HIGH COURT OF JUSTICE (CHANCERY DIVISION)—
6TH, 7TH, 8TH AND 28TH JULY 1964

COURT OF APPEAL—4TH, 5TH AND 8TH FEBRUARY 1965

HOUSE OF LORDS—16TH, 17TH AND 18TH NOVEMBER 1965
AND 27TH JANUARY 1966

Commissioners of Inland Revenue *v.* G. G. Parker[1]
Commissioners of Inland Revenue *v.* M. E. Parker
Commissioners of Inland Revenue *v.* F. J. Tomlinson
Commissioners of Inland Revenue *v.* H. A. Parker

Surtax—Tax advantage—Transaction in securities—Bonus issue of debentures followed by redemption—Whether transaction in securities—Whether in connection with the distribution of profits—Whether a tax advantage obtained and, if so, when—Finance Act 1960 (8 & 9 *Eliz.* 2, *c.* 44), *ss.* 28 *and* 43.

In 1953 *a company capitalised* £35,002 *standing to the credit of its profit and loss account and applied that sum in issuing debentures to the members in proportion to the amounts paid up on their shares. The debentures did not confer any charge on any of the company's assets nor carry interest. In January* 1961 *the debentures issued to the four members then surviving, the Respondents in this case, were redeemed at par.*

The Commissioners of Inland Revenue gave notice to each of the Respondents under s. 28(3), *Finance Act* 1960, *that the adjustment requisite to counteract the tax advantage obtained by the capitalisation and the issue and redemption of the debentures was that his or her liability to surtax for the year* 1960–61 *should be computed on the basis of treating the redemption moneys as the net amount of a dividend payable under deduction of tax at the date of receipt.*

On appeal, the Respondents contended (1) *that the debentures were not securities within the meaning of ss.* 28 *and* 43(4)(*b*), *Finance Act* 1960, (2) *that the language of s.* 28 *was inappropriate to make the section apply to the transactions,* (3) *that the redemption of the debentures was not a transaction in securities,* (4) *that if it was, any tax advantage was obtained on the issue of the debentures and not on their redemption,* (5) *that none of the circumstances mentioned in s.* 28(2) *applied,* (6) *that the redemption was carried out in the ordinary course of managing the investments of the Respondents, and* (7) *that the adjustments directed to be made in the notice were inappropriate. The Special Commissioners accepted the first, second, fourth and fifth contentions and cancelled the notices.*

In the Court of Appeal and the House of Lords it was further contended that the redemption of the debentures represented a return of sums paid by subscribers on the issue of securities.

Held, *that the notices should be confirmed.*

(1) Reported (Ch. D.) [1965] Ch. 866; [1964] 3 W.L.R. 1121; 108 S.J. 675; [1964] 3 All E.R. 510; 235 L.T. Jo. 626; (C.A.) [1965] Ch. 1032; [1965] 2 W.L.R. 1141; 109 S.J. 177; [1965] 1 All E.R. 796; 236 L.T. Jo. 164; (H.L.) [1966] A.C. 141; [1966] 2 W.L.R. 486; 110 S.J. 91; [1966] 1 All E.R. 399.

A

CASES

(1) *Commissioners of Inland Revenue* v. *G. G. Parker*

CASE

Stated under the Finance Act 1960, s. 28(8), and the Income Tax Act 1952, ss. 247
B and 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 7th and 8th February 1963, George G. Parker (hereinafter called "Mr. Parker") appealed against a notice in the following terms given by the Commissioners of Inland Revenue on 16th August 1962, under the
C provisions of s. 28, Finance Act 1960:

> "Whereas, on 17th July, 1961, the Commissioners of Inland Revenue notified you, in accordance with subsection (4) of Section 28 of the Finance Act, 1960, that they had reason to believe that the said Section 28 (which relates to the cancellation of tax advantages from certain transactions in securities) might apply to you in respect of the following transactions, that
> D is to say, (1) the Resolution of Parker Shoes, Ltd., on 18th May, 1953, to capitalise £35,002 standing to the credit of the company's profit and loss account and to apply that sum in paying up in full at par debentures for securing the sum of £35,002, such debentures to be allotted and distributed, credited as fully paid up, to and amongst the members of the company in proportion to the amounts paid up on their shares; (2) the allotment and
> E distribution to you, in pursuance of the said Resolution, of debentures in Parker Shoes, Ltd., to the amount of £18,002; (3) the payment to you on 14th January, 1961, by Parker Shoes, Ltd., of £18,002, being the principal sum secured by the aforesaid debentures; And whereas, on 12th March, 1962, the Tribunal constituted under the said Section 28, having taken into consideration the statutory declaration made by you under subsection (4)
> F of that Section and the certificate and counter-statement of the Commissioners of Inland Revenue under subsection (5) thereof, determined that there was a prima facie case for proceeding in this matter: Now therefore the Commissioners of Inland Revenue, being of opinion that Section 28 of the Finance Act, 1960, applies to you in respect of the aforesaid transactions, hereby give notice, in accordance with subsection (3) of that
> G Section, that the following adjustments are requisite for counteracting the tax advantage thereby obtained or obtainable, that is to say, the computation or recomputation of your liability to surtax for the year of assessment 1960–61 on the basis that the said sum of £18,002 should be taken into account as if it were the net amount received in respect of a dividend payable at the date of the receipt thereof from which deduction of tax was
> H authorised by subsection (1) of Section 184 of the Income Tax Act, 1952, and any assessment or additional assessment to surtax which may be requisite to give effect to such computation or recomputation."

2. The appeal raised two points, viz: (*a*) whether the provisions of s. 28, Finance Act 1960, applied to Mr. Parker in respect of the transactions specified in the notice of 16th August 1962, and (*b*) if so, whether the adjustments directed
I to be made therein were inappropriate.

3. Evidence was given before us by Mr. Parker and by Mr. J. F. T. Nangle, F.C.A., a partner in the firm of Messrs. Barton, Mayhew & Co.

The facts found by us are set out in paras. 4 to 17 inclusive below.

4. Parker Shoes Ltd. (hereinafter called "the company") was formed on 11th June 1925 to acquire the business of boot and shoe manufacturer carried on by Frank Parker. The authorised capital of the company on formation was £40,000, divided into 40,000 shares of £1 each. At all material times the company has had an issued share capital of 35,002 £1 ordinary shares.

5. In the company's balance sheet at 31st December 1952 the amount at credit of the profit and loss account was £69,914. This amount represented an accumulation of profits within the charge to income tax. The corresponding figure at 31st December 1960 was £128,720.

6. On 18th May 1953 at an extraordinary general meeting a special resolution was passed amending the articles of association so as to give the company power upon the directors' recommendation to capitalise any part of the amount standing to the credit of the company's reserve or profit and loss accounts and to apply it in paying up unissued shares or debentures. On the same date an ordinary resolution was passed recommending that a sum of £35,002 out of the amount at credit of the company's profit and loss account to be set free for distribution to the members as at 18th May 1953, but that the directors be authorised to apply such sum in paying up in full at par debentures for securing the sum of £35,002.

7. The members at 18th May 1953 and the bonus debentures issued to them were as follows:

Member	*Shares held*	*Debentures issued*
		£
Mrs. Annie M. Parker	4,250	4,250
Mr. Parker	18,002	18,002
Miss Marjorie E. Parker	6,075	6,075
Miss Hilda A. Parker	6,075	6,075
Frederick J. Tomlinson	600	600
	35,002	35,002

8. A copy of the form of debenture, marked "A", is attached to and forms part of this Case[1]. Paragraph 8 of the conditions of issue states that the company may at any time after the death of the registered holder or after the expiration of seven years from the date thereof (whichever is the earlier) give notice of its intention to pay off the debenture upon the expiration of six calendar months from the giving of such notice. The debentures did not confer any charge on any of the company's assets nor carry interest. The debentures were dated, sealed and issued under the company's seal on 13th July 1953.

9. Mrs. Annie M. Parker died in 1953. The debentures issued to her were repaid in that year and are not relevant. The 4,250 shares in her name were divided among the other members on 12th December 1955. On 14th July 1960 the company gave notice to the remaining debenture-holders of its intention to redeem their debentures on 14th January 1961, and on that date they were duly repaid: the recipients, the amounts received, and their shareholdings were as follows:

[1] Not included in the present print.

Recipient	*Shareholding at 14th January* 1961	*Debentures repaid* £
Mr. Parker	19,002	18,002
Miss Marjorie E. Parker	7,500	6,075
Miss Hilda A. Parker	7,500	6,075
Frederick J. Tomlinson	1,000	600
	35,002	30,752

10. For the year of assessment 1960–61 the total income of each of the above-named members of the company (which does not include the receipt mentioned in para. 9) was such as to make him or her liable to surtax for that year.

11. On 17th July 1961 the Commissioners of Inland Revenue sent to Mr. Parker a notification under s. 28(4) of the Finance Act 1960, and on 16th August 1962 the Commissioners of Inland Revenue sent to Mr. Parker a notice under s. 28(3) of the said Act, a copy of which is set out in para. 1 above.

12. On 21st August 1962 Mr. Parker gave notice of appeal against the said notice on the ground

> "that the section does not apply to the shareholder in respect of the transactions specified in the notices and, in the alternative, that, if the section does apply, the adjustments directed to be made are inappropriate".

13. The bonus debentures referred to in para. 6 above were issued by the company in order that on the death of a shareholder money might be made available to meet the death duties payable on his estate. Consideration had been given for some time prior to this issue to the position which would arise in the event of the death of Mr. Parker. As will be seen from para. 7 above, Mr. Parker was a majority shareholder in the company and in the event of his death his shares therein would have been valued on an assets basis for estate duty purposes in accordance with s. 55, Finance Act 1940.

14. Mr. J. F. T. Nangle, F.C.A., was called in early in 1958 to advise Mr. Parker in relation to the liability of his estate to death duties and his taxation position generally.

Mr. Nangle was given particulars of the investments of Mr. Parker other than his holding in the company, and also excluding his shareholding in a company called Basic Models Ltd., which company owned one of the factories in which the company [Parker Shoes Ltd.] operated. He was also given similar information about Mr. Parker's two sisters, Miss Marjorie E. Parker and Miss Hilda A. Parker. Mr. Parker was a bachelor and his two sisters were his next-of-kin.

These particulars disclosed that Mr. Parker's investments, other than his holdings in the company and Basic Models Ltd., had a market value of some £15,000, and those of each of his sisters a market value of some £7,500. Mr. Nangle estimated that the death duties payable on Mr. Parker's estate including his holdings in the company might be of the order of £65,000. It was obvious that duties of this amount could not be met from the free resources of Mr. Parker and his two sisters (i.e., without a forced realisation of his shares in the company), and Mr. Nangle advised that steps be taken to increase their assets outside their shares in the company, if possible, particularly in the case of Mr. Parker.

15. Mr. Nangle advised that the factory owned by Basic Models Ltd. should be sold to the company and the former company liquidated. This was done, and the moneys received by Mr. Parker and his two sisters on the liquidation of Basic Models Ltd. were invested by them in readily realisable securities. At January 1961 Mr. Parker's investments other than his shareholding in the company had a market value of approximately £17,400, and the investments then of his sisters Marjorie and Hilda were worth about £18,750 and £18,000 respectively. We annex schedules of the investments of Mr. Parker and his sisters as at May 1953 and January 1961 respectively(1).

16. As stated in para. 9 above, the debentures were redeemed on 14th January 1961, and the sums received by Mr. Parker and his two sisters were invested by them in readily realisable securities.

17. The object of making moneys available to Mr. Parker and his two sisters through the liquidation of Basic Models Ltd. and the redemption of the debentures in the company was to enable them to have available investments which could be realised to pay death duties, particularly in the event of the death of Mr. Parker. If resources outside the company were not so available a claim for death duties could only have been met by making available moneys from the company (which might have interfered with its ability to carry on its trade) or by a forced realisation of shares in the company.

18. Mr. Nangle also advised that in view of the proposed redemption of the debentures in the company it would be necessary for the company to pay a substantially increased dividend, in order to avoid, if possible, a direction being made under the provisions of s. 245, Income Tax Act 1952. Accordingly the company paid dividends for the year ended 31st December 1960 amounting gross to £22,751 out of profits of £81,970, an effective increase in the rate of dividend from 30 to 65 per cent.

19. It was contended on behalf of Mr. Parker that:

(*a*) the form of debenture (exhibit A) was not a security within the meaning of ss. 28 and 43(4)(*f*) of the Finance Act 1960;

(*b*) the language of the said s. 28 was inappropriate to make the section apply to the transactions referred to in the notice sent to Mr. Parker by the Commissioners of Inland Revenue on 16th August 1962;

(*c*) the redemption of the debentures by the company on 14th January 1961 was not a transaction in securities within the meaning of the said s. 28, but that even if it were, any tax advantage was obtained on the issue of the debentures in 1953 and accordingly under proviso (i) to s. 28(1) the section should not apply to Mr. Parker;

(*d*) none of the circumstances set out in subs. (2) of the said s. 28 were applicable to the transactions set out in the notice of 16th August 1962, and, in particular, the redemption of the debentures by the company on 14th January 1961 was not in connection with a distribution of profits within the meaning of s. 28(2)(*d*), nor was such a consideration as mentioned in the said subsection received as therein mentioned;

(*e*) the redemption of the debentures by the company was carried out in the ordinary course of managing the investments of Mr. Parker and his two sisters, and accordingly, by virtue of s. 28(1) that section should not be applied to Mr. Parker; and

(1) Not included in the present print.

(*f*) in any event, the adjustments directed to be made in the notice of 16th August 1962 are inappropriate.

20. It was contended on behalf of the Commissioners of Inland Revenue that:

(*a*) Mr. Parker had obtained a tax advantage by reason of the receipt of £18,002 on 14th January 1961 by way of redemption of his debentures in the company;

(*b*) the capitalisation of profits and the issue of bonus debentures by the company on 13th July 1953, together with the redemption of those debentures on 14th January 1961, were transactions in securities as a consequence of which Mr. Parker received assets of the company which would have been available for distribution by way of dividend;

(*c*) the redemption of the debentures was a "distribution of profits" within the meaning of s. 28(2)(*d*), Finance Act 1960, and accordingly, in circumstances mentioned in that subsection and in consequence of the combined effect of two transactions in securities, Mr. Parker had obtained a tax advantage;

(*d*) the proviso to subs. (1) of the said s. 28 was not applicable to Mr. Parker, since only one of the said transactions in securities was carried out before 5th April 1960;

(*e*) the aforesaid transactions in securities were not carried out in the ordinary course of making or managing investments;

(*f*) the adjustments specified in the notice issued by the Commissioners of Inland Revenue on 16th August 1962 were appropriate for counteracting the tax advantage obtained by Mr. Parker; and

(*g*) the said notice should be confirmed without variation.

21. (*a*) We, the Commissioners who heard the appeal, were of the opinion that the terms of s. 28, Finance Act 1960—particularly subs. (2) thereof—were inappropriate to deal with the circumstances with which we were faced in this appeal. The device of capitalising profits and utilising them to issue debentures which could be subsequently redeemed had been dealt with in legislation dating from 1936. Section 246 of the Income Tax Act 1952, which re-enacts s. 19(4) of the Finance Act 1936, specifically provided for disregard of this device in considering whether a reasonable part of a company's income had been distributed in a taxable form for the purposes of s. 245. Even by straining the language of s. 28 of the Finance Act 1960, it did not seem to us possible to bring within its ambit circumstances such as are to be found in this appeal.

Apart from this general ground, we held that the so-called debentures issued by the company on 13th July 1953 were not "securities" within the normal meaning of that word or as extended by s. 43(4)(*f*). The term "securities", in our view, must be interpreted as obligations secured on property or a fund. The debentures issued by the company carried no interest and were not secured in any way. Section 43(4) extended the definition of "securities" to include shares, but was not apt, we held, to bring in the company's debentures.

We also held that if any tax advantage arose to Mr. Parker it arose when the profits of the company were capitalised and debentures were issued to him in 1953. The redemption of the debentures in 1961 was not a transaction in securities as a consequence of which Mr. Parker obtained a tax advantage. It seemed to us, therefore, that even if s. 28 applied Mr. Parker was entitled to be relieved of liability under the section by virtue of the proviso to subs. (1) thereof.

We further held that the payment of cash to Mr. Parker in redemption of his debentures in 1961 was not a distribution of profits within the meaning of s. 28(2)(*d*), Finance Act 1960. Having regard to the decision in *St. Aubyn* v. *Attorney-General* [1952] A.C. 15, at page 32, we could not regard the payment of money in redemption of debentures as a transfer of assets by the company to Mr. Parker; and it was only if the payment could be so regarded that it could be held to be a distribution of profits by virtue of the extended definitions in s. 28(2)(i) and (ii).

For the above-mentioned reasons we held that s. 28 did not apply in respect of the transaction or transactions in question, and we therefore cancelled the notice issued by the Commissioners of Inland Revenue on 16th August 1962.

(*b*) We also considered whether, if we were wrong in holding that s. 28 did not apply, Mr. Parker would be entitled to escape liability under the terms of s. 28(1) by showing that the issue of the debentures by the company and their subsequent redemption were carried out in the ordinary course of making or managing investments. We found, however, that this had not been established.

22. The representative of the Commissioners of Inland Revenue immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court, which Case we have stated and do sign accordingly.

23. The question of law for the opinion of the Court is whether on the facts found by us as set out in this Case our decision in para. 21 hereof was incorrect.

W. E. Bradley
B. Todd-Jones
} Commissioners for the Special Purposes of the Income Tax Acts

Turnstile House
94–99 High Holborn
London W.C.1
30th October 1963

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(2) *Commissioners of Inland Revenue* v. *M. E. Parker*
(3) *Commissioners of Inland Revenue* v. *Tomlinson*
(4) *Commissioners of Inland Revenue* v. *H. A. Parker*

These Cases related to appeals by other members of Parker Shoes Ltd. The facts, the contentions of the parties and the decision of the Commissioners were the same as in the first Case.

The cases came before Ungoed-Thomas J. in the Chancery Division on 6th, 7th and 8th July 1964, when judgment was reserved. On 28th July 1964 judgment was given in favour of the Crown, with costs.

W. A. Bagnall Q.C., *E. Blanshard Stamp* and *J. Raymond Phillips* for the Crown.

F. N. Bucher Q.C. and *L. J. Bromley* (*P. L. Gibson* with them) for the taxpayers.

Rae v. *Lazard Investment Co. Ltd.* 41 T.C. 1; [1963] 1 W.L.R. 555 was cited in argument in addition to the cases referred to in the judgment.

A **Ungoed-Thomas J.**—These four cases raise identical questions under s. 28 of the Finance Act 1960. That section provides that where, in specified circumstances and in consequence of transactions in securities, a person obtains a tax advantage, it shall be counteracted on such basis as the Commissioners of Inland Revenue may specify as requisite for counteracting it. In this case, are there the specified circumstances? Is there the requisite security? Are there transactions
B in securities? Is there a tax advantage? Is the tax advantage in consequence of transactions in securities? Is the basis specified by the Commissioners of Inland Revenue for counteracting the tax advantage requisite for doing so?

At all material times the private company of Parker Shoes Ltd. had an issued share capital of 35,002 £1 ordinary shares. In 1953 those shares were held by the four Respondents: Mr. George Parker, 18,002; his sisters, Misses
C Marjorie and Hilda Parker, 6,075 each; Mr. Tomlinson, 600; and Mr. Parker's mother, who has since died, 4,250. The members were concerned how liability for estate duty should be discharged on the death of any member, and particularly on the death of Mr. George Parker, whose shares would be valued on an assets basis and the estate duty on whose estate might be as much as £65,000. Therefore the members wanted liquid funds available for estate duty without
D interfering with the company's ability to carry on trade or involving a forced realisation of shares in the company. However, the company's balance sheet for the year ending 31st December 1952 showed an accumulated fund of £69,914 to the credit of the profit and loss account. Thus the operations with which we are concerned in this case were carried out to make money available out of that accumulated fund to meet the death duties payable out of a member's estate
E on his death.

On 18th May 1953 the company duly amended its articles to give power to capitalise any part of the amount outstanding to the credit of the company's reserve or profit and loss accounts, and to apply it in paying up unissued shares or debentures. On the same day, an ordinary resolution was passed that a sum of £35,002 out of the amount at credit of the profit and loss account be set free
F for distribution to the members, but that the directors be authorised to apply such sum in paying up in full at par debentures for securing the sum of £35,002. Accordingly, bonus debentures dated 13th July 1953 were issued to the members for amounts equal to the par value of their shares. Mrs. Annie Parker died later in the year, and her debenture was repaid; and in 1955 her shares were divided among the other members.

G The debentures were redeemable at the option of the company at par on six months' notice given after seven years. At the end of the seven years—namely, on 14th July 1960—the company gave all the debenture holders the six months' notice of its intention to redeem on 14th January 1961. At that time the figure corresponding to the £69,914 to the credit of the profit and loss account on 31st December 1952 was £128,720, and on 14th January 1961 the debentures
H were redeemed and the amounts for which they were issued were paid to the four holders, the Respondents. The member debenture-holders received amounts out of what had before the capitalisation been accumulated profits, and thus received them free of liability to surtax, apart from the disputed application of s. 28; and so, the Crown say, obtained a tax advantage.

On 18th August 1962 the Commissioners of Inland Revenue served notices on the Respondents in accordance with s. 28 that the tax advantage obtained by
I the capitalisation and the issue and redemption of the debentures should be counteracted by computation for surtax on the basis that the sums received on redemption should be taken into account for surtax purposes as if they were

(Ungoed-Thomas J.)

net amounts of dividends payable at the date of their receipt, and by any requisite assessment or additional assessment to surtax.

Section 28 of the Finance Act 1960, so far as material for present purposes, reads:

> "(1) Where—(*a*) in any such circumstances as are mentioned in the next following subsection, and (*b*) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage, then . . . this section shall apply to him in respect of that transaction or those transactions: Provided that this section shall not apply to him if—(i) the transaction or transactions in securities were carried out . . . before the fifth day of April, nineteen hundred and sixty. (2) The circumstances mentioned in the foregoing subsection are that"—and I omit paragraphs (*a*) and (*b*)—"(*c*) the person in question receives . . . a consideration which either is, or represents the value of, assets which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend . . . and the said person so receives the consideration that he does not pay or bear tax on it as income; or (*d*) in connection with the distribution of profits of a company to which this paragraph applies, the person in question so receives as is mentioned in paragraph (*c*) of this subsection such a consideration as is therein mentioned. In this subsection (i) references to profits include references to income, reserves or other assets, (ii) references to distribution include references to transfer or realisation (including application in discharge of liabilities), and (iii) references to the receipt of consideration include references to the receipt of any money or money's worth". I omit the rest of subs. (2), and come to subs. (3): "Where this section applies to a person in respect of any transaction or transactions the tax advantage obtained or obtainable by him in consequence thereof shall be counteracted by such of the following adjustments, that is to say an assessment or additional assessment . . . on such basis as the Commissioners of Inland Revenue may specify by notice in writing served on him as being requisite for counteracting the tax advantage so obtained or obtainable." Subsection (12) reads: "No other provision contained in this Act, or in any other of the Income Tax Acts, shall be construed as limiting the powers conferred by this section", and I omit the rest of that subsection. Section 43, which is the interpretation section, provides, by subs. (4): "(*f*) 'securities' includes shares, 'shares', except where the context otherwise requires, includes stock, and references to dividends include references to interest; (*g*) 'tax advantage' means . . . the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains; . . . (*i*) 'transaction in securities' includes transactions, of whatever description, relating to securities, and in particular . . . (ii) the issuing or securing the issue of, or applying or subscribing for, new securities", and I omit the rest of that subsection.

It is common ground that at all relevant times this company was a controlled company to which s. 28(2)(*d*) applies, and that each Respondent was a surtax payer.

The first question, then, is: Are these debentures securities within s. 28? The debenture is headed "Parker Shoes Limited", and gives the address of the registered office. Then there is a space for the number, and then "Debenture", and there is a space for the amount. The body of it reads:

(Ungoed-Thomas J.)

A "1. For valuable consideration already received Parker Shoes Limited (hereinafter called 'the Company') will, as and when the Principal Money hereby secured becomes payable in accordance with the Conditions endorsed hereon, pay to", and then there is a space for the description of the debenture holder, "or other the Registered Holder hereof for the time being, his Executors, Administrators, or Assigns, the Sum of", and then there is B a space for the amount: "2. This Debenture is issued subject to the Conditions endorsed hereon, which are to be deemed part of it"; and that is executed under the seal of the company. Then there is the heading: "The Conditions within referred to". Condition 1 reads: "This Debenture is one of a series of Debentures issued or to be issued by the Company for securing Principal Sums not exceeding at any one time the sum of Thirty-five C Thousand and Two Pounds." Condition 8 reads: "The Company may at any time after the death of the Registered Holder hereof or after the expiration of 7 years from the date hereof (whichever is the earlier) give notice in writing to the Registered Holder hereof, or his executors or administrators, of its intention to pay off this Debenture, and upon the expiration of six calendar months from such notice being given the Principal D Money hereby secured shall become payable." Then condition 9 provides: "The Principal Money hereby secured shall immediately become payable:— (*a*) If a distress or execution be levied or sued out upon or against any of the property and assets of the Company, and be not paid out within five days; (*b*) If an Order be made or an effective Resolution be passed for the winding up of the Company; (*c*) If a Receiver of the property and assets E of the Company be appointed" by the court. Condition 11 provides: "The Registered Holders of three-fourths in value of the outstanding Debentures of this series may, by writing under their hands, sanction any agreement or arrangement with the Company for the compromise, modification, or alteration of the rights of the Registered Holders of the Debentures": this condition was never operated.

F Section 28 introduces into income tax legislation the conception of nullification *ex post facto*, through power given to the Commissioners of Inland Revenue for the purpose, of a tax advantage obtained by a taxpayer through company operations in accordance with the law. It is thus of a penal and retroactive nature, requiring a strict approach in accordance with the presumed intention of the Legislature. On the other hand, it is designed to deal with well-G recognised evasions of liability through company operations in a commercial context, and in my view the strict approach must be applied within this company and commercial context in which the Legislature is speaking. It seems to me that words used in such a context must have a company and commercial meaning, and not a meaning appropriate to some other context. "Securities" is not a term of art, and it has no precise meaning. It may refer to security secured on real H estate or on personal estate or by personal covenant or to shares and investments generally.

In *Singer* v. *Williams*[1] 7 T.C. 419 the question was whether shares in an American corporation were "foreign possessions", and therefore chargeable to tax on the average of income over the three years preceding the year of assessment, or were "foreign securities", and therefore chargeable to tax on the basis I of the income of the year of assessment. The issue in that case to which the minds

[1] [1921] 1 A.C. 41.

(Ungoed-Thomas J.)

of the Judges were directed was not whether security by personal liability, as contrasted with security by charge on property, came within the meaning of "securities", but whether securities extended from security for payment of a debt to shares in a company. Lord Shaw stated, at page 435:

> "The word 'securities' has no legal signification which necessarily attaches to it on all occasions of the use of the term. It is an ordinary English word used in a variety of collocations: and it is to be interpreted without the embarrassment of a legal definition and simply according to the best conclusion one can make as to the real meaning of the term as it is employed in, say, a testament, an agreement, or a taxing or other statute, as the case may be. The attempt to transfer legal definitions derived from one collocation to another leads to confusion and sometimes to a defeat of true intention."

Viscount Cave, at page 431, says:

> "My Lords, the normal meaning of the word 'securities' is not open to doubt. The word denotes a debt or claim, the payment of which is in some way secured. The security would generally consist of a right to resort to some fund or property for payment; but I am not prepared to say that other forms of security (such as a personal guarantee) are excluded. In each case, however, where the word is used in its normal sense, some form of secured liability is postulated. No doubt the meaning of the word may be enlarged by an interpretation clause contained in a statute". Then, after making certain references, he continues: "But, in the absence of any such aid to interpretation, I think it clear that the word 'securities' must be construed in the sense above defined, and accordingly does not include shares or stock in a company. In the present case there is no interpretation clause, and there appears to me to be no context which affects the ordinary meaning of the word 'securities'."

Lord Wrenbury, in a passage referring to the difference between "security" and "share", says, at page 436:

> "A security, I take it, is a possession such that the grantee or holder of the security holds as against the grantor a right to resort to some property or some fund for the satisfaction of some demand, after whose satisfaction the balance of the property or fund belongs to the grantor."

Then, in considering the meaning of the word "securities" in its context in that case, Viscount Cave, at page 431, observes:

> "The combination . . . of the word 'interest' with the word 'securities' tells strongly in favour of a strict interpretation of the latter word"; and he quotes Wright J.'s statement([1]) that "shares in a company are not securities, but portions of its capital".

Lord Shaw, similarly, in considering the meaning of the word "securities" in its context in that case, and whilst directing his mind, not to the distinction between different kinds of security for debt, but to the distinction between shares and security for debt (of which security on a property for the repayment of interest is the most familiar), says, at page 436:

> "Securities in the Fourth Case of Schedule D appear to me to mean securities upon something as contrasted with the possession of something. The term involves the idea of the relation of creditor with debtor, the creditor having

([1]) Bartholomay Brewing Co. *v.* Wyatt 3 T.C. 213, at p. 222; [1893] 2 Q.B. 499.

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A a security over property, concern, assets, goods or other things, which are, so to speak, put in pledge by the debtor and form the security for the fulfilment of his obligation to the creditor. This is not the position of Mr. Singer's title. He is a shareholder. The relation between him and his fellow shareholders is not that of creditor with debtor but of partner or joint adventurer with the other shareholders. His relation with the company is
B that of part owner of the concern. The property which he so holds falls, in my opinion, accordingly, as a matter of construction, under the term 'possessions' and not under the term 'securities'." Then later he says(1): 'For in practice the return from securities is in the general case a fixed and certain return; whereas in practice the income or dividends derived from shares is or may be in the general case variable and uncertain, depending as
C it does upon the rise or fall of the fortunes of the business." Then, relying on the context and purpose of the legislation in which the reference to "foreign possessions and foreign securities" occurs, he adds: "To the former, *i.e.*, securities with a fixed return, the principle of averaging up one year with another is not in place; whereas to the latter, the case of variable returns from possessions, the principle of averaging up during a course of three
D years naturally applies."

In In re *United Law Clerks Society* [1946] 2 All E.R. 674, Evershed J. says, at page 675:

"The sole point in the appeal is whether the word 'security' occurring in the phrase 'any other security' in s. 44(1)(*e*) of the Act of 1896"—
E that was the Friendly Societies Act—"is meant to include any form of investment of money or must be confined to the stricter or more narrow significance of debts or money claims the payment of which is 'secured' or 'guaranteed' by a charge on some property or by some document recording the obligation of some person or corporation to pay and so as not to include the holding of shares in limited companies which are of the
F nature of participations in an enterprise and do not involve the conception of a creditor-debtor relationship. There is no doubt that at the present day the words 'security' and 'securities' are not uncommonly used as synonymous with 'investment' or 'investments', and it is tempting in a case such as the present so to stretch the meaning of the words. Several cases were cited in argument to illustrate this popular usage of which *Re Rayner*(2)
G is an example. It is [not] necessary" (the word "not" is omitted from the report, obviously by a slip) "for me to refer in detail to the authorities since it was conceded by counsel for the appellants that the *prima facie* meaning of the words 'security' or 'securities' is the narrower of the two alternatives already posed and that the meaning will not be extended to the wider alternative in the absence of some context requiring such extension".

H In *Grimwade* v. *Mutual Society* (1884) 52 L.T. 409, at page 415, Chitty J. referred to "personal security". He said:

"The term personal security is now well understood. . . . It includes every case where nothing more is obtained than the personal liability of the borrower, or of the borrower and sureties. It is the same thing as a loan on personal credit only."

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(1) 7 T.C., at p. 436. (2) [1904] 1 Ch. 176.

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In *Clough* v. *Bond* (1838) 3 My. & Cr. 490, at page 496, Lord Cottenham L.C. refers to "personal security" in reference to *Powell* v. *Evans* (1801) 5 Ves. 838, which was a case of security on personal liability only. These passages refer to personal security, without charge on property, as a form of security.

These cases indicate, to my mind, (1) that *prima facie* "security" is limited to security for the payment of a debt as contrasted with shares in the capital of a company; (2) that the context may extend its meaning to include shares; (3) that security by a document establishing personal liability and without charge on property is recognised as a form of security; (4) that it is questionable whether security in that sense would be within its *prima facie* meaning; but (5) even if it is not within the *prima facie* meaning of security, yet such security is a less extended meaning of that word than are shares.

The references made in these cases to security as including security on personal liability without charge on any property are in line with the references in Sch. 1 to the Stamp Act 1891 to "Covenant for securing the payment or repayment of money", and to "Mortgage, bond, debenture, covenant (except a marketable security otherwise specially charged with duty), and Warrant of Attorney to confess and enter up judgment" as securities in the sub-headings stating the amount of duty. And in s. 455(1) of the Companies Act 1948 it is said:

> "'debenture' includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not".

So that the Companies Act contemplates that the meaning of "securities" issued by a company incorporated under that Act is unaffected by their not constituting a charge on the assets of the company.

Sections 28 and 27 of the Finance Act 1960 deal with tax avoidance in company and commercial operations. Section 27 imports references to the stock exchange, to brokers and to jobbers. Section 28(2)(*a*) refers to "dividends" "in connection with the sale and purchase of securities"; and s. 43(4)(*f*) includes "shares" in "securities" and "interest" in "dividends". Thus, by definition in the Act, "securities" includes shares, which does not involve a creditor-debtor relationship at all and is further removed from security involving a charge than is a security on personal covenant without a charge. It would seem odd that the more remote meaning of "security" should be included whilst the more primary meaning should be excluded, particularly if excluded in circumstances in which the exclusion would be irrational. Section 27(2) provides that where, under a contract for sale of securities, the seller is required to pay to the purchaser the amount of a periodical payment of interest on the securities, then, in specified circumstances, s. 170(2) and (3) of the Income Tax Act 1952 is to apply, with the result that the payment is treated as though made after deduction of tax, and the seller has to account for the tax to the Revenue. In such a case it would be quite irrelevant to distinguish between a security which does and a security which does not give a charge on property. And similarly the distinction between security with and without a charge on property is completely irrelevant to s. 28. It seems to me that for the Legislature to intend a distinction between such securities in "securities" within these sections would be irrational.

It is submitted, however, that even if securities secured by covenant without a charge on property were within these sections, yet these particular debentures are not securities on the ground that they do not give any advantage over a mere debt, that they do not involve a creditor-debtor relationship and that they do

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A not provide for the payment of interest. They confer the advantage over a mere debt that consideration need not be proved and that the proof of the document establishes the company's obligation. The maturing of the company's liability to pay depended on condition 9, which might be anticipated by the company in the circumstances mentioned in condition 8; and, in fact, in accordance with condition 8, there arose a liability to pay on 14th January 1961. And liability B to pay interest is not an essential feature of a security. In my view, it could not be said that the conditions of the debentures and the absence of obligation to pay interest would prevent these debentures, if secured by a charge on property, from being a security; nor do I understand that to be suggested. And it is not suggested that these debentures are not in every other respect than those which I have mentioned debentures and securities of the company. The nub of C the Respondents' case is that it is the absence of a charge on property that prevents this debenture being a security. In my view, neither that nor the other features relied on by the Respondents prevent the debentures being securities at any rate in an appropriate context, and my conclusion is that these debentures in the context of s. 28 are securities within the meaning of that section.

D The next question that arises is: Was there here a "transaction in securities" or "two or more such transactions" as required by s. 28(1)(*b*)? Section 43(4)(*i*) includes in "transaction in securities" "transactions of whatever description relating to securities". There could hardly be a wider net connecting transactions and securities. The resolution authorising the directors to apply the £35,002 released from the profit and loss account in paying up in full the debentures E at par, followed accordingly by the issue of the debentures, constituted a transaction relating to the debentures, and that is not disputed. It was suggested, however, that the redemption did not relate to securities on the ground that the interpretation of "transaction in securities" in s. 43(4)(*i*) went on to include "in particular . . . (ii) the issuing . . . of . . . new securities", without reference to the redemption of securities. It seems to me clear, however, that what follows F the words "in particular" does not cut down the general scope of the earlier words: and the references to the issuing, and perhaps more particularly the reference, coupled with it, to the application and subscription for new shares, might well have been thought desirable in order to exclude any possibility of contention that the issuing, and more particularly the application and subscription before issue, were pre-natal operations which could not relate to securities G which *ex hypothesi* must exist before anything could relate to them. It seems to me so plain as to be self-evident that the redemption of securities is a transaction in securities within s. 28.

Thus there are two transactions in securities in this case—namely, (1) the interlocked capitalisation and issue of debentures in 1953, and (2) the redemption H in 1961. Section 28(1), however, provides that where, in consequence of a transaction or transactions in securities, a person is in a position to obtain or has obtained a tax advantage, then, in specified circumstances, the section shall apply subject to a proviso that it is not to apply if "the transaction or transactions in securities were carried out" before 5th April 1960. It is immaterial that any tax advantage was not obtained until after that date. So the capitalisa- I tion and issue would fall within the proviso but the redemption would not, and the question therefore becomes material whether it was in consequence of the capitalisation and issue or in consequence of the combined effect of the capitalisation and issue and the redemption that the Respondents were in a position to obtain or had obtained any tax advantage. If it was in consequence of the

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capitalisation and issue, the proviso applies and the taxpayer succeeds; but if it was in consequence of the combined effect of the capitalisation and issue and redemption, then the proviso does not enable him to succeed.

"Tax advantage", as defined by s. 43(4)(*g*), so far as material, means the avoidance of a possible assessment to tax

> "whether the avoidance . . . is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them or" otherwise as specified.

In consequence of which of the transactions in this case is it to be said that "a person is in a position to obtain or has obtained the avoidance of a possible assessment by the receipts accruing in such a way that the recipient does not pay or bear tax on them"?

It seems quite clear, to my mind, that if the capitalisation of itself could be considered apart from any debenture issue by which it was carried out, it did not put the taxpayer in a position to obtain the avoidance of a possible assessment by the receipts accruing in one way rather than another, simply because no receipt would accrue at all to the taxpayer merely by such capitalisation.

As Sankey J. said in *Pool* v. *Guardian Investment Trust Co. Ltd.*[1] [1922] 1 K.B. 347, at page 356:

> "If there has been no release of assets there has been no distribution and there is nothing to tax, neither is there anything to tax if the release is the distribution of capital. *Blott's* case was so decided because the majority of the members of the House of Lords were of opinion that there had been no release of assets."

In *Commissioners of Inland Revenue* v. *Blott*[2] 8 T.C. 101 a company declared a bonus out of its undivided profits, and in satisfaction allotted to its shareholders some of its unissued shares credited as full paid. Lords Haldane, Finlay and Cave constituted the majority. At pages 126–7, Lord Haldane said of the recipient shareholder:

> "His new shares do not give him an immediate right to a larger amount of the existing assets. These remain where they were. . . . In these assets, the undistributed profits now allocated to capital, will be included profits which will be used by the company for its business, but henceforth as part of its issued share capital. Such a transaction appears to me to be one purely of internal management".

Lord Finlay, at page 131, said:

> "Though the number of shares was increased by the issue of the new preference shares to the ordinary shareholders, this did not affect the proportions to which they were entitled in the undertaking and in any profits. All the shareholders received these new preference shares, so that the proportion in which they were to share in any profits remained the same." At page 132, he said, speaking of the shareholder: "He could not have sued for the bonus in money, as the resolution which gave the bonus *uno flatu* declared that it was to be satisfied by the distribution of preference shares. Under these circumstances it seems to me impossible to treat the shareholders for the purpose of Super-tax as having received the bonus and paid it back to the Company to be retained as capital. They never received it at all. The case appears to stand exactly as Mr. Justice Rowlatt put it". Then he makes a reference, and continues, quoting Rowlatt J.[3]: "'Now

(1) 8 T.C. 167, at p. 177. (2) [1921] 2 A.C. 171. (3) 8 T.C. 101, at p. 112.

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A I do not think that there is a payment of a dividend to a shareholder unless a part of the profits of the company is thereby liberated to him in the sense that the company parts with it and he takes it. If in this Case the Company could have found means to capitalise their profits and divide them as capital without adopting the machinery of declaring a bonus and allotting shares by agreement (not, be it observed, a voluntary agreement) in satisfaction B of such bonus, I do not think the case would have been arguable. I am asked to decide that there was a payment of this bonus upon the strength of what I consider bare machinery. I cannot do so. The fact is simply that the shareholder was given shares instead of a bonus.'" Then, later([1]): "The second contention of the Crown is that the allotment of the preference shares was equivalent to the payment of the bonus. . . . What might have been paid C as income went to increase the capital of the Company. The shareholder got his proportionate share in the business of the Company as increased by the additional capital. The proportion of his share in that business as compared with the proportions of other shareholders was in no way affected by the issue of the preference shares, as all the shareholders alike got them. The benefit, and the sole benefit which the Respondent derived, was that D the business in which he had a share was a larger one, with more capital embarked in it, precisely as might have been the case if the accumulated profits had been applied in the improvement of the Company's works and machinery." Then later on: "The preference shares are in themselves valueless. They are merely part of the machinery for carrying out the capitalisation, and if that capitalisation could have been carried out without E their issue the Respondent would have been just as well off without them as he is with them. What he gained was that the business in which he had the same proportionate interest had become more valuable owing to the increase of capital. Super-tax cannot be levied on such an increase in the capital value of the business."

Like Lord Cave, Lord Haldane, at page 126, said that what the shareholder F gets "is no doubt a valuable thing", but, as Lord Finlay indicated, though itself having a value in the market, it did not add to the value of the company's assets, in which the shareholders' share was precisely the same both before and after the new issue. The capitalisation merely transferred assets in the company's hands from one account into another, and the share issue, as emphasised by Rowlatt J. and Lords Finlay and Cave, was merely machinery for achieving that G transfer. There was thus no transfer or distribution of any asset from the company to the shareholder.

In *Commissioners of Inland Revenue* v. *Fisher's Executors*([2]) 10 T.C. 302 the House of Lords unanimously applied the principle of *Commissioners of Inland Revenue* v. *Blott*([3]) to the case of capitalisation of profits and distribution of bonus to shareholders, as in *Blott's* case, but satisfied by the issue of deben- H tures and not shares. The debentures in fact were redeemable in not less than six years from the date of issue. Lord Cave L.C. said, at pages 333–4:

> "No doubt, the shareholders got debenture stock which, like the shares in *Blott's* case, was a valuable thing; but they had no power to call in the stock, which gave them no present right to receive any part of the Company's assets either in money or in money's worth, but only entitled them I to a sum to be carved out of those assets if and when the stock was paid

([1]) 8 T.C., at pp. 132–3. ([2]) [1926] A.C. 395. ([3]) 8 T.C. 101.

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off. It is true that debenture stock, unlike shares, creates a debt; but the debt in this case was not presently payable and may never become payable while the Company is in existence. The whole transaction was 'bare machinery' for capitalising profits and involved no release of assets either as income or as capital." A

Lord Atkinson concurred; and then Lord Shaw said, at pages 335–6:

"The Company, before the operation of distribution of bonus per issue of debenture stock took place, stood in possession of so much capital, with so much accumulation and reserve. In a commercial and economic sense these accumulations of profit and reserve did add, and add largely, to the value of each share in the Company. When these were swept away, the value of each share subject to ordinary market contingencies would be economically *pro tanto* reduced. That reduction of each shareholder's capital value as a market source was, however, recouped to him by the issue of debenture stock. He then stood in possession of a *pro rata* share of the capital stock of the Company which, added to his original shares though these were now reduced in value, left him at the end of the transaction as nearly as possible where he was in the matter of finance before the transaction began." Then later, he says([1]): "The result of it was to negate emphatically the idea of distribution to shareholders as income; on the contrary, it was to withdraw from each shareholder the sum which might have been given to him as income and to withdraw it definitely from an income fund. It was stamped as a capitalisation transaction. Such a transaction was within the power of the shareholders of the Company, and all, including the Crown, are bound by that." B C D E

These cases also establish that the conversion by a company of profit into capital is effective against all the world, including the Crown, and the decisions can be justified on that basis and were founded by some of the Lords on that basis. But, at any rate in *Blott's* case([2]), the majority's *ratio decidendi* for the decision was that the capitalisation and issue did not release any assets at all, and the observations quoted appear to me to establish that they did not affect the value of the members' rights in relation to the company, were mere machinery for capitalisation, and (as in this case) created no right to payment immediately, or whilst the company existed, except by the company's decision. F

It seems to me, therefore, that, when a debenture was issued, the member to whom it was issued did not receive anything "in such a way" that he did not bear tax on it. If the debenture is what was received, then what was received was received on its issue; but in that case it was not the way in which it was received that made it untaxable, because the debenture was not taxable in whatever way it had been received. The debenture may be regarded as a way, or part of a way, of transferring money representing profits from the company, but that money becomes payable only on winding up, or on one of certain events which might never occur and did not in fact occur until 14th January 1961. So, if it is a way of ensuring the receipt of money, then there was no such receipt on the issue of the debenture, but only on 14th January 1961, when the money became payable and was paid. G H

It was suggested that the reference in s. 43(4)(*g*) to the receipts "accruing" was apt to cover the receipt of a *chose in action*, and that the taxpayer was in

([1]) 10 T.C., at p. 336. ([2]) 8 T.C. 101.

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A a position to obtain or obtained the tax advantage when the debenture was issued. Even assuming that the debenture issue was anything more than capitalisation machinery as described in the quoted passages from the speeches in the House of Lords, yet it is not the receipt of the debenture which accrues on its issue but the debt under it which accrues after its issue: and the avoidance of assessment cannot be effected until that debt has completed its accrual and has B accrued due—i.e., in this case, on 14th January 1961. Nor is the recipient "in a position" to avoid a possible assessment by receipts accruing in that particular way until they have completed accruing in that way—that is, on 14th January 1961.

It was, however, further submitted for the taxpayers that s. 28 was not directed to tax evasion through redemption of debentures at all, but only through C capitalisation, on the ground that ss. 245 and 246 of the Income Tax Act 1952 had already dealt with tax evasion through redemption; and that s. 79 of the Finance Act 1960 provides that Part II of that Act, which includes s. 28, has to be construed as one with the Income Tax Acts. Section 245 gave the Special Commissioners power to direct that the income of controlled companies, such as we are concerned with in this case, should be deemed to be the income of D its members if a reasonable part of its income is not distributed; and s. 246(2) provided that any income of the company applied in redemption of a debt incurred otherwise than for adequate consideration should be regarded as income available for distribution amongst the company's members.

Section 28(12) of the Finance Act 1960 provides that no provision in the Income Tax Acts "shall be construed as limiting the powers conferred by this E section", and it is concluded that, whilst subss. (1) and (2) lay down the conditions and circumstances in which, under subs. (3), the tax advantage may be counteracted, that counteracting takes effect under powers conferred by subs. (3), and that those powers are within subs. (12). But it was nevertheless submitted that subss. (1) and (2) should not be so construed as to apply to redemption, and thus, it was suggested, include conditions provided for by ss. 245 and 246(2) of the F Income Tax Act 1952. It was submitted for the taxpayers that s. 28, on the one hand, and ss. 245 and 246, on the other hand, are to be treated as dealing with two entirely separate operations: (1) within s. 28, capitalisation; and (2) within ss. 245 and 246, redemption. It was conceded on their behalf, however, that in cases where capitalisation and redemption took place after 5th April 1960 s. 28 would apply to capitalisation and ss. 245 and 246 would apply to redemption, G so as, in effect, to provide for double taxation where profits are capitalised by the issue of debentures which are later redeemed. If, on the other hand, in such a case a tax advantage is only obtained under s. 28 on redemption, it would appear that if ss. 245 and 246(2) were to be operated, then there would be no avoidance of assessment within s. 43(4)(*g*): and that if s. 28 were to be operated, then, to the extent to which the tax advantage was counteracted, the amount H of the redemption moneys would, under s. 249 of the 1952 Act, be an amount distributed to the taxpayer by the company which would be deducted from the amount included in any assessment on him in accordance with s. 249 in pursuance of ss. 245 and 246(2). So, on the Crown's contention, the double taxation effect would not arise.

It seems to me that ss. 245 and 246, on the one hand, and s. 28, on the other I hand, are directed to different objectives: the first to inadequate distribution of a company's income, and the second to tax advantages obtained on distribution of a company's assets. The relevant words in s. 28(1) include, as most

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important parts, words dependent for their definition on the interpretation section, and it has not been shown that effect could be given to the taxpayers' submission without affecting those definitions to some extent. But these definitions not only apply to subsections with which this case is concerned, but also to other subsections and to other sections throughout Part II of the Act. So that to distort these definitions, because of the suggested relationship of a subsection in a different Act to one of the sections in Part II of the 1960 Act, would be a course which it would seem clearly inadvisable to adopt without fully investigating the consequences upon those other sections—which has not been done, doubtless rightly, because the consequences might not only be multifarious but unforeseeable. I therefore conclude that the construction of s. 28 of the Finance Act 1960 should not be limited as suggested by reason of the provisions of ss. 245 and 246 of the Income Tax Act 1952.

The question still remains whether the circumstances referred to in s. 28(1) are satisfied in this case. The circumstances relied on are those mentioned in subs. (2)(*d*), which, so far as material, may be stated as follows: in connection with the transfer of assets of the company or their application in discharge of liabilities, the Respondent so receives money which is or represents the value of assets which, apart from anything done by the company, would have been available for distribution by way of dividend, that he does not pay or bear tax on it as income. Arguments were advanced against the payment of the redemption moneys coming within these words. It was suggested that, in spite of the interpretation provisions contained in subs. (2), yet "distribution of profits" in subs. (2)(*d*) must retain its primary meaning, and "consideration" in subs.(2)(*d*), despite the provision that references to the receipt of consideration include references to the receipt of money, must import a *quid pro quo*. This seems to me plainly contrary to the words of the interpretation provisions, and to the course adopted by the House of Lords when a somewhat similar argument was advanced in *Thomas* v. *Marshall*([1]) 34 T.C. 178, at pages 201–4. It was secondly suggested that, as there was no liability on the company to pay until it gave notice, there was no liability to which discharge of the redemption moneys could be applied. What seems to me material is that the money received, when received, was in discharge of a liability, and that it admittedly was. And, even if it were not received in connection with the discharge of a liability, then it seems to me to be within paragraph (*d*) as received as or in connection with the transfer of an asset: see *Thomas* v. *Marshall* 34 T.C. 178.

The result, therefore, is that these cases fall, in my view, within s. 28(1) and (2), and that accordingly, under subs. (3), the tax advantage should be counteracted by an assessment or additional assessment on such basis as the Commissioners of Inland Revenue might specify "as being requisite for counteracting the tax advantage so obtained or obtainable". The tax advantage in accordance with s. 43(4)(*g*) is "the avoidance . . . of a possible assessment by receipts accruing in such a way that the recipient does not pay or bear tax on them". The receipts in this case were the redemption moneys, and the relevant way in which they accrued was as capital and not as profits. The Commissioners of Inland Revenue seek to counteract the tax advantage by treating the redemption moneys received as dividends, and grossing them up for surtax assessment in respect of the year in which they were received.

It was submitted for the taxpayers, in view of *Neumann* v. *Commissioners of Inland Revenue*([2]) 18 T.C. 332, that where no income tax is deducted there

([1]) [1953] A.C. 543. ([2]) [1934] A.C. 215.

A can be no grossing up. That, however, was a special case, described by Lord Wright, at page 373, as "unusual, because a fund has been segregated and divided *in toto*". There it was the gross fund that was divided without any deduction of tax, and, as Lord Tomlin said, at page 364, after pointing out that the Crown's contention involved a gross sum in excess of anything the company had to divide:

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> "If a deduction from the gross sum was authorised but was not in fact made, as was the case here, there is, in my opinion, nothing in the language of the Sub-section which entitles the Inland Revenue to treat the gross sum as being greater than in fact it was."

It is unnecessary to decide, however, whether *Neumann* v. *Commissioners of Inland Revenue*[1] establishes the submission for the taxpayers, as s. 186 of the C Income Tax Act 1952, re-enacting s. 20 of the Finance Act 1940, passed since *Neumann's* case, provides:

> "(1) Where any dividend from which deduction of tax is authorised by subsection (1) of section one hundred and eighty-four of this Act is paid without deduction of tax, the amount received in respect thereof shall, for the purposes of this Act, be deemed to be a net amount received in respect D of a dividend from the gross amount of which such deduction as is authorised by the said subsection (1) has been made, and the provisions of—(*a*) the last preceding section; and (*b*) section one hundred and ninety-nine of this Act (which relates to the form of dividend warrants and other documents), shall apply accordingly."

In this case, if the redemption moneys had been received as dividends E instead of as capital, the amounts received would have been grossed up for the purposes of assessment, although paid without deduction of tax. It is only the way in which these receipts accrued that enabled the recipient not to pay or bear tax on them when received, and it seems to me, therefore, to follow that to treat them as though they had not accrued in that way, but as the dividends which they would have been apart from the capitalisation and debenture issue and F redemption transactions, is properly "requisite for counteracting the tax advantage".

It was suggested, alternatively, for the Respondents that the redemption moneys should be treated as received over the years 1953 to 1961, but no rational basis was provided for this submission, and I see no justification for such a course in s. 28.

G I therefore conclude that the appeal succeeds.

Stamp—Would your Lordship allow each of the appeals with costs?

Gibson (for Bucher Q.C.)—I cannot resist that, my Lord.

Ungoed-Thomas J.—Very well.

Stamp—Where there is an appeal against a direction, I think the practice H is to confirm the direction. I apprehend that it would be right here for your Lordship to confirm the notices. The procedure is the same: the notices are treated as a direction. I think it would be right for your Lordship to confirm the notices and to allow the appeal.

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(1) 18 T.C. 332.

Ungoed-Thomas J.—Very well.

Stamp—If your Lordship pleases.

The taxpayers having appealed against the above decision, the cases came before the Court of Appeal (Lord Denning M.R. and Danckwerts and Diplock L.JJ.) on 4th, 5th and 8th February 1965, when judgment was given unanimously against the Crown, with costs(1).

F. Heyworth Talbot Q.C. and *L. J. Bromley* for the taxpayers.

W. A. Bagnall Q.C. and *J. Raymond Phillips* for the Crown.

The following cases were cited in argument in addition to those referred to in the judgments: *Thomas* v. *Marshall* 34 T.C. 178; [1953] A.C. 543; *Dewar* v. *Commissioners of Inland Revenue* 19 T.C. 561; [1935] 2 K.B. 351; *Wallace-Johnson* v. *The King* [1940] A.C. 231; *Commissioners of Inland Revenue* v. *Blott* 8 T.C. 101; [1921] 2 A.C. 171; *Commissioners of Inland Revenue* v. *Fisher's Executors* 10 T.C. 302; [1926] A.C. 395; *Abbott* v. *Philbin* 39 T.C. 82; [1961] A.C. 352; *Hill* v. *Permanent Trustee Co. of New South Wales Ltd.* [1930] A.C. 720; *Pool* v. *Guardian Investment Trust Co. Ltd.* 8 T.C. 167; [1922] 1 K.B. 347; *Jamieson* v. *Commissioners of Inland Revenue* 41 T.C. 43; [1964] A.C. 1445.

Lord Denning M.R.—In this case there was a company called Parker Shoes Ltd., a private company, a controlled company. Its issued capital was 35,002 shares of £1 each, nearly all held by members of the Parker family. George Parker held 18,002 of the shares. In 1953 the company had accumulated substantial profits which it had not distributed by way of dividend. It was apparent that, if George Parker died and his shares were valued for estate duty purposes, the amount of estate duty would be so high that the shares would probably have to be sold. He had not got enough other funds to enable his estate to pay the duty without selling the shares. But he did not want the shares to be sold, for then the control might go out of the family. In these circumstances, so as to provide funds in the event of his death, it was arranged that debentures should be issued in 1953 to the shareholders in this company. The debenture issued to George Parker was a debenture for £18,002. It was somewhat unusual. No interest was payable. No charge was given on the company's assets. It was repayable at George Parker's death, or at the end of seven years, by the company giving notice in writing to the holder. It was also provided that the principal money should become immediately payable if a distress or execution should be levied on the company, or if there was a resolution for winding up, or if a receiver was appointed. There were, however, provisions for enabling the debenture to be transferred. The debenture was, of course, evidence of a debt by the company to Mr. George Parker.

I would notice at once this fact. The company had in 1953 substantial undistributed profits, and this debenture was calculated to absorb some of them. So it would have been possible, if the Revenue authorities had thought fit, for a direction to have been given under ss. 245 and 246 of the Income Tax Act 1952 on the ground that the profits had not been distributed. If such a direction had been given in 1953 or the succeeding six years, the income of the company would have been deemed to be the income of the members and the amount apportioned

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(1) Mr. Tomlinson having died before the hearing, his appeal was stood out pending the appointment of personal representatives; it was eventually dismissed by consent, following the decision of the House of Lords in Mr. Parker's case.

among them for the purposes of surtax. But no such direction was given. After the seven years were up, on 14th January 1961, the company paid over to Mr. George Parker the amount secured by the debenture, namely £18,002. On that sum being paid, the Crown claim that they are entitled to put into operation s. 28 of the Finance Act 1960. They say that George Parker obtained a tax advantage by a transaction in securities; that they are enabled to counteract that tax advantage; and that they will do so by charging him to surtax for the year 1960–61 on the basis of this sum of £18,002 grossed up—as if £18,002 were the net amount received after the tax had been deducted.

The question is whether this transaction falls within s. 28 of the Finance Act 1960. The Special Commissioners thought it did not, but Ungoed-Thomas J. thought it did. Now there is an appeal by the taxpayer to this Court. We have gone through the detailed provisions of s. 28 of the Finance Act 1960, and the definition section, s. 43, in order to try to see what those sections mean. Now one thing is plain to anyone who has had any experience of tax matters. It is that s. 28 is designed to deal with avoidance of tax by dividend-stripping. There are many cases in the books which show how people used to get money out of the Revenue by this means. If one reads s. 28(2)(*a*), (*b*) and (*c*), it is quite plain that those particular paragraphs are directed to the well-known operation of dividend-stripping. This, of course, is not such a case. It was not dividend-stripping, but simply the redemption of a debenture. The Crown say, however, that it comes within the words of s. 28(2)(*d*). Mr. Bagnall says that this particular paragraph scores a hit against this taxpayer even though it was not aimed at him: whereas Mr. Talbot says the whole section, including subs. (2)(*d*), was aimed at the rooks and should only hit the rooks. Now let us see about it. We have had this section closely analysed to our great advantage.

The first question is whether this case comes within the opening words of a "transaction in securities", remembering that, to be within the section, it must be a transaction carried out after 5th April 1960. "Transaction in securities" is defined in s. 43(4)(*i*), which says:

> "'transaction in securities' includes transactions, of whatever description, relating to securities, and in particular—(i) the purchase, sale or exchange of securities, (ii) the issuing or securing the issue of, or applying or subscribing for, new securities, (iii) the altering, or securing the alteration of, the rights attached to securities."

The only way in which Mr. George Parker can be caught by this section is by reason of the redemption of the debenture in January 1961: for that is the only transaction which took place after 5th April 1960. The question is, therefore, whether the redemption of the debenture, that is, the payment off of the debenture, is a transaction in securities within the definition.

If it were permissible to take the ordinary meaning of a "transaction in securities", I would think of a sale or purchase of shares or debentures. I would not myself describe the payment off of a debenture as a transaction in securities. But the definition extends the ordinary meaning so as to include "transactions, of whatever description, *relating to* securities". It is said that the repayment of a debenture is a transaction *relating to* securities. I think that is giving this definition far too wide an interpretation. I think that those opening wide words should be read together with the particular instances (i), (ii) and (iii) so as to show the nature of the transactions which the Legislature had in mind. The Legislature had in mind such transactions as the transfer and sale and issue of securities. It is plain to me that the phrase cannot be extended so as to include

(Lord Denning M.R.)

dividends paid on shares, nor money which is paid out on liquidation of a company, or a reduction of capital. It does not include the payment off of a debenture. I am confirmed in this view by looking at the general mischief which this section is designed to hit. It is designed to hit dividend-stripping and not the redemption of debentures. On this first point, therefore, I hold that s. 28 does not hit this transaction at all because it was not a transaction in securities.

But then, in case I am wrong and the redemption of the debentures was a "transaction in securities", I must consider the next point. Did Mr. Parker "in consequence of" that transaction in January 1961 obtain a "tax advantage" or was he then put "in a position to obtain a tax advantage"? "Tax advantage" is defined in s. 43(4)(*g*) as meaning—I will miss out some immaterial words—

> ". . . . the avoidance of a possible assessment [to income tax], whether the avoidance is effected *by receipts accruing* in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains".

The question here is whether by receiving payment of the debenture Mr. Parker avoided a possible assessment to income tax, including, of course, surtax. The short answer is that there was no possibility of his being assessed on the money he received in January 1961, when the debenture was paid off. He could not possibly be taxed on that capital receipt. The only transaction which gave him a tax advantage was the transaction in 1953, when, instead of distributing a dividend, the company issued to him the debenture. If it were not for the debenture, the company might well have declared a dividend (which could be "receipts accruing") on which he could be taxed. So by accepting the debenture he avoided a possible assessment to tax. But that took place in 1953, whereas this s. 28 only catches transactions after 5th April 1960. So I hold that it was not the transaction in 1961 which gave him the tax advantage, but only the transaction in 1953. He is therefore not caught by the section.

I can deal with the other points quite shortly. It seems to me in this case that, if I were wrong on the first two points, the tax advantage obtained by Mr. Parker was obtained by him "in connection with the distribution of profits" within s. 28(2)(*d*), and that the money he received was not shown to represent "a return of sums paid by subscribers". I put my decision, therefore, on the ground, first, that the redemption of this debenture in January 1961 was not a "transaction in securities", and, second, that it was not in consequence of that transaction that Mr. Parker was in a position to obtain or did obtain a "tax advantage". He obtained it long before in 1953.

The Special Commissioners, too, rejected the Crown's claim. Their principal reason was that s. 246 specifically provided for such a situation as this. The case did not come within the mischief of the section, which was to catch dividend-stripping operations. I agree, but I prefer to put it on the ground that this transaction does not come within the wording of the section on a fair reading. I would allow the appeal accordingly.

Danckwerts L.J.—This appeal concerns s. 28 of the Finance Act 1960, which was no doubt passed by Parliament at the instigation of the Board of Inland Revenue. Like the famous arrow shot into the air, it seems to have landed they know not where. The target was plain enough: it was the operation which has come to be known as "dividend-stripping". The operation carried out in the present case was not of that character. It was a genuine and reasonable operation, devised for the shareholders in the company to enable cash to be provided upon

A the death of a member so as to pay the estate duty which would become payable in that event. Without such a provision in each case, the member might be without sufficient liquid assets and would then have to sell the shares in the private company or put the company into liquidation.

In such circumstances the provisions of this highly artificial section require particular scrutiny. In order to succeed the Crown must show, first, that the B payment of the sums due on the debentures was a transaction in securities or a transaction relating to securities, and, second, that a tax advantage was secured in 1961 when the payment was made. In my view, in the proper use of the English language, the payment of the money due on the debentures was neither of those things. It was simply the payment of a debt which was due. I also think that the tax advantage, if any, was secured when the transaction of capitalisation C of profits and issuing debentures was carried out in 1953. The payment in 1961 was merely the result of a tax advantage secured in 1953. For these two reasons I also would allow the appeal.

Diplock L.J.—It would be a poor compliment to the draftsman of a section of the Finance Act 1960 if this Court were to be unanimous as to its meaning. I do not propose to pay that poor compliment, for I regret to say that D I differ from my brethren as to the meaning of "transaction in securities", though I am comforted to think that I agree with the learned Judge.

In order to entitle the Commissioners of Inland Revenue to give a counteracting notice under s. 28(3) they had to show first that the circumstances mentioned in s. 28(2), or some of them, exist. I agree with the learned Judge and with my brethren that in this case they do. Next it has to be shown that as E a consequence there was a transaction in securities, and, as I have already said, I agree with the learned Judge that in this case there was a transaction in securities when the debentures were redeemed.

Then it has to be shown that in the circumstances and as a result of the combined effect of two such transactions in this case, a person is in a position to obtain, or has obtained, a tax advantage. If "tax advantage" were used in F its ordinary sense in this section, and not in the restricted sense given to it by s. 43(4)(*g*), I should have said that undoubtedly Mr. Parker had obtained a tax advantage. He had got some £20,000 out of the profits of the company without paying any tax on it. I express no view as to whether that was the sort of transaction that the draftsman intended to hit. I do not think he hit it, because of the restricted meaning given to "tax advantage" in the Act, in that section. There G has to be a tax advantage which, for the purposes of this case, means "the avoidance of a possible assessment to income tax" where the avoidance "is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them". The recipient, Mr Parker, in this case did obtain receipts in such a way that he did not pay or bear tax on them, but where, I ask, is the possible assessment to tax which was avoided? Undoubtedly under ss. 245 and 246 of the Income H Tax Act 1952 a notice under that section could have been given to the company in respect of the undistributed profit of the company, which included Mr. Parker's £20,000, and if that had been given then Mr. Parker would have been assessed to surtax. That assessment could have been made in the 1953 assessment itself and could have been made in any of the subsequent six years, because the Revenue could have reopened the assessment for that purpose, but once that I period for reopening the 1953 assessment had passed the undistributed profits

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were capitalised, and there was, so far as I can see, no further room for a possible assessment in respect of those sums. Consequently, when the Act came into force and a subsequent transaction took place under which Mr. Parker successfully obtained his £20,000 surtax relief, no possible assessment to income tax was avoided by the second transaction in 1961. It is only when it is by a combination of the two transactions that an assessment was avoided, that the case comes within s. 28(1), because of the proviso to that subsection. I agree that this appeal should be allowed.

Heyworth Talbot Q.C.—My Lord, then the appeal of Mr. George Parker will be allowed with costs, and may I submit that the same result should follow in the case of each of the Misses Parker?

Lord Denning M.R.—Yes.

Talbot Q.C.—And I take it that they are at liberty to restore the late Mr. Tomlinson's case to your Lordship's list, when he has obtained representation.

Lord Denning M.R.—The appeal will be allowed with costs.

Bagnall Q.C.—Your Lordship will have expected, if not anticipated, the application that I now have to make, I was going to say, of the draftsman of the Act being paid the further compliment of the matter being appealed to the House of Lords.

Lord Denning M.R.—Have you anything to say about this, Mr. Talbot?

Talbot Q.C.—I can only say this, that the application does not on the whole surprise me because this is the first occasion, as your Lordships know, on which it has been before the Court, and it is a very important point and a very important section. I would invite your Lordships to consider the question of whether or not this might be a proper case in which to impose terms, because I gather that the total amount of tax at stake is something under £20,000. It looks as if it is about £15,000 in the case of Mr. Parker and considerably less in the other cases.

Lord Denning M.R.—You suggest terms not disturbing the Order here and allow for the costs below?

Talbot Q.C.—Yes. It would be rather hard if the Parkers had to be butchered to make a Roman holiday, and that they had to bear the whole costs of the litigation this involves.

Bagnall Q.C.—One fact that impressed me was the different way in which my learned friend put the amount of the burden that was going to be placed on his client this morning from when opening the case on Thursday.

Talbot Q.C.—It is a very grievous burden on the individual but it is nothing at all to my learned friend's clients.

Lord Denning M.R.—You want to take it up so as to get this section elucidated?

Bagnall Q.C.—Yes. If your Lordships thought that it was a case in which those terms should be offered by the Crown, I am instructed to say that we would be prepared to make that offer.

Talbot Q.C.—I am very content with that.

Bagnall Q.C.—That is to say, irrespective of the decision of the House of Lords, the Order that your Lordships have made as to costs in this appeal—and I apprehend that my friend will also have the costs below, although he did not specifically ask for them—and the costs below, should not be disturbed.

Lord Denning M.R.—At any rate they have got to ask for costs in the House of Lords.

Bagnall Q.C.—I did not know whether that was one of the terms as well.

Heyworth Talbot Q.C.—I hope my friend will not be weary in well doing and that his clients would think it proper.

Bagnall Q.C.—My Lord, my eye alighted a moment ago on a report in the Tax Cases([1]) where Sellers L.J. asked very specifically whether the Crown would be prepared to give that undertaking if it was asked for and they said "Yes", and his Lordship then said "We do not give leave on those terms"; but, my Lord, I would be prepared to add to the terms that we should not ask for costs in the House of Lords if your Lordships thought it was right so to do.

Lord Denning M.R.—Thank you very much. I am not sure that we do. The appeal will be allowed with costs here and below. There will be leave to appeal to the House of Lords on the terms that the Crown will not seek to disturb the Order made by this Court as to costs.

Talbot Q.C.—I do not know whether under modern practice (I ought to have mentioned this before) it is necessary for me to ask that there should be embodied in the Order a direction for the discharge of the Commissioners' notice. I have never had anything like this before.

Bagnall Q.C.—What the Special Commissioners did was simply to cancel the notice. The learned Judge's Order allowed the appeal and confirmed the notice. If your Lordship allowed this appeal and directed that the notice be cancelled—

Lord Denning M.R.—That would deal with it, would it?

Bagnall Q.C.—Yes.

Lord Denning M.R.—We allow the appeal and direct that the counteracting notice be cancelled.

Bagnall Q.C.—My Lord, there is only one other matter. I do not know how it is proposed that the *Tomlinson* case should be disposed of, but all I would want to say is this, that if it were possible to dispose of that, so to speak, administratively, without an actual hearing, it would be right that there should also be leave in that case on the same terms.

Lord Denning M.R.—Yes, a little note can be put in that case without bothering anybody, on the self-same terms.

Talbot Q.C.—I am sure we can arrange that.

Bagnall Q.C.—I apprehend that an Order could be made simply on producing the grounds of payment.

Lord Denning M.R.—An agreed minute can be put in to the Court.

Talbot Q.C.—I am sure we can arrange that.

The Crown having appealed against the above decision, Mr. G. G. Parker's case came before the House of Lords (Viscount Dilhorne and Lords Morton of Henryton, Hodson, Guest and Wilberforce) on 16th, 17th and 18th November

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([1]) 41 T.C., at p. 42.

1965, when judgment was reserved. On 27th January 1966 judgment was given in favour of the Crown, with costs (Lords Morton of Henryton and Hodson dissenting). The Crown's appeals in the other cases were subsequently allowed by consent.

([1])*W. A. Bagnall Q.C.*, *J. Raymond Phillips* and *J. P. Warner*, for the Crown. The basic facts of this case are that: (1) In 1953 the accumulated profits were £69,914 and in 1961 they were £128,720; (2) the Respondent wanted to be in a position to get cash for payment of estate duty; (3) the only source of that cash was the company; (4) if the £18,002 had been distributed as a dividend, there would have been a surtax charge of about £14,000 on the gross sum represented by the £18,002 net; (5) by reason of the capitalisation and the debenture issue in 1953 and the redemption in 1961 the Respondent received £18,002 with no liability to surtax; (6) looking at the whole operation the Respondent received in laymen's language a substantial tax advantage.

The question is whether he received a "tax advantage" within the meaning of s. 28 of the Finance Act 1960. The test is whether or not he received a "tax advantage" in 1953.

The effect of the notice of 16th August 1962 was that the Respondent's liability to surtax for the year of assessment 1961–62 was to be computed on the basis that the £18,002 which he had received from the company on 4th January 1961 was to be taken into account as if it were the net amount received in respect of a dividend payable at the date of its receipt from which deduction of tax was authorised by s. 184(1) of the Income Tax Act 1952, and that he should be assessed accordingly. The notice should be confirmed. The Respondent is seeking to prevent it being effective against him.

In consequence of the combined effect of the following transactions in securities, namely, (*a*) the issue in 1953 and (*b*) the redemption in 1961 of £18,002 of debentures, and in the following circumstances, that is to say, in connection with the distribution of the profits of the company (namely, the transfer of £18,002 of the assets of the company to the Respondent or, alternatively, the application of £18,002 of the assets of the company in discharge of its liability to the Respondent), the Respondent received a consideration (that is to say, he received money), namely, £18,002, which, apart from the capitalisation of profits and issue of debentures done by the company in 1953, could have been available for distribution by way of dividend, and so received that consideration that he did not pay tax on it as income. The Respondent has obtained a tax advantage, namely, the reduction of his assessment to surtax for the year 1960–61 effected by the receipt of £18,002 accruing in such a way that he did not pay surtax on it because the gross amount which, after deduction of income tax at the standard rate, would leave £18,002 did not form part of his total income for surtax purposes for that year.

There are six issues in the case: (1) Were the debentures "securities" as defined by s. 43(4)(*g*) of the Act of 1960? (This is not now a live issue.) (2) Accepting that the issue of the debentures was a transaction in securities as defined by the Act, did the redemption come within the definition of "transactions in securities" in s. 43(4)(*i*)? (3) Was the payment to the Respondent "in connection with the distribution of profits of a company" within s. 28(2)(*d*) of the Act? (4) Did the Respondent receive a "tax advantage" within s. 43(4)(*g*)? If so, when

([1]) Reported by F. H. Cowper, Esq., Barrister-at-Law.

A was it obtained? (5) Did s. 28 generally apply to this transaction? (6) Assuming that the Crown was right on the main point, was the proposed counteraction expressed in the notice of 16th August 1962 a proper proposal?

It is submitted (1) that the issue and the redemption of the debentures were both transactions in securities; (2) that the Respondent received a "tax advantage" in 1961, and (3) that the tax advantage was obtained as a result of the B combined effect of both the issue and redemption of the debentures.

As to the first submission, the redemption was a "transaction in securities" within the words of s. 43(4)(*i*), that is, it fell within the description of "transactions, of whatever description, relating to securities", because debentures are "securities" within the definition of s. 43(4)(*f*). In "transactions" there must be an element of mutuality; they cannot be unilateral. It is not necessary to show C an actual dealing with the debentures; a transaction relating to them is enough.

As to the second submission, the Respondent obtained a "tax advantage" within s. 43(4)(*g*), where the antithesis is between receipts accruing in such a way that tax is paid and receipts accruing in such a way that tax is not paid. The only such receipt was in 1961. Reliance is placed on *Commissioners of Inland Revenue* v. *Blott*([1]), which shows that the issue of the debentures in 1953 was D not a "receipt accruing". The debenture is a consideration and not a receipt. See also *Pool* v. *Guardian Investment Trust Co. Ltd.*([2]) (*per* Sankey J.) and *Commissioners of Inland Revenue* v. *Fisher's Executors*([3]), where the principle in *Blott's* case was accepted as applying. One starts with a company with accumulated profits and one ends with cash in the hands of the shareholders. The surtax direction provisions in ss. 245 and 246 of the Income Tax Act 1952 are E wholly irrelevant. Their purpose, which is to prevent the avoidance of surtax through the withholding from distribution of the income of a company, must not be confused with the purpose of s. 28 of the Finance Act 1960, which is to prevent the avoidance of surtax through the actual distribution of such income in capital form.

A person cannot be "in a position to obtain" a tax advantage, within the F meaning of s. 28(1)(*b*) of the Act of 1960, unless he can obtain it by his own act and not by the act of some other person whom he does not control. A tax advantage may consist of a repayment claim, and the advantage is not obtained until there can be such a claim.

The "tax advantage" must be a relevant tax advantage, and by definition it must be brought about in two specified ways: s. 43(4)(*g*). A person does not G obtain a tax advantage under s. 28 unless it comes within one or other of the alternatives mentioned and also is effected either by receipts so accruing that the recipient does not pay tax on them or by a deduction in computing profits or gains.

In 1953 there was no relevant receipt for the purposes of s. 28. A taxing Statute taxes what it taxes and not what it does not tax, and the mind of the H Legislature was directed to the particular tax advantage defined and no other. Whenever the various ways of delimiting a tax position are set out, they must be strictly construed. Nothing was received by the Respondent till 1961, when the cash was paid out. All that he received in 1953 was a piece of paper evidencing a reorganisation of the company's capital, which gave him nothing. The advan-

([1]) 8 T.C. 101; [1921] 2 A.C. 171. ([2]) 8 T.C. 167; [1922] 1 K.B. 347.
([3]) 10 T.C. 302; [1926] A.C. 395.

tage was obtained by the combined effect of the transactions of 1953 and 1961, the issue of the debentures and their redemption, and the tax advantage was not complete until the redemption. A

The provisions of s. 28(2)(*a*), (*b*) and (*c*) are not confined to dividend-stripping operations, and s. 28(2)(*d*) does not apply to them. The operations attacked by s. 28 are those whereby persons receive income, which might be taxable, in a form in which it is not taxable or which allows a claim for repayment of tax. B

The case of the Respondent came within the "circumstances" referred to in s. 28(1) and stated in s. 28(2)(*d*). There was an avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment.

J. Raymond Phillips following. The definition of "tax advantage" in s. 43(4)(*g*) of the Act of 1960 falls into three parts: "relief or increased relief", "repayment or increased repayment" and "avoidance or reduction of an assessment or the avoidance of a possible assessment thereto", etc. The reason why only in the third category are there qualifying words is that in the case of the others something concrete has happened. But in the third category nothing positive has happened and one must go a stage further. One has to see whether, had things happened differently, there would have been an assessment. C D

F. Heyworth Talbot Q.C. and *Leonard Bromley*, for the Respondent. The case for the Respondent rests on four main contentions: (1) If the Respondent obtained a tax advantage at all it was in 1953. (2) The redemption of the debentures was not a "transaction in securities" as defined by s. 43(4)(*i*) of the Act of 1960. (3) Circumstances of the kind specified in s. 28(2)(*d*) of the Act are not present in this case. (4) The redemption of the debentures was "a return of sums paid by subscribers on the issue of securities" within s. 28(2)(*c*) of the Act. If any one of these contentions proves to be well founded the Respondent must succeed. Alternatively, if the House of Lords comes to the conclusion that a tax advantage was obtained by a combination of what was done in 1953 and 1961, then the Inland Revenue should apportion that advantage. E F

As to the first point, any tax advantage obtained by the Respondent was obtained in 1953 alone and no tax advantage was obtained in 1961, the proviso to s. 28(1) being applicable. In 1953 the Respondent became beneficially possessed of an item of valuable property representing part of the company's undistributed profits. It accrued to him in such a way that he did not bear tax on it, and there was an avoidance of tax in that, if the profit represented by the debenture had been paid out as a dividend, it would have been a taxable receipt: see the definition of a "tax advantage" in s. 43(4)(*g*) of the Act of 1960, which refers to "the avoidance of a possible assessment". The Respondent relies strongly on those words. The definition of "avoidance" in the Oxford English Dictionary (1933 edn. vol. I, p. 587) is G

> "The action of making void or of no effect; voidance, invalidation, annulment (Esp. in *Law*)" and "the action of avoiding or shunning anything unwelcome." H

The whole of the definition in the Act is framed with skill and point by a draftsman familiar with the machinery of the income tax law, and it means the avoidance of a particular assessment. This was a case of "receipts accruing in such a way that the recipient does not pay or bear tax on them". The word "receipts" extends beyond cash and is wide enough to cover such things as shares and debentures in the present case. I

A *Blott's* case(1) and *Fisher's* case(2) have little bearing on this case. They were confined to the question whether what the taxpayer got was income within the Income Tax Acts, not whether he got something of value.

What was done in 1953 was the clearest case of avoidance of tax and the Respondent was outside the ambit of s. 28. The relevant "tax advantage" occurred once and for all in 1953 and was complete. The test is whether or not
B that is so. It is conceded that if it occurred as a result of the combined effect of what occurred in 1953 and 1961 the Crown must succeed. But, if that were the law, there would be an anomaly in that, if a debenture-holder disposed of his debenture for value, no charge to tax would arise, nor could the purchaser be liable to tax. The debentures, if they were assets at all, were capital assets, and in 1961 all that happened was that a debt, of which the debentures were evidence,
C was repaid.

The second submission is that the redemption of the debentures was not a "transaction in securities" within the meaning of ss. 28(1) and 43(4)(*i*) of the Act of 1960. It would not be so in ordinary language, but the definition in s. 43(4)(*i*) goes on to add "of whatever description relating to securities"; the content of those words is made clear by the instances which follow in the defini-
D tion. The true view is that there is no transaction in securities, and no transaction relating to securities, where all that happens is that rights already inherent in the securities take effect. It is striking what is included and what is omitted in the definition. By itself the expression "relating to securities" is of doubtful content. One might ask whether it includes redemptions and issues, but the subsequent gloss and illustrations interpret the words of Parliament. The things
E omitted from the classification are rights inherent in the securities themselves. Careful draftsmanship has expressed the very idea contemplated by Parliament. On any other interpretation s. 25(5) of the Finance Act 1962 would have been otiose.

As to the third submission, the circumstances mentioned in s. 28(2)(*d*) of the Act were not present in this case. Two events are there contemplated—a
F distribution of profits and a receipt of a consideration—and a connection between the two is postulated. On the construction of para. (*d*) the words "so receives as is mentioned in paragraph (*c*)" relate back to the words "and the said person so receives the consideration that he does not pay or bear tax on it as income". Admittedly the result is that, if the construction which the Respondent submits should be adopted is correct, then para. (*d*) can have no area
G of operation which is not covered by para. (*c*). But, whatever the consequences, the Act must be construed according to the natural meaning of its language.

As to the fourth submission, the redemption of the debenture in 1961 represented a return of sums paid by subscribers on the issue of securities, and was accordingly excluded from s. 28(2)(*c*) by virtue of the proviso to para. (*d*). It is common ground that the debentures were fully paid. By whom were they
H subscribed? They must have been paid up either by the shareholders or by the company. The resolution of 18th May 1953 shows that it was the shareholders. The directors were acting, not *qua* directors, but as agents for the shareholders. When the resolution was passed the sums were set free for distribution among the shareholders, and the very next moment they were in the directors' hands impressed with the trust to pay off the debentures. The sums in the directors'
I hands were already dedicated to a particular purpose.

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(1) 8 T.C. 101. (2) 10 T.C. 302.

As to the alternative contention, on the footing that the House of Lords concludes that there was a tax advantage resulting from the combined operation of what was done in 1953 and 1961, it is not appropriate that the Respondent should be taxed on the part of the tax advantage which he obtained in 1953, before the passing of the Act of 1960. It is for the Special Commissioners to decide on a just apportionment, doing what is fair in the circumstances. They should find what was the value of what the Respondent got in 1953. What is taxable is £18,002, less £X, grossed up.

Leonard Bromley following. The *ratio decidendi* in *Fisher's* case([1]) and *Blott's* case([2]), as explained by Lord Sumner in the former case, was that what the taxpayer obtained was not income. The question was whether the shares and the bonus were part of his total income for tax purposes. *Blott's* case is relied on by the Respondent.

The redemption in 1961 was not a relevant transaction at all within s. 28(1). What must be considered is: which transaction or transactions yielded the tax advantage? It was in 1953 that there was the avoidance of an assessment or possible assessment within the definition of "tax advantage" in s. 43(4)(*g*). That definition is applicable throughout the legislation and is of general import. The debenture directly represented that which had been income, and the 1953 transmutation from income to debenture binds the Revenue as much as the company. When a company declares a dividend which is not paid it is a chose in action, as is the debenture, and both appear in the balance sheet as liabilities, before payment. It is not correct, therefore, that because nothing was actually paid out by the company in 1953 there was then no tax advantage.

W. A. Bagnall Q.C. in reply. It is common ground that: (1) the definition of "tax advantage" in s. 43(4)(*g*) of the Act of 1960 refers to receipts accruing in such a way that the recipient does not pay or bear tax on them; (2) if the £18,002 had been paid as dividends it would have borne tax; (3) the contrast is the receipt in cash in 1961 in consequence of the two transactions in 1953 and 1961.

The question is whether that receipt amounted to a "tax advantage" within the definition. The payment in 1961 represents an exact comparison with the payment of a dividend in 1953, but to compare a payment of dividends with a bonus issue of shares would be to compare things which are different in kind. The Respondent received nothing in 1953, since, though he had acquired a debenture document, his position was only altered in that he had rights available to him only on a liquidation. The authoritative statement of the *ratio decidendi* in *Fishers* case([3]) was expressed by Viscount Cave L.C. That accords with the Crown's submissions. Here there was no release of assets in 1953. Whatever happened then, the company did not transfer or distribute anything. It was in 1961 that the Respondent came within the words "the person in question so receives", etc., in s. 28(2)(*d*) of the Act of 1960. The events of 1953 merely set the stage for the operation. There was then no way in which the Respondent could have had receipts accruing to him in such a way as to come within the definition of "tax advantage" in s. 43(4)(*g*). The debenture was not equivalent to a receipt. The Crown's argument, however, compares like with like—cash in 1961 and cash in 1953. The "tax advantage" consists in getting cash out of a company by a manoeuvre through which one does not pay tax. That was achieved in 1961. The tax advantage is not complete until the cash is obtained. If there had been a liquidation, the transaction of 1953 would have been a work of supererogation.

([1]) 10 T.C. 302. ([2]) 8 T.C. 101. ([3]) 10 T.C. 302, 331–4.

A The exclusion in s. 28(2)(*d*) of assets which "represent a return of sums paid by subscribers", etc., does not apply here because this was a case of the company's own money dealt with in its accounts, and no cash passed in 1953. In that year there was no payment of dividends to the Respondent followed by a dealing with them by him. As to s. 28(3), there is no warrant for seeking to divide the tax advantage between 1953 and 1961 any more than for spreading it over the B whole period. The one tax advantage cannot be divided into two.

Commissioners of Inland Revenue v. *Cleary*[1] decided by Pennycuick J. is not of any assistance in this case.

If this appeal is allowed the Crown will not ask for costs or seek to have the Order for costs made by the Court of Appeal disturbed.

C **Viscount Dilhorne**—My Lords, on 16th August 1962 the Commissioners of Inland Revenue served a notice under s. 28 of the Finance Act 1960 upon the Respondent. That notice recited that on 17th July 1961 the Commissioners of Inland Revenue had, in accordance with s. 28(4) of the Finance Act 1960, notified the Respondent that they had reason to believe that s. 28 might apply to him in respect of certain transactions in securities, and that the matter had D gone before the Tribunal appointed under that section, who had held that there was a *prima facie* case for proceeding. By the notice the Revenue informed the Respondent that, in their view, s. 28 applied and that, to counteract the tax advantage obtained or obtainable, the computation or recomputation of his liability to surtax for the year 1960–61 should be on the basis that £18,002 received from Parker Shoes Ltd. by the Respondent on 14th January 1961 should E be taken into account as if it were the net amount received in respect of a dividend payable at the date of its receipt from which deduction of tax was authorised.

The Respondent appealed against this notice, and the Special Commissioners allowed the appeal and cancelled the notice. The Crown appealed to the High Court, and Ungoed-Thomas J. on 28th July 1964 gave judgment allowing the appeal. The Respondent appealed to the Court of Appeal, who F allowed the appeal. The Crown then appealed to your Lordships' House.

In 1925 a company called Parker Shoes Ltd. was formed to acquire the business then carried on by a Mr. Frank Parker. On 18th May 1953 the members of the company were Mrs. Annie Parker, the Respondent, Miss Marjorie and Miss Hilda Parker, sisters of the Respondent, and a Mr. Frederick Tomlinson. On that date at an extraordinary general meeting the following resolution G was passed:

> "(i) That it is desirable and that the Members of the Company be recommended to capitalise the sum of £35,002 being part of the undivided profits of the Company standing to the credit of the Profit and Loss Account of the Company, and accordingly that such sum be set free for distribution amongst the Members of the Company whose names appear in the Register H of Members at Noon on the 18th day of May 1953, in proportion to the amounts paid up on the Shares held by them respectively, on condition that the same be not paid in cash, but that the Directors be authorised to apply such sum in paying up in full at par Debentures for securing the sum of £35,002, such Debentures to be allotted and distributed, credited as fully paid up, to and amongst the said Members of the Company in the propor-

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(1) [1965] Ch. 1098; to be printed later in Tax Cases.

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tion aforesaid. (ii) That the Debentures so to be paid up and distributed as aforesaid be in the form of the draft submitted to this Meeting and for the purpose of identification signed by the Chairman thereof."

The issued share capital of the company consisted of 35,002 £1 ordinary shares, so each member of the company received a debenture for each share he held. The Respondent received debentures for £18,002.

The debentures were in the following form:

"1. For Valuable Consideration already received Parker Shoes Limited (hereinafter called 'the Company') will, as and when the Principal Money hereby secured becomes payable in accordance with the Conditions endorsed hereon, pay to of or other the Registered Holder hereof for the time being, his Executors, Administrators, or Assigns, the Sum of . 2. This Debenture is issued subject to the Conditions endorsed hereon, which are to be deemed part of it."

The only conditions to which it is necessary to refer are conditions 8 and 9. They were as follows:

"8. The Company may at any time after the death of the Registered Holder or after the expiration of 7 years from the date hereof (whichever is the earlier) give notice in writing to the Registered Holder hereof, or his executors or administrators, of its intention to pay off this Debenture, and upon the expiration of six calendar months from such notice being given the Principal Money hereby secured shall become payable. 9. The Principal Money hereby secured shall immediately become payable: (*a*) If a distress or execution be levied or sued out upon or against any of the property and assets of the Company, and be not paid out within five days; (*b*) If an Order be made or an effective Resolution be passed for the winding up of the Company; (*c*) If a Receiver of the property and assets of the Company be appointed by any Court of competent jurisdiction."

The debentures were not secured on any property of the company. No interest was payable on them. The debentures, in my view, amounted to no more than a recognition by the company of an obligation to pay the amounts for which they were issued, dischargeable, unless condition 9 applied, after the happening of certain events, solely at the discretion of the company. If, instead of capitalising this £35,002 of the undivided profits of the company, the sum had been distributed by way of dividend, it would have been liable to surtax. The only object of this operation can have been to enable the company at some date in the future to pay to the members of the company their shares of the £35,002 in such a way as not to attract liability to surtax.

In 1958 a Mr. Nangle, F.C.A., advised the Respondent as to the liability of his estate to death duties. He estimated that they might be of the order of £65,000, and it was obvious that an amount of this size could not be met from the Respondent's free resources or from those of his sisters, his next-of-kin. Therefore, unless something was done, there would have to be a forced realisation of the Respondent's shares in the company. Mr. Nangle advised that steps be taken to increase the assets held by the Respondent and his sisters outside their shares in the company. On 14th July 1960 the company gave notice to the debenture-holders, who were then the Respondent, his two sisters and Mr. Tomlinson, of its intention to redeem the debentures on 14th January 1961. Mrs. Annie Parker, the only other person to whom debentures had been issued, died in 1953, and the debentures issued to her had been redeemed. Pursuant to

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this notice, the Respondent on 14th January 1961 received £18,002, his sisters £6,075 each and Mr. Tomlinson £600.

By virtue of s. 245 of the Income Tax Act 1952, the Special Commissioners could, if it appeared to them that the company had not, within a reasonable time after the end of any year or other period for which accounts had been made up, distributed so as to be liable to surtax a reasonable part of its income from all sources for the year or other period, have served a notice on the company directing that for the purpose of assessment to surtax the income of the company for the year or other period specified in the notice should be deemed to be the income of the members and apportioned among them. No such notice was served on the company. Whether it could have been, one does not know. It is to be noted that such a notice can only be issued if a reasonable part of its income for a year or other accounting period had not been distributed. The £35,002 capitalised on 18th May 1953 may not have represented income received in any one year but accumulated over a number of years.

Were it not for the provisions of s. 28 of the Finance Act 1960, it is clear that the £18,002 received by the Respondent would not be liable to surtax. The material parts of s. 28(1) are as follows:

> "(1) Where—(*a*) in any such circumstances as are mentioned in the next following subsection, and (*b*) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage, then . . . this section shall apply to him in respect of that transaction or those transactions: Provided that this section shall not apply to him if—(i) the transaction or transactions in securities were carried out . . . before the fifth day of April, nineteen hundred and sixty."

The first question for consideration is whether in this case there were any such circumstances as are mentioned in s. 28(2). The Crown contended that these were the circumstances mentioned in s. 28(2)(*d*). The material parts of s. 28(2) are as follows:

> "(2) The circumstances mentioned in the foregoing subsection are that— . . . (*c*) the person in question receives, in consequence of a transaction whereby any other person—(i) subsequently receives, or has received, an abnormal amount by way of dividend; or (ii) subsequently becomes entitled, or has become entitled, to a deduction as mentioned in paragraph (*b*) of this subsection, a consideration which either is, or represents the value of, assets which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend . . . and the said person so receives the consideration that he does not pay or bear tax on it as income; or (*d*) in connection with the distribution of profits of a company to which this paragraph applies, the person in question so receives as is mentioned in paragraph (*c*) of this subsection such a consideration as is therein mentioned. In this subsection—(i) references to profits include references to income, reserves or other assets, (ii) references to distribution include references to transfer or realisation (including application in discharge of liabilities), and (iii) references to the receipt of consideration include references to the receipt of any money or money's worth, but the assets mentioned in paragraph (*c*) of this subsection do not include assets which (while of a description which under the law of the country in in which the company is incorporated is available for distribution by way

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of dividend) are shown to represent a return of sums paid by subscribers on the issue of securities: and the companies to which paragraph (*d*) of this subsection applies are—(iv) any company under the control of not more than five persons . . ." A

As Parker Shoes Ltd. had no more than five members, it is a company to which para. (*d*) applies.

The questions to be answered in relation to this are: (1) did the Respondent receive a consideration which either was, or represented the value of, assets which were (or apart from anything done by the company in question would have been) available for distribution by way of income; and (2) if so, did he receive it in connection with the distribution of the profits of the company? B

The £35,002 which was capitalised on 18th May 1953 was, as the resolution stated, part of the undivided profits of the company. As a result of action taken by the company it was distributed in the redemption of the debentures on 19th January 1961. But for the action of the company in creating the debentures and in redeeming them, the £35,002 would have been available for distribution by way of dividend. In my opinion, the £18,002 received by the Respondent, forming part of this £35,002, was a "consideration" which represented the value of assets which apart from anything done by the company would have been available for distribution by way of dividend, and was so received by him that he did not pay or bear tax on it as income. C D

Having reached this conclusion, it is not, I think necessary to decide whether the receipt by the Respondent of the debentures constituted such a "consideration". By the issue of them the company recognised an obligation to pay at some time in the future, after either the death of the holder or the expiry of seven years, whichever should happen first, the amount stated on each debenture. The company might not have exercised its discretion to redeem them for a great many years. They bore no interest. If a holder of them had tried to sell them, he would not have been likely to obtain for them anything approaching their face value. I doubt whether in these circumstances the debentures can properly be regarded as representing the value of assets of the company in the sense required by s. 28(2)(*c*) and (*d*). E F

Was the £18,002 received by the Respondent received by him in connection with the distribution of the profits of the company? It is provided in the section that references to distribution include application in discharge of liabilities. In my opinion, the sum received by the Respondent was received in connection with the distribution of profits of the company. It was received by him as a result of two transactions by the company, first, the capitalisation of the £35,002 of the profits of the company and the issue of debentures for that sum, and, secondly, by the redemption of those debentures. G

I am therefore of the opinion that the requirement of s. 28(1)(*a*) is satisfied. The view was expressed in the Court of Appeal that s. 28 was directed to dividend-stripping, and that the objective of the company in this case was not of this character. I think I should make it clear that, in my opinion, this is taking too narrow a view of s. 28. That section was, in my view, directed to tax avoidance taking place in certain circumstances, and one has to consider whether in a particular case the circumstances specified existed. In my opinion, in this case they did. H

At this point it is convenient to refer to the Respondent's contention that the £18,002 paid to him represented a return of the sums paid by him on the I

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A issue of the debentures, and that consequently the sum has, by virtue of s. 28(2), to be disregarded when deciding whether or not he received a consideration which either was or represented the value of assets of the company available for distribution. I have had the advantage of reading the opinion of my noble and learned friend Lord Wilberforce, and I agree with his observations on this contention.

B One has now to consider whether the other requirements of the section are satisfied. The next question for consideration is, was the Respondent in a position to obtain, or did he obtain, a tax advantage in consequence of a transaction in securities or the combined effect of two or more such transactions?

The Special Commissioners were of the opinion that

> "the so-called debentures were not securities within the normal meaning of the word or as extended by s. 43(4)(*f*)" of the 1960 Act.

C Ungoed-Thomas J. held that they were securities. I find the reasons he gave for that conclusion entirely convincing. A "transaction in securities" is defined in s. 43(4)(*i*) of the 1960 Act as including

> "transactions, of whatever description, relating to securities, and in particular—(i) the purchase, sale or exchange of securities, (ii) the issuing or securing the issue of, or applying or subscribing for, new securities, (iii) the altering, or securing the alteration of, the rights attached to securities."

D Lord Denning M.R. said that he would not himself describe the payment off of a debenture as a transaction in securities. He thought it would be giving far too wide an interpretation of the words "transactions, of whatever description, relating to securities" to hold that they covered the repayment of debentures. He thought that the particular instances (i), (ii) and (iii) in s. 43(4)(*i*) should E be read with the opening words so as to show the nature of the transactions which the Legislature had in mind. He held that the payment of the debentures was not a transaction in securities, and said that he was confirmed in this view by looking at the general mischief which this section was designed to hit. It was, he said, designed to hit dividend-stripping, not the redemption of debentures. Danckwerts L.J. also held that such redemption did not consitutute a trans- F action in securities. I do not agree that the general mischief which s. 28 was designed to hit was dividend-stripping. It was, to my mind, designed to hit other forms of tax avoidance as well. I do not think that one should restrict the general and unambiguous words of the definition in the Statute by regard to the mischief which it is thought that the section is aimed at. Nor do I think that it is right to seek to interpret the general words in the light of the particular instances given G in the section. It is a familiar device of a draftsman to state expressly that certain matters are to be treated as coming within a definition to avoid argument on whether they did or not. The particular instances given in s. 43(4)(*i*) in my opinion do not in any way restrict the meaning to be given to the general words which precede them. The redemption of the debentures was, in my opinion, a transaction relating to them, and so a "transaction in securities" as defined H by the section. I think that the issue of the debentures on 18th May 1953 was also a "transaction in securities" within the meaning of the section.

If these transactions in securities had been carried out before 5th April 1960 the Respondent would have been able to rely on the proviso to s. 28(1). As the redemption took place on 14th January 1961 he cannot, however, do so.

The next question for consideration is, was the Respondent in a position I to obtain, or did he obtain, a tax advantage in consequence of these transactions

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or either of them? The words "tax advantage" are defined by 43(4)(*g*) as meaning A

> "a relief or increased relief from, or repayment or increased repayment of, income tax, or the avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains". B

In this case there is no question of the Respondent obtaining or having been in a position to obtain a relief or increased relief from or repayment or increased repayment of income tax. So one can ignore that part of the definition. If the Crown are right, there was in this case an avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment thereto, and it C is not, in my opinion, necessary to decide into which category this case comes. The receipt of the £18,002 by the Respondent accrued in such a way that the recipient did not pay surtax on it. If he had received it by way of dividend he would have done. By receiving it in redemption of the debenture issued to him by the company he secured the avoidance or reduction of an assessment to tax or a possible assessment thereto. Consequently, on the receipt by him of the D £18,002 on 14th January 1961, he secured a tax advantage within the meaning of the section.

The Respondent contended that, if he obtained a tax advantage at all, he obtained it on the issue of debentures in 1953 alone, and that therefore he was outside the ambit of s. 28. Lord Denning M.R. agreed with this. Danckwerts L.J. held that if there was any tax advantage it was secured in 1953. It is, I think, E important to keep distinct the circumstances which are required to be present for the section to apply and the meaning to be attached to the words "tax advantage". If it be the case that the receipt of debentures in 1953 constituted a receipt of "consideration" within s. 28(2)(*d*), it does not follow that the Respondent then was in a position to obtain or obtained a tax advantage. If the prescribed circumstances exist, one has then to see whether in consequence of F a transaction or transactions in securities a person was in a position to obtain or obtained a tax advantage. All that the Respondent received in 1953 was an acknowledgment by the company of indebtedness to him, which the company could discharge if it wished after the happening of certain events, and which it was only obliged to discharge if condition 9 of the conditions of issue of the debentures applied. No part of the profits of the company were then distributed G to him. All that he received was debentures showing that he or his estate was entitled to receive £18,002 when the company thought fit to pay it either after his death or after 14th January 1960. In my opinion, the short answer to the Respondent's contention is that he did not in 1953 receive any part of the profits of the company. There was at the time no receipt by him of anything which, if it had been given to him in another way, would have been liable to tax. I do H not, therefore, think that he was then in a position to obtain or had obtained a tax advantage within the meaning of the section. I realise that this conclusion means that a recipient of such a debenture might sell it for what it will fetch before redemption and neither he nor the purchaser would be liable to tax. On the other hand, if the Respondent is right, it means that the recipient of such a debenture will be liable to surtax on the amount of the debenture when it is received, even though years may elapse before it is redeemed and even though I it be impossible to sell it for any sum approaching its nominal value.

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A Diplock L.J. thought that there was no tax advantage the Respondent was in a position to obtain, as he did not consider that there was any possible assessment to tax which was avoided. In my view, the possible assessment to tax which was avoided was the assessment to tax of the £18,002 which would have been made if this sum had been paid to the Respondent by way of dividend on 14th January 1961. That it was so paid to the Respondent was in consequence B of the combined effect of two transactions in securities, namely, the capitalisation of £35,002 of the undivided profits of the company and the issue of debentures in respect thereof in May 1953 and the redemption of the debentures in January 1961. As I said at the beginning of this opinion, the only object of capitalising the £35,002 and of the issue of debentures was to secure at some date the distribution of £35,002 to the members of the company without liability to surtax. C The issue of the debentures was a necessary stage in the achievement of this object. It was not achieved until the debentures were redeemed, and in my opinion the Respondent then received a consideration which was the value of assets of the company which apart from anything done by the company would have been available for distribution by way of dividend, and received it in such a way that he did not pay tax upon it: s. 28(2)(*c*) and (*d*). It was then and only D then that he received a tax advantage within the meaning of the Statute.

For these reasons I think that s. 28 applies to the Respondent in respect of these transactions in securities, and that the Commissioners of Inland Revenue were entitled to counteract the tax advantage he secured by requiring the computation or recomputation or the Respondent's liability to surtax for the year 1960–61 on the basis that £18,002 should be taken into account as if it were E the net amount received in respect of a dividend payable at the date of the receipt thereof from which deduction of tax was authorised at source and the necessary consequent assessment or re-assessment to surtax.

For these reasons, I would allow the appeal, and the Order made by Ungoed-Thomas J. should in my opinion be restored.

Lord Morton of Henryton—My Lords, I have had the advantage of reading F the opinion about to be expressed by my noble and learned friend Lord Hodson. I agree with it and have nothing to add. I would therefore dismiss the appeal.

Lord Hodson—My Lords, this case arises under s. 28 of the Finance Act 1960, which relates to the cancellation of tax advantages from certain transactions in securities, a notice having been given by the Commissioners of Inland Revenue to the Respondent. The effect of the notice was that the liability of G the Respondent to surtax for the year of assessment 1960–61 should be computed on the basis that £18,002 received by him from Parker Shoes Ltd. on 4th January 1961 should be taken into account as if it were the net amount received in respect of a dividend payable at the date of its receipt from which deduction of tax was authorised by s. 184(1) of the Income Tax Act 1952, and that he should be assessed accordingly.

H The first question is whether there was "a transaction in securities", for in order to be within the section it must be such a transaction, and one carried out after 5th April 1960. Section 43(4)(*i*) says:

> "'transaction in securities' includes transactions, of whatever description, relating to securities, and in particular—(i) the purchase, sale or exchange of securities, (ii) the issuing or securing the issue of, or applying I or subscribing for, new securities, (iii) the altering, or securing the alteration of, the rights attached to securities."

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The words "transactions, of whatever description, relating to securities" are so wide that, in my opinion, they must cover the receipt of the £18,002 which came about through the redemption of the Respondent's debenture in 1961. In my opinion, it is not legitimate to cut down the width of this phrase by treating the examples which follow the words "in particular" as words of limitation. I agree with the learned trial Judge that there could hardly be a wider net connecting transactions and securities. This, however, is not an end of the matter, for unless the Respondent obtained a tax advantage from a transaction after 5th April 1960 the appeal cannot succeed.

The circumstances in which the tax advantage was said to have been obtained are those covered by s. 28(2)(*d*), which refers to circumstances as that

> "in connection with the distribution of profits of a company to which this paragraph applies, the person in question so receives as is mentioned in paragraph (*c*) of this subsection such a consideration as is therein mentioned".

The companies to which para. (*d*) applies are "(iv) any company under the control of not more than five persons". Parker Shoes Ltd. was such a company. Paragraph (*c*) defines "consideration" as one

> "which either is, or represents the value of, assets which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend . . . and the said person so receives the consideration that he does not pay or bear tax on it as income".

The words "so receives" in s. 28(2)(*d*) refer back to the same words in s. 28(2)(*c*), and make it clear that the receipt of the consideration is such that the person in question does not pay or bear tax on it as income. These words exactly fit the transaction which took place on 18th May 1953, when the company passed the resolution which provided as follows:

> "(i) That it is desirable and that the Members of the Company be recommended to capitalise the sum of £35,002 being part of the undivided profits of the Company standing to the credit of the Profit and Loss Account of the Company, and accordingly that such sum be set free for distribution amongst the Members of the Company whose names appear in the Register of Members at Noon on the 18th day of May 1953, in proportion to the amounts paid up on the Shares held by them respectively, on condition that the same be not paid in cash, but that the Directors be authorised to apply such sum in paying up in full at par Debentures for securing the sum of £35,002, such Debentures to be allotted and distributed, credited as fully paid up, to and amongst the said Members of the Company in the proportion aforesaid."

The Respondent's share of the undivided profits was £18,002. Instead of receiving that sum in cash he received, as the resolution provided, a debenture for the same amount. If the profits had been distributed, your Lordships were informed that he could have suffered a surtax charge of £14,000. This he avoided, receiving, as he did, consideration in the form of a chose in action in connection with the distribution of the profits of the company. Nothing turns on the form of the debenture, which bore no interest and charged no property, but was redeemed in 1961, when the sum of £18,002 was paid out to the Respondent.

That the Respondent received a tax advantage in 1953 is, in my opinion, plain from the facts I have stated, but there is confirmation to be found in the definition of "tax advantage" in s. 43(4)(*g*) of the Act, which reads:

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A "'tax advantage' means a relief or increased relief from, or repayment or increased repayment of, income tax, or the avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains".

B The word "relief" is no doubt used in the technical income tax sense, and the relevant words of the section are "avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment thereto".

The Respondent was, apart from this transaction, a surtax payer, and it is immaterial whether he is treated as having escaped surtax by reduction or avoidance of an assessment or of a possible assessment. That he did so in 1953 C is clear unless the word "receipts" is inapplicable to the debenture which was then issued to him. It is argued on behalf of the Crown that nothing was received by him until 1961, when the cash was paid out on the redemption of the debenture, and that all that he received in 1953 was a piece of paper which evidenced a reorganisation of the capital of the company but gave him nothing. This is wholly unrealistic. The debenture was not money, but it was money's worth and D indeed capable of realisation by transfer at any time, albeit at less than its face value. The fact that the money, namely, £18,002, the exact equivalent of the money secured by the debenture, was not paid till 1961 does not make it necessary to look to 1961 for the time when the section takes effect. The section, if it had been in existence in 1953, would have taken effect then, when the tax advantage was complete, that is to say, when the profits of the company were E distributed in such a way as to avoid tax by the issue of debentures instead of a cash distribution.

I do not find that, as the learned Judge thought, the use of the words "in such a way" prevents one from looking to see what the debenture represented in the way of undivided profits. The argument for the Crown is summarised in the language of Sankey J. in *Pool* v. *Guardian Investment Trust Co. Ltd.*(1) F [1922] 1 K.B. 347, at page 356, where he said:

"If there has been no release of assets there has been no distribution and there is nothing to tax, neither is there anything to tax if the release is the distribution of capital. *Blott's* case(2) ([1921] 2 A.C. 171) was so decided because the majority of the members of the House of Lords were of opinion that there had been no release of assets."

G Reliance was placed, not only on *Commissioners of Inland Revenue* v. *Blott*, but also on *Commissioners of Inland Revenue* v. *Fisher's Executors*(3) [1926] A.C. 395, where Lord Cave L.C. said, at page 403:

"No doubt, the shareholders got debenture stock which, like the shares in *Blott's* case, was a valuable thing; but they had no power to call in the stock, which gave them no present right to receive any part of the company's H assets either in money or in money's worth, but only entitled them to a sum to be carved out of those assets if and when the stock was paid off. It is true that debenture stock, unlike shares, creates a debt; but the debt in this case was not presently payable and may never become payable while the company is in existence. The whole transaction was 'bare machinery' for capitalizing profits and involved no release of assets either as income I or as capital."

(1) 8 T.C. 167, at p. 177. (2) 8 T.C. 101. (3) 10 T.C. 302. at pp. 333–4.

(Lord Hodson)

These cases demonstrate that the Respondent's debenture was not taxable under the Income Tax Acts as income. No one has supposed that these debentures were so taxable. The whole object of the resolution was to distribute undivided profits so as to avoid the incidence of income tax. This they succeeded in doing, and until the Legislature intervened by passing s. 28 of the Act of 1960 such a transaction was inviolate. The section deals, not with cases where tax is exigible, but with transactions where a tax advantage has been obtained, that is to say, with transactions which would not otherwise be the subject matter of assessment.

The cases cited, therefore, lend no support to the Crown's argument but serve to demonstrate circumstances in which that which is termed a tax advantage may arise. There is, in my opinion, no justification for limiting the meaning of the word "receipts" in s. 43(4)(*g*) to the exact cash equivalent of the money which would have been distributed in 1953. This is too narrow a view. The receipt was obtained when the debentures were issued, and the tax advantage was then complete, although the fruits were not enjoyed until the debentures were redeemed and the cash became available to the debenture-holders. There was only one tax advantage, not two, and that advantage was obtained in consequence of the transaction which took place in 1953, not, as the Crown contend, in consequence of two transactions, namely, the issue in 1953 and the redemption in 1961 of £18,002 of debentures. That there was nothing to tax in 1953 does not, in my opinion, stand in the way of the tax advantage having been obtained at that time. In 1961, on the other hand, when the debenture was redeemed, no tax advantage was obtained.

I would dismiss the appeal.

Lord Guest—My Lords, the Respondent was a shareholder in Parker Shoes Ltd., which had an issued share capital of £35,002 in the form of 35,002 £1 ordinary shares. As at 31st December 1952, the amount standing to the credit of the profit and loss account was £69,914, representing an accumulation of profits within the charge to income tax. The Respondent was a majority shareholder in the company. Consideration had been given for some time prior to 1953 to the position which would arise on the Respondent's death. In the event of his death his estate would have been valued on an assets basis for estate duty purposes under s. 55 of the Finance Act 1940. On 18th May 1953 a special resolution was passed at an extraordinary general meeting of the company amending the articles of association of the company to give it power upon the directors' recommendation to capitalise any part of the amount standing at credit of the company's reserve or profit and loss accounts and to apply it in paying up unissued shares or debentures. On the same day an ordinary resolution was passed recommending that a sum of £35,002, being part of the sum standing to the credit of the company's profit and loss account, be set free for distribution to the members of the company on condition that the same be not paid in cash but that the directors be authorised to apply the sum in paying up in full at par debentures for securing the sum of £35,002. The debentures were issued on 13th July 1953. They did not confer any charge on the company's assets, nor did they carry any interest. By condition 8, the company was entitled to pay off the debenture upon giving the appropriate notice at any time after the death of the registered holder or upon the expiration of seven years. The Respondent had issued to him a debenture of £18,002 and the remaining shareholders received debentures proportionate to their shareholding in the company. The debentures were issued by the company in order that upon the death of

(Lord Guest)

A a shareholder, in particular the Respondent, money might be made available to meet the death duties payable on his estate.

On 14th January 1961 the company after the appropriate notice repaid the debentures. As at 31st December 1960, the sum standing at the credit of profit and loss account representing an accumulation of profits was £128,720. The debentures were redeemed with the object of enabling the Respondent and two B other shareholders who were his sisters to have investments available which would have been realised to pay death duties. If resources outside the company had not been available a claim for death duties could only have been met by making moneys available from the company (which might have interfered with its trading position) or by a forced realisation of shares in the company.

In the year of assessment 1960–61 the total income of the Respondent, C exclusive of the sum received upon the redemption of the debentures, was such as to make him liable to surtax for that year.

The Commissioners of Inland Revenue on 16th August 1962 sent a notice to the Respondent under s. 28(3) of the Finance Act 1960, in the following terms: [His Lordship then read the notice set out at page 397 *ante*.] Upon the matter being before the Special Commissioners they held that s. 28 did not apply to the D transaction or transactions in question and they cancelled the notice above referred to. Ungoed-Thomas J. allowed the appeal of the Crown and confirmed the notice of the Commissioners of Inland Revenue. The Court of Appeal reversed the order of Ungoed-Thomas J. and cancelled the notice.

The question is whether s. 28 of the Finance Act 1960 applies to the transaction or transactions referred to. The material provisions of the Finance Act E 1960 are as follows. [His Lordship then read s. 28 and s. 43(4)(*f*), (*g*) and (*i*) of the Finance Act 1960, and continued:]

For the Respondent it was argued: (1) that the redemption of the debentures in 1961 was not a transaction in securities within the meaning of s. 28(1) and s. 43(4)(*i*) of the 1960 Act; (2) that the circumstances mentioned in s. 28(2)(*d*) were not present in the case; (3) that any tax advantage obtained by the Respon- F dent was obtained in 1953 alone, and no tax advantage was obtained in 1961, the proviso to s. 28(1) being applicable; (4) that the redemption of the debenture in 1961 represented a return of sums paid by subscribers on the issue of securities and was accordingly excluded from s. 28(2)(*c*) by virtue of the proviso to para. (*d*).

Upon the first point I am clear that the Respondent's argument fails. The definition of "transaction in securities" includes "transactions, of whatever G description, relating to securities", and then proceeds to include in the definition the purchase, etc., of securities, the issuing, etc., of securities and the alteration of rights attached to securities. It was said that the particularisation which followed the wide inclusion of "transactions, of whatever description, relating to securities" in some way qualified the general words, and that, as the issue of securities was mentioned and nothing was said of the redemption of securities, H it must be presumed to have been excluded. There is, in my view, no substance in this argument. The words "of whatever description relating to securities" are extremely wide and are apt to cover the redemption of a debenture.

The second and third points can conveniently be taken together. These require close consideration of the terms of ss. 28 and 43(4) of the 1960 Act. Before the sections can apply two conditions must be satisfied: (1) the circum- I stances mentioned in s. 28(2) must be present, and (2) a person must be in a position to obtain or have obtained a tax advantage in consequence of a trans-

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action in securities or the combined effect of two or more transactions. The relevant circumstances to be considered in the present case are to be found in s. 28(2)(*d*). This subsection as expanded reads:

> "in connection with the distribution [including application in discharge of liabilities] of profits [including income, reserves or assets] of a company . . . the person in question receives a consideration [including any money or money's worth] which represents the value of assets which are (or apart from anything done by the company would have been) available for distribution by way of dividend".

The relevant "tax advantage" under s. 43(4)(*g*) is either the reduction of an assessment to surtax or

> "the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains".

For the Crown it was contended that the relevant tax advantage was not completed until 1961, when the debenture was redeemed. The taxpayer argued that it occurred in 1953 once and for all and was then complete. I think it is clear that, if the relevant tax advantage was complete in 1953, then no further tax advantage would be obtained in 1961. Equally, it is clear, and I think was conceded by Mr. Heyworth Talbot, for the taxpayer, that if the relevant tax advantage was obtained in consequence of the combined effect of the issue of the debentures in 1953 and their redemption in 1961 the Crown must succeed. I am not sure that the issue in this case can be determined by asking the question: When was the relevant tax advantage obtained? In my view, there is a good deal to be said for the view that the Respondent was in a position to obtain a tax advantage in 1953. The consideration was received "in connection with the distribution of profits" in the terms of s. 28(2)(*d*). The resolution evidences this fact. The Respondent received a consideration representing company assets—the debenture—which apart from the capitalisation of profits would have been available for distribution by way of dividend, and the Respondent received the debenture so that he did not pay tax on it as income: see *Commissioners of Inland Revenue* v. *Fisher's Executors*[1] [1926] A.C. 395. This fits precisely the provisions of s. 28(2)(*d*). Mr. Bagnall, for the Crown, contended that, having regard to the definition of "tax advantage" in s. 43(4)(*g*), the Respondent obtained no tax advantage in 1953 in respect that the phrase "receipts accruing" did not cover the issue of the debenture in 1953. I am not certain, having regard to the terms of s. 28(2)(*d*), where the tax advantage is clearly set out as "the person so [receiving] the consideration that he does not pay tax on it as income", that it is necessary to look at this part of the definition of "tax advantage", which, having stated what a tax advantage is, then describes two ways in which the avoidance of tax can be effected without prejudice to other ways. However that may be, if s. 43(4)(*g*) does apply I have the greatest difficulty in following Mr. Bagnall's argument that the receipt of a debenture is not a "receipt accruing" under s. 43(4)(*g*). "Receipt" is, in my view, a deliberately wide term, and "accruing" does not necessarily import payment. Moreover, the "consideration" in s. 28(2)(*d*) admittedly covers a debenture. It is pure sophistry for Mr. Bagnall to say that a debenture is a consideration but it is not a receipt. The cases of *Commissioners of Inland Revenue* v. *Blott*[2] [1921] 2 A.C. 171, and *Commissioners of Inland Revenue* v. *Fisher's Executors* relied on are not in point.

(1) 10 T.C. 302. (2) 8 T.C. 101.

(Lord Guest)

A But, as I have already indicated, I am not sure that the fact that the Crown might have on a particular construction of s. 28 operated this section on the 1953 transaction, if the 1960 Act had been in force, precludes them from applying s. 28 to the 1961 transaction if a relevant tax advantage was obtained as a consequence of the combined effect of the two transactions. Let me, then, look at the position in 1961. Upon this view it is legitimate to go back to 1953 B to ascertain that the redemption of the debenture as a matter of fact was linked with the capitalisation of the profits in 1953. The resolution of 18th May 1953 speaks of the undivided profits being set free for distribution amongst the members of the company and not being paid in cash but being applied in paying up the debentures in full. The debenture was thus stamped in 1953 with the mark "part of undivided profits". When one comes to consider the situation in 1961, C it is thus easy to satisfy the requirement of s. 28(2)(*d*) that the debenture was redeemed "in connection with the distribution of profits". The debenture had as its antecedent the capitalisation of the profits in 1953 and the two are thus linked together. In any event, having regard to the definition in s. 28(2)(*d*), the opening words of the subsection would be satisfied if it was either the transfer of £18,002 of the assets of the company in the form of the issue of a debenture to the D Respondent in 1953 or the application of £18,002 of the assets of the company in discharge of its liability to the Respondent by the redemption of the debenture in 1961. Following, then, the words of s. 28(2)(*d*), the provisions exactly fit the 1961 transaction, for the debenture represented the value of assets which apart from the capitalisation of the undivided profits in 1953 would have been available for distribution as dividend, and the Respondent received the redemp- E tion money so that he did not pay tax on it. Upon this construction there is no difficulty with s. 43(4)(*g*), and the antithesis properly stressed by Mr. Bagnall is achieved between receipts accruing in such a way that the Respondent did not pay tax on them, namely, the receipt of cash in 1961, and the receipts accruing in such a way that the Respondent would have had to pay tax on the receipt of this sum in 1953 if it had been distributed as dividend.

F I have thus reached the conclusion that the Respondent obtained a relevant tax advantage in 1960–61 as a result of the combined effect of the 1953 and 1961 transactions when he received £18,002 in cash upon the redemption of the debenture in 1961 so that he either avoided paying surtax on this sum or secured a reduction of his assessment to surtax. It is said that if this view be sound there is an undoubted anomaly in that if the debenture-holder disposes of his deben- G ture for value then no charge arises nor would the purchaser be liable to tax. Equally, if the Respondent's contention be sound a charge to tax would arise upon the issue of a debenture. The contrast of anomalies is, however, never a satisfactory aid to the construction of a Revenue Statute. The answer may be that the Crown could if the 1960 Act had been in force have applied s. 28 in 1953 upon the basis that the Respondent was in a position to obtain a tax H advantage by transferring his debenture and thus escaping liability to tax.

Upon the fourth point argued for the Respondent I agree with my noble and learned friend Lord Wilberforce.

I would allow the appeal.

Lord Wilberforce—My Lords, the transactions upon which the claim of the I Crown is based have been fully described by my noble and learned friend Viscount Dilhorne, whose opinion I have had the benefit of reading.

(Lord Wilberforce)

What has to be considered is the impact upon these transactions of s. 28 of the Finance Act 1960. The Statute mounted a massive attack against tax avoidance in many forms. One type of tax avoidance transaction at which the Act is evidently aimed is that generically known as "dividend-stripping". This being perhaps the most easily identifiable target, it was contended in the Court of Appeal, and the argument found some favour there, that the Act, or at least s. 28, was confined to this and analogous practices and was not intended to and did not deal at all with the kind of arrangement with which we are concerned. This is an argument which I cannot accept. I do not find it possible to discern in this Act any indication that it was the purpose of the Legislature to limit it to any specific form of tax avoidance. The scheme and drafting, not only of s. 28 but of the preceding sections, is far too general to admit of the suggested restriction, and I do not think that interpretation should seek to narrow this generality. But perhaps it is fair to add that, although the particular type of arrangement adopted by Mr. Parker has been perfectly well known as a means of avoiding or reducing tax at least since the decision in *Commissioners of Inland Revenue* v. *Fisher's Executors*[1] in 1926, where the fiscal consequences were very clearly pointed out by Lord Shaw of Dunfermline and by Lord Sumner, and although language has been devised to deal in some respects with it (I refer to the language used for purposes of profits tax in the Finance Act 1951, s. 31), the Finance Act 1960 neither refers specifically to the practice nor makes use of that language. That does not mean that the legislative intention does not extend to the kind of transaction that we have here to consider: we must take the Act as we find it and endeavour to see what it fairly covers. But we need not be surprised if if turns out that the attack is confined to a limited sector of the front.

The questions of substance in this appeal are two, namely, (1) whether the necessary "circumstances" existed as mentioned in s. 28(2) of the Finance Act 1960, and (2) whether the Respondent obtained or was in a position to obtain a tax advantage in consequence of a transaction in securities occurring after 5th April 1960 or of the combined effect of transactions one of which occurred after that date. If he obtained a tax advantage but the transaction or transactions by which he did so occurred before 5th April 1960, the Revenue cannot attack him in respect of that tax advantage.

(1) The "circumstance" relied on by the Crown is of the kind stated in s. 28(2)(*d*). After the necessary incorporation has been made of words taken from para. (*c*) of the subsection, this requires that, in connection with the distribution of profits of the company, the Respondent shall have so received that he did not pay tax on it as income a consideration which, apart from anything done by the company (in this case the capitalisation of profits and issue of debentures in 1953), would have been available for distribution by way of dividend. There appears to me to be no doubt that these requirements are exactly fulfilled in relation to the receipt by the Respondent of £18,002 in 1961. It was "in connection with the distribution of profits" because the assets distributed (viz. £18,002) represented profits. I am reassured to see that all the learned Judges who have considered this case take this view.

(2) The other requirement is more difficult—the difficulty arising in this particular case because of the various "transactions" only one, viz. the redemption of the debentures, took place after 5th April 1960. The Respondent founds on this an argument that, if any tax advantage was obtained, it was obtained

(1) 10 T.C. 302.

(Lord Wilberforce)

A solely by virtue of the transaction or transactions of 1953; that at that time he acquired debentures which, if assets at all, were capital assets, and that all that happened in 1961 was that a debt, of which the debentures were evidence, was repaid. The test of the validity of this argument, by common agreement of learned Counsel on both sides, is said to be whether the Respondent obtained a tax advantage in 1953, when the profits were capitalised and the debentures B issued, the assumption being that, if he did, he did not obtain a tax advantage in 1961. I find difficulty in this. It seems to me that this particular issue should be resolved more simply and more directly by concentrating attention on the transaction of 1961. The Respondent then obtained a tax-free sum: he obtained it through combined transactions which included the capitalisation of the company's profits. Had it not been for this combination of transactions, the C sum would have been taxable in his hands. I cannot see that it is an answer to this to show that, had the current of transactions been stopped midway, after the issue of the debentures in 1953, he would also, at that point, have been found to have obtained a tax advantage. (I do not forget the alternative words "is in a position to obtain . . . a tax advantage" but I do not consider that these words applied in 1953. If he did not actually obtain one in 1953, he could not get one D without independent action by the company.) For even if he did obtain a tax advantage in 1953, that was not the advantage that he obtained in 1961: the one was a promise to pay in the future when the company should decide to make payment, the other was an actual sum of money. The receipt of 1961 was not merely the automatic fruition of something he had already gained in 1953: it was received as the result of a fresh transaction in that year. If this argument E is correct, it is sufficient to entitle the Crown to succeed in this appeal. But in case this is too simple a view of the matter, I must deal with the argument as presented and consider whether the Respondent did receive a tax advantage in 1953.

For this purpose it is necessary to look carefully at the definition of tax advantage in s. 43(4)(*g*) as:

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> "a relief or increased relief from, or repayment or increased repayment of, income tax, or the avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains".

G Can these words fairly be applied to the debentures? In my opinion, they cannot. The paragraph, as I understand it, presupposes a situation in which an assessment to tax, or increased tax, either is made or may possibly be made, that the taxpayer is in a position to resist the assessment by saying that *the way in which he received what it is sought to tax* prevents him from being taxed on it, and that the Crown is in a position to reply that if he had received what it is sought H to tax *in another way* he would have had to bear tax. In other words, there must be a contrast as regards the "receipts" between the actual case where these accrue in a non-taxable way with a possible accruer in a taxable way, and unless this contrast exists the existence of the advantage is not established.

To apply this to the present case, as regards the 1961 receipt there is no difficulty. The first step is to establish a connection with the distribution of I profits—this must be done in order to prove the "circumstance" under s. 28(2)(*d*). I have already shown that this can be done here. Then, given the fact of that connection, it follows that a tax advantage has been gained through the receipt

(Lord Wilberforce)

of £18,002 (representing profits which if received by way of dividend would be taxable) in such a way as not to be taxable. Through this the Respondent has avoided an assessment or obtained a reduction in his assessment—it matters not which.

But if one seeks to apply s. 43(4)(*g*) to the 1953 transaction, a different result follows. It is impossible, in my opinion, to say that the Respondent at that point received profits of the company in a non-taxable form, or in any way at all. The basis of the decision of this House in *Commissioners of Inland Revenue* v. *Fisher's Executors*[1] [1926] A.C. 395, following (as it was thought logical to follow) *Commissioners of Inland Revenue* v. *Blott*[2] [1921] 2 A.C. 171, I understand to be that by a decision of the company, effective against all the world including the Revenue, the character of divisible profits had been taken away from the capitalised sums. The shareholders, instead of receiving their share of those profits, received a right, enforceable at the time and in the manner defined by the resolution creating the debentures, to participate in the company's capital. Nothing (and this is I think crucial for the present case) passed from the company—out of the company's coffers, to use the words of Viscount Cave[3] ([1921] 2 A.C., at page 200)—to the shareholders: they were merely given a right, a chose in action, over the company's capital assets.

Furthermore, I do not think that s. 43(4)(*g*) can apply to the debentures as such. A debenture may be a receipt, but it is untaxable, not because it was received in a particular way, but because it is a debenture, i.e., a right over a portion of the company's capital. There was no way in which the company could issue paid-up debentures of its own (the case might be different if they were debentures in another company) in such a way as to be taxable, because the issue presupposes a capitalisation of profits. So I reach the conclusion that there was no "tax advantage" in 1953. If this is right, the section does not treat as a tax advantage the issue (after capitalisation of profits) of debentures: it waits until a later stage—which will normally follow if the object is (as it clearly was here) to extract profits from a company in cash—when money, or assets, leave the company and reach the shareholder's hands. It is perhaps superfluous to look for logic or principle behind such provisions as are found in this legislation, but I find this result not unsatisfactory. On my understanding, so far as debentures are concerned, the section makes a limited attack upon the capitalisation of profits followed by an issue at the moment when cash (or the equivalent) reaches his hands. Then it prevents him from enjoying the tax advantage which he would gain if that cash were treated as capital. If the Respondent's contention were accepted, the subject would be taxable at once, so soon as such an issue was made, whether the issue was merely a preliminary to the receipt of cash or whether it was not. But if it were the intention to tax such issues so generally, one might expect to find some more specific indication of this intention and some guidance as to the precise basis of taxation.

In the Courts below Ungoed-Thomas J. decided this point as I would decide it, and I acknowledge my debt to his reasoning. In the Court of Appeal Lord Denning M.R. held that the tax advantage arose in 1953 when the debenture was issued.

> "If it were not for the debenture", he said[4], "the company might well have declared a dividend (which could be 'receipts accruing') on which he could be taxed."

(1) 10 T.C. 302. (2) 8 T.C. 101. (3) *Ibid.*, at p. 135. (4) *See* page 418 *ante*.

(Lord Wilberforce)

A As an analysis of the facts, this is of course true; the difficulty arises when one seeks to find the statutory tax advantage: and I cannot read s. 43(4)(*g*) as attributing a tax advantage to a taxpayer who receives one non-taxable thing merely because he might have received another different taxable thing. Danckwerts L.J. adopted the same argument, but Diplock L.J. based his decision on different reasoning, namely, that no possible assessment was avoided in 1961.
B I have already given the reasons why I think that an assessment, or possible assessment, was then avoided, and I would only add that I do not think that the possibility or otherwise of an assessment under s. 245 of the Income Tax Act 1952 (as to which the Special Commissioners made no finding) has a bearing on the issue before us. Section 28(12) of the Finance Act 1960 makes plain the independence of s. 28 from all other income tax legislation.

C On the main point in the appeal, therefore, I am of opinion that the Crown makes good its claim. I need add nothing on the questions whether the debentures were "securities" or whether their redemption was a "transaction in securities" to what has been said, but I must mention briefly one additional argument and one subsidiary point.

The additional argument, which was put forward for the Respondent, was
D based on words appearing in s. 28(2) which have the effect of exempting from para. (*c*), and consequently from para. (*d*), assets "which . . . are shown to represent a return of sums paid by subscribers on the issue of securities". The argument is that the debentures are *ex concessis* fully paid, that they must have been paid up by the shareholders or alternatively by the company, that the resolution of 18th May 1953 shows that such was the case; consequently the
E £18,002 paid on 14th January 1961 represented a return of sums paid. In rejecting this argument I do not rely on the fact that if it is correct s. 28 would lose all application to such arrangements as the present: the section must be approached without any predisposition to suppose that they are covered. But I do not think that the wording aptly relates to what happened here. I return to the analysis of this type of transaction which was accepted in the cases of *Blott*([1])
F and *Fisher's Executors*([2]). According to those decisions, what happened was that the company, being master of its fund of profits, decided to turn part of this into capital and to distribute rights to that capital to its members. It is inherent in those decisons that the members never received any part of the profits themselves. As it was put by Lord Cave L.C. in *Fisher's* case([3]), the company decided to impound the fund and apply it as income-producing capital. Lord Sumner([4]),
G after referring to *Blott's* case and saying that "nothing was paid up on the shares, though alterations in the books and balance sheet were made as required", described the *Fisher* transaction as one in which an indebtedness was acknowledged to exist that in truth was purely voluntary, for the company had borrowed nothing and owed nothing to the trustees for the debenture-holders. In these cases there is no "subscription", a term which to my mind involves—as the word
H "return" also shows—a payment by one who owns a disposable sum of money to the company. I agree, therefore, with the Courts below in rejecting this argument.

The subsidiary point relates to the "adjustment" which the Commissioners of Inland Revenue are to carry out in accordance with s. 28(3). It was suggested by the Respondent that in making this adjustment some allowance ought to be
I made for what was done in 1953, on the basis, as I understand it, that some part

([1]) 8 T.C. 101. ([2]) 10 T.C. 302. ([3]) *Ibid.*, at p. 333. ([4]) *Ibid.*, at p. 337.

(Lord Wilberforce)

of the tax advantage ought to be treated as obtained then, at a time before the Finance Act 1960 was in force. The matter ought, so it was said, to be sent back to the Commissioners to do what is fair in the circumstances. The charge for tax which hangs over the taxpayer is certainly a very heavy—almost a penal —charge but I can see no basis for any discretionary examination of it. The wording of s. 28(3) combined with s. 43(4)(*g*) is clear: the "tax advantage" must be counteracted; and the tax advantage consists in receiving £18,002 free of surtax whereas it might have been received so as to attract surtax. There is no room here for any discretion; the only adjustment possible is that which the Commissioners have sought to make.

I would allow the appeal, and restore the Order made by Ungoed-Thomas J.

Questions put:

That the Order appealed from be reversed except as to costs, and that the judgment of Ungoed-Thomas J. be restored except as to costs.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Field Roscoe & Co., for Whetstone & Frost, Leicester.]

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