is, therefore, necessary to consider what are the legal characteristics of the proceedings on appeal to the Special Commissioners against surtax assessment and what are the respective roles of the Board and the Special Commissioners in such appeals. The Board, though entitled to be represented during the hearing and at the determination, are not necessary parties to an appeal. If they do not attend, the Special Commissioners must still be satisfied "by examination of the appellant on oath or affirmation, or by other lawful

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A evidence" that the appellant is overcharged by the assessment; and the Special Commissioners may increase the assessment *proprio motu* if they are satisfied that the appellant has been underassessed. If the Board do exercise their right to appear, their role is restricted to that allotted to them by s. 52(2)(*b*) and (*c*) of the Income Tax Act 1952, viz. "to produce any lawful evidence in support of the assessment", and "to give reasons in B support of the assessment". They have no right to adduce evidence or to give reasons for any increase in the assessment although the Special Commissioners have express power to make one.

It is thus evident that the function of the Special Commissioners on an appeal against an assessment to surtax differs from that of a court of law on the hearing of a civil action, whether at first instance or on appeal. A C court of law adjudicates upon issues in dispute between the parties to the civil action which they have chosen to submit to the Court's adjudication. It is not entitled to adjudicate upon any other issues or to make an order which none of the parties to the action has sought. In contrast to this, the Special Commissioners on an appeal against an assessment have to satisfy themselves by lawful evidence that the appellant has been overcharged, even D though the Board themselves do not dispute this on the appeal, and they can make an order increasing the assessment although the appellant has not sought, and the Board are not entitled to seek, or even to support, the making of such an order. Thus, even if the Court in a civil action to which a taxpayer and the Board were parties had jurisdiction to determine an issue of mixed fact and law which would also arise upon the taxpayer's appeal to the E Special Commissioners against an assessment on him to surtax, the issue estoppel *per rem judicatam* resulting from the Court's determination of that issue would prevent the Board from producing any evidence before the Special Commissioners which conflicted with the Court's determination of fact or advancing any reasons to the Special Commissioners which conflicted with what the Court had decided on that issue as a matter of fact or law. F But it would do no more. The taxpayer would still have to satisfy the Special Commissioners that the assessment was wrong and, so far as it depended upon facts, to do so by lawful evidence of them. The judgment of the Court in the action would not be lawful evidence of the facts found therein. Those facts would have to be proved afresh by the taxpayer if the grounds on which he sought reduction of the assessment depended on the truth of G those facts.

My Lords, I do not desire to say anything to discourage the sensible practice on appeals before the Special Commissioners of dispensing with proof by lawful evidence of facts which are agreed between the taxpayer and the Commissioners of Inland Revenue or which the latter do not wish to contest. The functions of the Special Commissioners have been substantially altered H by the Income Tax Management Act 1964. They have become more judicial and less administrative, although the procedure on appeals to them laid down in s. 52 of the Income Tax Act 1952 has not been amended to take account of this. Nevertheless, if with the consent of both the parties entitled to be heard on the appeal they determine it upon facts which are agreed but not proved by evidence, this is irregularity in procedure which I can be waived. The resulting assessment as altered or confirmed by the Special Commissioners would be valid and neither of the consenting parties would be able to object to it thereafter on the ground of irregularity. No doubt the taxpayer and the Board might also agree to accept as correct, for the purposes of the appeal, facts already found in any judgment of a Court, whether or not the taxpayer or the Board were themselves parties

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to that judgment. They might also, without any irregularity, agree not to appeal by way of Case Stated from any determination of the Special Commissioners which followed any ruling of law contained in the judgment. That is the purpose for which the executors and the Board intend to make use of the judgment in the instant action. But the Board are unwilling to do so unless they themselves are made parties to the action.

My Lords, however sensible this latter course may be, it would involve an irregularity in the procedure laid down by Parliament for the determination of surtax appeals. What the Court is being asked to do, against the opposition of one of the parties to the action, is to give its aid to this proposed irregularity. I do not think that it can. The decisive question, as I see it, is whether the Court has any jurisdiction after an assessment to surtax has once been made to adjudicate between the taxpayer and the Crown upon the correctness of the assessment or upon any underlying issue of fact on which the correctness of the assessment depends, where the Crown has no other interest in that issue except its effect upon the taxpayer's liability to surtax. I think the Court has no such jurisdiction. The provisions of s. 5(6) of the Income Tax Management Act 1964, which I cited at the outset of my speech, are clear and unequivocal. The power to alter an assessment once it has been made and served is conferred upon the Special Commissioners to the exclusion of any court of law, except in so far as an appeal from a determination of the Special Commissioners upon a point of law lies to the High Court under s. 64 of the Income Tax Act 1952. It is not suggested that the Court has any jurisdiction to entertain an action between the taxpayer and the Board for a declaration that the taxpayer's liability to surtax is different from that with which he is charged by the assessment. That would be to trespass upon the jurisdiction to alter an assessment which Parliament has confided exclusively to the Special Commissioners. And I do not think that this statutory exclusion of the jurisdiction of the High Court can be circumvented by seeking a declaration upon an issue, whether of fact or of mixed fact and law, upon which the liability of the taxpayer to the amount of surtax with which he has been charged by the assessment depends. If the only interest of the Board in that issue is the taxpayer's liability to surtax, any relief granted by the Court by way of declaration would either not be a declaration of any rights to which the taxpayer was entitled against the Board or *vice versa,* or would be a declaration of his liability to surtax, and this lies within the excluded jurisdictional field. If the Court has no jurisdiction to grant relief by way of a declaratory judgment of this kind against the Board at the suit of the taxpayer or against the taxpayer at the suit of the Board, it cannot, in my view, acquire jurisdiction to do so merely because a declaratory judgment in similar terms is sought by one or other party in an existing action instituted for some other purpose between the taxpayer and some other person. It follows that if the Crown was made party to the instant action neither the executors nor the Board would be entitled to claim any relief by way of declaration or otherwise against one another in that action. A party to an action must be a person who claims in that action some relief against another party to the action or against whom some relief is claimed by another party to the action. There is, in my view, no jurisdiction to add as a party to an existing action a person by and against whom no relief which the Court has jurisdiction to grant can be claimed.

My Lords, I have deliberately confined my observations to cases such as the instant case where an assessment to surtax has already been made and is under appeal to the Special Commissioners. Much wider topics have been

A canvassed in argument, and your Lordships have been invited to express some general views as to the validity of what has been termed " the consent procedure " in adding the Revenue as parties to civil actions between subjects. Despite the helpful argument I do not feel qualified to do so. It seems to me that the problem would be more appropriately dealt with by Parliament itself rather than by attempting, by judicial decision, to reconcile a procedure
B of this kind with a whole variety of statutory procedures in fiscal matters which never contemplated it. But, for the reasons I have given, I would allow the instant appeal.

*Questions put :*

That the Order appealed from be reversed and the judgment of Buckley J. restored.

C *The Contents have it.*

That the first, second and third Respondents do pay to the Appellants their costs here and in the Court of Appeal in any event.

*The Contents have it.*

[Solicitors:—Culross (for Vandervell Trustees Ltd.); Allen & Overy (for the executors of G. A. Vandervell deceased); Solicitor of Inland Revenue.]

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