A HIGH COURT OF JUSTICE (CHANCERY DIVISION)—8TH AND 13TH APRIL 1965

COURT OF APPEAL—11TH FEBRUARY AND 4TH MARCH 1966

HOUSE OF LORDS—24TH AND 25TH JANUARY AND 5TH MARCH 1967

B **Commissioners of Inland Revenue *v.* Cleary(1)**

Commissioners of Inland Revenue *v.* Perren

Surtax—Tax advantage—Transaction in securities—Purchase of securities by company from shareholder—Finance Act 1960 (8 & 9 *Eliz.* 2, *c.* 44), *ss.* 28 *and* 43.

C *Each of the Respondents held half of the issued share capital of M Ltd. and half of the issued share capital of G Ltd. At* 31*st December* 1960 *G Ltd. had an accumulation of profits within the charge to income tax of* £180,840. *In July* 1961 *the Respondents each sold* 22,000 £1 *shares in M Ltd. to G Ltd. for* £60,500, *which was their value, in cash. The Commissioners of Inland Revenue gave notice to each Respondent under s.* 28 (3), *Finance Act* 1960, *that the adjustment requisite for counteracting the tax advantage thereby obtained was that in the computation* D *of her liability to surtax for the year* 1961–62 *the payment of* £60,500 *should be taken into account as if it were the net amount of a dividend payable under deduction of tax at the date of receipt.*

On appeal, the Respondents contended (a) *that they did not obtain a tax advantage, as defined in s.* 43(4)(*g*), *Finance Act* 1960, *in consequence of the sale, and* (b) *that the payment was not received in connection with a transfer of assets* E *of G Ltd., or otherwise "in connection with the distribution of profits" of that company within the meaning of s.* 28(2)(*d*). *The Special Commissioners accepted the second contention.*

Held, *that the price of the shares in M Ltd. was received "in connection with the distribution of profits" of G Ltd., and that the Respondents obtained a tax advantage.*

F

CASES

(1) *Commissioners of Inland Revenue* v. *Cleary*

CASE

Stated under the Finance Act 1960, s. 28(8), and the Income Tax Act 1952, ss. 247(3) and 64, by the Commissioners for the Special Purposes of the G 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 12th March 1964 Mrs. K. S. Cleary (hereinafter called

(1) Reported (Ch.D.) [1965] Ch. 1098; [1965] 3 W.L.R. 219; [1965] 2 All E.R. 603; (C.A.) [1966] Ch. 365; [1966] 2 W.L.R. 790; [1966] 2 All E.R. 19; (H.L.) [1968] A.C. 766; [1967] 2 W.L.R. 1271; 111 S.J. 277; [1967] 2 All E.R. 48.

"the Respondent") appealed against a notice dated 13th November 1963 given by the Commissioners of Inland Revenue under s. 28(3) of the Finance Act 1960 in the following terms:

"To: Mrs. K. S. Cleary, The Gables, Nether Padley, Grindleford, Near Sheffield.

Section 28, Finance Act, 1960

Whereas, on 14th February, 1963, the Commissioners of Inland Revenue issued a notification to 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 transaction, that is to say: the sale by you on or about 24th July, 1961, to Gleeson Development Co. Ltd., of 22,000 ordinary shares of £1 each in M. J. Gleeson Ltd.

And whereas, on 30th October, 1963, the Tribunal constituted under the said Section 28, having taken into consideration the statutory declaration made by you under subsection (4) 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 transaction, hereby give notice, in accordance with subsection (3) of that 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 1961–62 on the basis that the consideration of £60,500 which you received from Gleeson Development Co. Ltd. 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 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.

Dated this 13th day of November, 1963.

By Order of the Commissioners of Inland Revenue.
(*Signed*)
Assistant Secretary

Inland Revenue,
Somerset House,
London, W.C.2."

on the grounds that the said s. 28 did not apply to her in respect of the transaction in question and that the adjustments directed to be made were inappropriate.

2. At the hearing of the appeal evidence was given before us by (1) Mr. Richard Byron Caws, F.R.I.C.S., a partner in the firm of Messrs. Nightingale, Page & Bennett, of 18 Eden Street, Kingston-upon-Thames, who acted as consultant surveyor to Gleeson Development Co. Ltd. (hereinafter referred to as "G.D.") and M. J. Gleeson Ltd. (hereinafter referred to as "M. J. G."); (2) Mr. Edward Lawson, F.C.A., principal advisory accountant to the Board of Inland Revenue.

The following documents were admitted or proved:

(1) Notification dated 14th February 1963 and determination dated 30th October 1963 referred to in the recitals to the said notice dated 13th November 1963, together with certain other documents, including the statutory declaration of the Respondent referred to in those recitals and agreed facts from the counter-statement of the Commissioners of Inland Revenue referred to therein;

(2) Notifications (hereinafter referred to as "surtax clearance certificates") issued by the Special Commissioners of Income Tax on 13th February 1964;

(3) Balance sheets of G.D. as at, and accounts of that company for the years ended, 31st December 1960 and 31st December 1961 respectively;

(4) Balance sheets of M.J.G. as at, and accounts of that company for the years ended, 31st December 1960 and 31st December 1961 respectively.

Copies of such of the above mentioned documents as are not attached hereto as exhibits are available for inspection by the Court if required.

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

(1) G.D. and M.J.G. were in pre-war years carrying on property development businesses, but have since the war been holding, and not developing, property. The property which these companies have held in post-war years consists mainly of detached and semi-detached houses built in pre-war years which remained unsold and were let by the companies to tenants.

(2) In 1957 many of these properties ceased to be rent-controlled. Thereupon the Respondent and her sister, Mrs. W. M. Perren (hereinafter referred to as "Mrs. Perren"), who were at that time the sole shareholders of the two companies, wished to adopt different policies of estate management as respects the properties, and with this in mind took steps to have the properties valued with a view to their being divided between them and their families. The sisters wished to arrange, first, for the estates to be split geographically so as to ensure as far as possible that on any subsequent rise in values in any particular locality each family would get an equal share of such potential increase; secondly, that reversionary interests should be divided as fairly as possible; and thirdly, that such of the properties as still remained subject to rent control would be divided as fairly as possible. The difference between the views which the sisters took on policy regarding estate management has persisted.

(3) The rearrangement of interests which the sisters envisaged could not be readily achieved by putting G.D. and M.J.G. into liquidation because G.D. had substantial outstanding liabilities in connection with estate roads and the amount of those liabilities could not be readily determined.

(4) On 13th February 1964 the Special Commissioners issued surtax clearance certificates in respect of the income of G.D. for the year ended 31st December 1962 and in respect of the estate or trading income of M.J.G. for that year.

(5) At 31st December 1960 and at all material times thereafter G.D. had an issued capital of 200,000 1*s.* ordinary shares, of which half were owned by the Respondent and half by Mrs. Perren.

(6) At 31st December 1960 and at all material times thereafter M.J.G. had an issued capital of 50,000 £1 ordinary shares, of which at 31st December 1960 half were owned by the Respondent and half by Mrs. Perren.

(7) On or about 24th July 1961 the Respondent and Mrs. Perren each sold 22,000 shares in M.J.G. to G.D. in consideration for which each of them received from the latter company £60,500 in cash, this being the full value of the shares as ascertained by a valuation thereof. A

(8) The balance sheets of G.D. as at 31st December 1960 and 31st December 1961 (copies of which are attached hereto as exhibit A and form part of this Case[1]) may be summarised shortly as follows: B

Summary of Balance Sheets

At 31st December	1960	1961	
	£	£	
Fixed assets	40,438	40,234	
Investments	869	—	
Debtors	29,995	31,535	C
Shares in subsidiary (M.J.G.)	—	123,420	
Cash at bank	130,653	1,121	
	201,955	196,310	
Less			
Creditors and provisions	10,115	9,239	D
Excess of assets over liabilities	191,840	187,071	
Representing the investment of:			
Issued capital	10,000	10,000	
Capital reserve	1,000	1,000	
Profit and loss account	180,840	176,071	E
	191,840	187,071	

As this summary shows, the amount at which the shares acquired by G.D. from the Respondent and Mrs. Perren was included in the balance sheet of G.D. as at 31st December 1961 was £123,420. The balance of £180,840 standing to the credit of the profit and loss account of G.D. at 31st December 1960 represented an accumulation of profits within the charge to income tax. F

(9) The balance standing to the credit of M.J.G.'s profit and loss account was £82,386 at 31st December 1960 and £82,311 at 31st December 1961.

(10) In accordance with the ordinary principles of commercial accounting, any dividend payable to G.D. and declared by M.J.G. out of its profits arising prior to the acquisition by G.D. of the said shares would be set off against the cost price of these shares in the books of G.D., and not treated as a revenue receipt increasing the profits of G.D. available for distribution by way of dividend to its own shareholders. G

(11) Mrs. Cleary is a married woman separately assessable to surtax for the year 1961–62 in accordance with the provisions of s. 356 of the Income Tax Act 1952. H

4. The following case was referred to: *St. Aubyn* v. *Attorney-General* [1952] A.C. 15.

(1) Not included in present print.

A 5. It was contended on behalf of the Respondent:

(1) that the transaction specified in the notice dated 13th November 1963 was not on the facts hereinbefore set out a transaction in securities in consequence of which she had obtained, or was in a position to obtain, any advantage which was a "tax advantage" as defined for the purposes of Part II of the Finance Act 1960 by s. 43(4)(*g*) thereof;

B (2) that the said transaction did not take place in any such circumstances as are mentioned in s. 28(2) of the Finance Act 1960 because:

(*a*) the £60,500 received by the Respondent as the purchase price of the shares sold to G.D. was not received by her in connection either with a transfer of assets of G.D. or otherwise so as to be received, within the meaning of para. (*d*) of that subsection, "in connection with the distribution of C profits" of that company, on the basis of the words "profits" and "distribution" being construed in accordance with the provisions contained in paras. (i) and (ii) of that subsection;

(*b*) The Respondent was not a person who, within the meaning of para. (*d*) of that subsection, "so receives as is mentioned in para. (*c*) of this subsection such a consideration as is therein mentioned" because:

D (i) the words "so receives as is mentioned in para. (*c*) of this subsection" should be construed as relating to the first part, and not to the words after "the said person" in the latter part, of para. (*c*), and

(ii) on the payment of the £60,500 as the purchase price of the shares that sum thereupon ceased to be, within the meaning of para. (*c*), "a consideration which either is, or represents the value of assets E which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend";

(3) that the appeal should succeed.

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

(1) that the transaction specified in the notice dated 13th November 1963 was on the facts hereinbefore set out a transaction in securities in consequence F of which the Respondent had obtained, or was in a position to obtain, an advantage which was a "tax advantage" as defined for the purposes of Part II of the Finance Act 1960 by s. 43(4)(*g*) thereof;

(2) that the said transaction had not been shown to be a transaction which had been carried out for bona fide commercial reasons and had not had as its main object, or one of its main objects, to enable tax advantages to be obtained;

G (3) that the said transaction had taken place in such circumstances as are mentioned in s. 28(2) of the Finance Act 1960, namely, those mentioned in para. (*d*) of that subsection, because:

(*a*) the £60,500 which the Respondent received for the shares sold to G.D. was received by her in connection with a transfer of assets of G.D. or otherwise so that it was received by her, within the meaning of the said H paragraph, "in connection with the distribution of profits" of that company, on the basis of the words "profits" and "distribution" being construed in accordance with the provisions contained in paras. (i) and (ii) of that subsection;

(*b*) the Respondent was a person who, within the meaning of the said para. (*d*), "so receives as is mentioned in para. (*c*) of this subsection such a consideration as is therein mentioned" because:

(i) the words "so receives as is mentioned in para. (*c*) of this subsection" should on the proper construction thereof be taken to refer to the words after "the said person" in the latter part of para. (*c*), and

(ii) the consideration of £60,500 received by the Respondent for the shares sold to G.D. was on the facts set out herein a consideration received from G.D. which, within the meaning of para. (*c*), "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";

(4) that the appeal should fail.

7. We, the Commissioners who heard the appeal, were of opinion, in the light of the decision in *St. Aubyn* v. *Attorney-General* [1952] A.C. 15, that the sum of £60,500 received by the Respondent from G.D., being the full value of the shares in M.J.G. sold by her to G.D., was not received by her either in connection with a transfer of assets of the latter company or otherwise so as to be received, within the meaning of s. 28(2)(*d*) of the Finance Act 1960, "in connection with the distribution of profits" of that company, on the basis of the words "profits" and "distribution" being construed in accordance with the provisions contained in paras. (i) and (ii) of that subsection.

Having come to this conclusion as respects the receipt of the said sum, we allowed the appeal on that ground, without expressing any opinion on the other matters raised in argument before us, and cancelled the notice dated 13th November 1963 against which the appeal was made.

8. The Commissioners of Inland Revenue immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act 1960, s. 28(8) and the Income Tax Act 1952, ss. 247(3) and 64, which Case we have stated and do sign accordingly.

9. The question of law for the opinion of the Court is whether on the facts found by us as set out in this Case the decision to be found in para. 7 above is correct.

G. R. East
W. E. Bradley
} Commissioners for the Special Purposes of the Income Tax Acts.

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

5th November 1964.

A (2) *Commissioners of Inland Revenue* v. *Perren*

This Case related to the other shareholder in the companies mentioned in the first Case. The facts, the contentions of the parties and the decision of the Commissioners were the same as in that Case.

The cases came before Pennycuick J. in the Chancery Division on 8th B April 1965, when judgment was reserved. On 13th April 1965 judgment was given against the Crown, with costs.

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

Sir John Senter Q.C. and *Neil Elles* for the Respondents.

Pennycuick J.—This is an appeal by the Crown from a decision of the Special C Commissioners whereby they allowed an appeal by Mrs. Cleary against a notice dated 13th November 1963 given to her pursuant to s. 28(3), Finance Act 1960.

The facts may be shortly stated. In July 1961 Mrs. Cleary and her sister Mrs. Perren owned in equal shares the whole of the issued capital—namely, 200,000 shares of 1*s.* each—in Gleeson Development Co. Ltd. (to which I will D refer as "the company"). The company carried on the business of holding property. It had a balance on profit and loss account of £180,000. Its assets included £130,000 cash at bank. The sisters also owned in equal shares the whole of the issued shares—namely, 50,000 shares of £1 each—in another company, M. J. Gleeson Ltd. (to which I will refer as "the M. J. company"). On 24th July 1961 the sisters each sold 22,000 shares in the M. J. company to E the company at a price of £60,500 in cash, this being the full value of the shares ascertained upon a proper valuation. In the result, the sisters had together taken £121,000 in cash out of the company. They continued to own all the issued shares in the company, which now held 44,000 shares in the M. J. company previously held by the sisters.

Section 28 of the Finance Act 1960 is long and complicated. I will read F those provisions which are relevant to the present appeal.

> "(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 unless he shows that the transaction or transactions were carried out either for bona fide G commercial reasons or in the ordinary course of making or managing investments, and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained, this section shall apply to him in respect of that transaction or those transactions". There follows a proviso excluding retrospective operation. "(2) The circumstances mentioned in the foregoing subsection are that . . ." Paragraphs H (*a*) and (*b*) deal with operations not now in point; so does para. (*c*), but I must read that paragraph by reason of the reference back in para. (*d*):

(Pennycuick J.)

"(*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, or is received in respect of future receipts of the company or is, or represents the value of, trading stock of the company, and the said person so receives the consideration that he does not pay or bear tax on it as income". Paragraph (*d*) is the one upon which the Crown's present claim is based: "(*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".

The subsection goes on to specify the companies to which the paragraph applies. Admittedly, the company is such a company. Subsection (3) prescribes the method of counteracting the tax advantage obtained. The rest of the section is not directly relevant to the present appeal.

Section 43 (4)(*g*) contains a definition of "tax advantage" in these terms:

" '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".

The contentions of the parties before the Special Commissioners will be found in paras. 5 and 6 of the Case Stated. I need not read those paragraphs. The Special Commissioners gave their decision as follows:

"We, the Commissioners who heard the appeal, were of opinion, in the light of the decision in *St. Aubyn* v. *Attorney-General* [1952] A.C. 15, that the sum of £60,500 received by the Respondent from G.D."—that is the company—"being the full value of the shares in M.J.G. sold by her to G.D., was not received by her either in connection with a transfer of assets of the latter company or otherwise so as to be received, within the meaning of s. 28(2)(*d*) of the Finance Act 1960, 'in connection with the distribution of profits' of that company, on the basis of the words 'profits' and 'distribution' being construed in accordance with the provisions contained in paras. (i) and (ii) of that subsection. Having come to this conclusion as respects the receipt of the said sum, we allowed the appeal on that ground, without expressing any opinion on the other matters raised in argument before us, and cancelled the notice dated 13th November 1963 against which the appeal was made."

A Unfortunately, although *St. Aubyn* v. *Attorney-General*(1) was cited to the Special Commissioners, the later case of *Thomas* v. *Marshall*(2) 34 T.C. 178, also in the House of Lords, was not so cited.

Mr. Bagnall, for the Crown, formulated the effect of ss. 28 and 43 as applied to the facts of this case in the following terms: Mrs. Cleary obtained a tax advantage, consisting of the avoidance of an assessment or possible assess-
B ment to income tax which would have been made if £60,500 had been distributed to her by way of dividend; in connection with a distribution of profits of the company—i.e., the transfer of assets of the company by payment of £60,500 to Mrs. Cleary—Mrs. Cleary received that consideration, being assets which were, or apart from their payment to Mrs. Cleary by the company would have been, available for distribution by way of dividend; and the receipt of that
C £60,500 by Mrs. Cleary was in such a way that she did not pay or bear tax upon it. It seems to me that this formulation encounters a major difficulty at the first stage—namely, the application of the definition of "tax advantage" in s. 43. I will, however, first refer to the point upon which the Special Commissioners decided the appeal.

In the *St. Aubyn* case the majority in the House of Lords (Lords Simonds,
D Oaksey and Normand; Lords Radcliffe and Tucker dissenting) held that the expression "transfer of property" in the context of an estate duty provision—namely, ss. 43 and 50 of the Finance Act 1940—did not cover cash paid to a company on subscription for shares. But in the *Thomas* case the House of Lords held that the expression "transfer of assets" in the context of a surtax provision—namely, s. 21 of the Finance Act 1936—did cover cash paid by a
E parent to a savings account in the name of his child. Lord Morton of Henryton referred at length to the decision in the *St. Aubyn* case, at pages 203–4, and, on the latter page, after making citation from the speeches of Lord Simonds and Lord Normand in the *St. Aubyn* case, said this:

> "The observations of Lord Simonds were clearly directed only to the section then under consideration and to the meaning of the words 'transfer
F of any property' in the context wherein they then appeared. In my view they do not assist the Appellant in the present case. On the contrary, I think that the transaction in the present case is one which the phase 'transfer of assets' in the Section now under consideration 'fairly and squarely hits'. It is no doubt possible to read Lord Normand's observations as referring generally to the meaning of the phrase 'transfer of property', but I feel
G sure that my noble and learned friend intended to deal only with the meaning and effect of the words 'transfer of property' in Section 46 of the Finance Act, 1940, and to concur with the view of Lord Simonds that Lord St. Levan, in paying cash for preference shares, did not transfer property to the company within the meaning of the Section."

Lord Normand himself, at page 199, said:

H > "I have had the advantage of reading the opinion about to be delivered by my noble and learned friend, Lord Morton of Henryton, and I agree with him that this appeal must be dismissed for the reasons given by him. He has quoted and commented upon certain observations made by me in

(1) [1952] A.C. 15. (2) [1953] A.C. 543.

(Pennycuick J.)

> *St. Aubyn* v. *Attorney-General*(1) . . . I must confess that I there used language of a breadth which lends itself to misunderstanding and that I ought to have expressly qualified my words in the manner which my noble and learned friend indicates."

In the present case, the relevant words are the same as those in the *Thomas* case(2)—namely, "transfer of assets"—and the context appears wholly appropriate for the construction of those words as covering cash paid by the company. I think that I ought so to construe the words.

I should also mention at this point that it is accepted on behalf of Mrs. Cleary that the company is one to which s. 28 applies; and that she has not sought to maintain that the transaction can be brought within the exception, for bona fide commercial reasons, and so forth, introduced by the word "unless" in s. 28(1).

I return now to the definition of "tax advantage" in s. 43(4)(*g*). I will read this definition again, omitting the words not relevant to the present point:

> " 'tax advantage' means . . . the avoidance . . . of an assessment to income tax or the avoidance of a possible assessment thereto [where] the avoidance . . . is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them . . ."

I have substituted "where" for "whether" in order to avoid reading the irrelevant alternative introduced by the word "or" at the end of the definition. Mr. Bagnall contends, and I agree, that the apparent effect of this definition, so far as now in point, is to treat as a tax advantage a receipt upon which, if the taxpayer had taken it in one way, he would have paid or borne tax, but which he takes in some other way without paying or bearing tax upon it. For this purpose it is necessary to compare like with like; that is to say, one must look at the actual transaction which comprises the receipt and see whether, upon another form of transaction producing the same result, the receipt would have been taxable. One cannot for this purpose look at the actual transaction and then compare it with a transaction which, although containing a common element, produces a different result. So, it seems to me, one cannot look at an actual transaction by way of sale, under which a member of a company transfers to the company property equivalent to the amount paid by the company to the member, and compare that transaction with a simple receipt by the member from the company without consideration. That is a transaction not only different in form but producing quite a different result. Other examples spring to mind. So here it seems to me impossible to say that Mrs. Cleary has obtained a tax advantage from the sale by reason that, if one part of that transaction—namely, the payment by the company to herself—were taken in isolation and treated as a complete transaction, she would have taken a receipt upon which, if she had taken it in another way, she would have paid or borne tax.

Mr. Bagnall was fully aware of the difficulty in his way. He sought to surmount it by saying that the result of the actual transaction was in substance the same as a simple payment by the company to Mrs. Cleary because, through her ownership of the shares in the company, she and her sister remained at one remove the beneficial owners of the shares in the M.J. company purchased

(1) [1952] A.C. 15. (2) 34 T.C. 178.

A from them by the company. I do not think it is legitimate thus to disregard the corporate entity of the company. I agree, as was pointed out by Mr. Warner, that the likelihood of the sisters' losing the benefit of the shares in the M. J. company through the insolvency of the company—a property-owning company with large assets and small liabilities—is so remote that it is not a practical risk. The fact remains that the shares in the M.J. company in the ownership of the B company are subject to all the incidents of company law applicable to the company, including the statutory requirements concerning return of capital. I do not think I am entitled to treat this sale as being, in substance, the equivalent of a gratuitous disposition by the company.

I was reminded by Sir John Senter, for Mrs. Cleary, of the well-established rule that one must look at the form of a transaction in order to determine its C taxable quality. Mr. Bagnall, on the other hand, pointed out that s. 28 contains a whole series of highly artificial deeming provisions, and that its entire purpose is to go behind the form of the transaction in question. That is so, but one would still have to find clear words to justify treating a sale of shares for cash by a member to a company as a gratuitous disposition of the cash by the company so as to bring the receipt in the hands of the member within the scope of the D definition in s. 43(4)(*g*); and I can find no such words.

Having reached this conclusion, I do not think I can usefully travel through the various artificialities in s. 28. It will be sufficient to say that, apart from the definition in s. 43(4)(*g*), the one issue upon which Sir John Senter, for Mrs. Cleary, really joined issue with Mr. Bagnall was the closely related question whether payment of a money consideration on sale represented a distribution E of profit by virtue of the terms of s. 28(2).

The only judicial decision upon s. 28 appears to be *Commissioners of Inland Revenue* v. *Parker*(1) [1964] 3 W.L.R. 1121; [1965] 1 All E.R. 796 (C.A.). This case, which I am told is under appeal to the House of Lords, raised quite a different point, and I do not think I can usefully refer to it except, perhaps, to mention that, at page 802(2), in the Court of Appeal, Diplock L.J. points out F that the definition of a tax advantage in s. 43(4)(*g*) gives a restricted meaning to that expression. I propose accordingly to dismiss this appeal.

The case of Mrs. Perren, the other sister, raises an identical point, and I propose to dismiss the appeal in that case for the same reason.

Elles—If your Lordship pleases. Both appeals will be dismissed with costs?

Bagnall Q.C.—That must be so, my Lord.

G **Pennycuick J.**—Very well.

Elles—I am much obliged, my Lord.

The Crown having appealed against the above decision, the cases came before the Court of Appeal (Lord Denning M.R. and Danckwerts and Salmon L.JJ.) on 11th February 1966, when judgment was reserved. On 4th March 1966 H judgment was given unanimously in favour of the Crown, with costs.

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(1) 43 T.C. 396; [1965] Ch. 866 (Ch.D.), 1032 (C.A.). (2) 43 T.C., at p. 419.

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

E. I. Goulding Q.C. and *Neil Elles* for the Respondents.

The cases cited in argument are referred to in the judgments.

Lord Denning M.R. (read by Danckwerts L.J.).—Two sisters, Mrs. Cleary and Mrs. Perren, owned all the shares in two companies. They had half each. B Gleeson Development Ltd. had issued 200,000 shares. Each sister had 100,000. M. J. Gleeson Ltd. had issued 50,000 shares. Each sister had 25,000. At the end of 1960 each company had sold off a good deal of property and had a lot of cash at bank. Gleeson Development Ltd. had £130,653 0*s.* 11*d.* cash at bank. M. J. Gleeson Ltd. had £80,273 19*s.* 7*d.* cash at bank.

On 24th July 1961 Mrs. Cleary and Mrs. Perren each sold 22,000 shares C in M. J. Gleeson Ltd. to Gleeson Development Ltd. for £60,500. Each sister received £60,500 in cash. This was the full value of the shares. The result was that the cash which Gleeson Development Ltd. had at the bank (over £130,000) was reduced by £121,000; and instead of the cash Gleeson Development Ltd. had 44,000 shares in M.J. Gleeson Ltd. So Gleeson Development Ltd. lost nothing. They had shares instead of cash. That is all. M. J. Gleeson Ltd. of course lost D nothing. It still had all its cash and assets. Only the shareholding was changed. Instead of the two sisters holding all the 50,000 shares in M. J. Gleeson Ltd., they only held 6,000; the remaining 44,000 were held by Gleeson Development Ltd. But, as the two sisters held all the shares in Gleeson Development Ltd., they really still owned M. J. Gleeson Ltd. as effectively as they did before. If we were at liberty to lift the curtain which conceals the truth, we should see that the E sisters each withdrew £60,500 in cash from Gleeson Development Ltd. without paying tax on it. It was money which was available for distribution by way of dividend. If it had been so distributed, the grossed-up figure for each sister would be £98,777. The Crown now claim tax on that figure from each sister.

Apart from s. 28 of the Finance Act 1960 the Crown could not have claimed tax on these sums of £60,500. They were sums received as capital as the F purchase price of shares. They were not income at all. The whole question is whether these transactions are caught by s. 28 of the Finance Act 1960. That section, in the words of Lord Wilberforce[1], "mounted a massive attack against tax avoidance in many forms". Bond-washing and dividend-stripping are caught by subs. (2)(*a*), (*b*) and (*c*). Other transactions are caught by subs. (2)(*d*). An instance of a transaction so caught is *Commissioners of Inland* G *Revenue* v. *Parker*[2]. Is the present case another instance?

Section 28(2)(*d*) applies only to companies under the control of five persons or less. It is designed so as to catch devices whereby the persons in control of the company get a tax advantage by manipulating its finances. Previously, when such a company had money available for distribution by way of dividend, there were means whereby the money could be taken out in the form of capital so as H not to attract income tax. Now Parliament strikes at those transactions. It enables the Commissioners of Inland Revenue to counteract the tax advantage by making an assessment as if the money were received as income and not

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(1) 43 T.C. 396, at p. 440. (2) 43 T.C. 396; [1966] A.C. 141.

A capital. We have here a company to which subs. (2)(*d*) applies, namely, Gleeson Development Ltd. We have a "transaction in securities", namely, the sale of shares for cash. We have money received by the sisters which was "available for distribution by way of dividend", namely, £60,500 each. They so received the money that they did not pay tax on it. It is not suggested that the transaction was carried out "for bona fide commercial reasons or in the ordinary course of B making or managing investments". It is therefore caught by subs. (2)(*d*) provided: (i) that the sisters received the moneys "in connection with the distribution of profits" of Gleeson Development Ltd., within subs. (2)(*d*); and (ii) the sisters obtained a "tax advantage", within s. 43(4)(*g*). Those are the only two points in the case.

As the argument proceeded before us, it was agreed that we must not C lift the curtain and look inside the bodies corporate. We must treat them as legal persons separate and distinct from their shareholders.

(1) Did each of the sisters receive her £60,500 "in connection with the distribution of profits"? If it were not for the definition clause, the answer would be No. Gleeson Development Ltd. did not distribute any profits. It only bought shares. But the definition clause says that references to "profits" include D references to "income, reserves or other assets", and that references to "distribution" include references to "transfer or realisation". It seems to me, therefore, that instead of the words "distribution of profits" we can read "transfer of assets". Mr. Goulding submitted that that was too naive an approach. He besought us to expand subs. (2)(*d*) in full, after the manner in which Lord Guest expanded it in *Parker's* case[1], and said that it would then appear that the E receipt of these sums of £60,500 by the sisters was not caught by the subsection. I do not accept Mr. Goulding's argument. My mind is too simple to follow him into these niceties. I think that if these sums were received by the sisters "in connection with the transfer of assets" that is enough. The Commissioners thought there was no transfer of assets here, relying on *St. Aubyn* v. *Attorney-General* [1952] A.C. 15. Pennycuick J. thought there was a transfer of assets, F relying on *Thomas* v. *Marshall*[2] [1953] A.C. 543. I agree with Pennycuick J. on this point. I think the payment of these two sums of £60,500 was a "transfer of assets" by the company. True the transfer was the purchase price of shares: but it was a transfer of assets all the same. The sums were received by the sisters "in connection with the transfer of assets", and therefore "in connection with the distribution of profits" within subs. (2)(*d*).

G (2) Did the sisters obtain a "tax advantage" within s. 43(4)(*g*)? The relevant words are that "tax advantage" means

> "the avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment thereto".

It seems to me that the sisters did obtain a tax advantage. They avoided an assessment to income tax or a possible assessment in this way. If the two sums H of £60,500 had been received by the sisters by way of dividend, they would have been assessed to tax. But as the two sums were received by the sisters as the purchase price for shares, they avoided that assessment. Mr. Goulding says that this view is wrong, because Gleeson Development Ltd. received 44,000

(1) 43 T.C. 396, at p. 438. (2) 34 T.C. 178.

(Lord Denning M.R.)

shares in exchange for £121,000. The company could have distributed those shares *in specie* by way of dividend, or it could have sold the shares and distributed the proceeds by way of dividend. On any such distribution, the sisters would be liable to be assessed to tax. So they did not avoid an assessment or possible assessment to tax. This is an attractive argument but I do not think it should prevail. The suggestion is utterly unreal. Gleeson Development Ltd. would never have dreamt of distributing the shares by way of dividend or of realising them and distributing the proceeds. As there was no possibility of such a distribution, there was no possible assessment and therefore no avoidance of a possible assessment. Mr. Goulding said that, however improbable, it was possible: and it would be most unfair that the sisters should now be caught under subs. (2)(*d*) and afterwards caught on a distribution of dividend. I am sure that the Courts are well able to take care of that contingency. They would not allow the sisters to be taxed twice over in that way. In my opinion, therefore, the sisters did obtain a "tax advantage" within s. 43(4)(*g*).

This means that the Crown succeed. Their massive attack on tax avoidance seems to have reached its objective. I would allow the appeal accordingly.

Danckwerts L.J.—Section 28 of the Finance Act 1960 is a highly artificial section and not at all easy to follow in its complicated language. Its objects are clear: to enable the Commissioners of Inland Revenue to outmanoeuvre the ingenuity of wealthy taxpayers in arranging their business affairs so as to avoid or minimise tax. How delightful it must be to a taxing officer to have the power to counteract "a tax advantage" which a person is in a position to obtain or has obtained, by assessments or other adjustments! The section is indeed a tax collector's dream. Gone is the old principle that a citizen was entitled to arrange his affairs so as to minimise his liability to tax.

The Master of the Rolls has set out fully the facts and the arguments, and I agree with his conclusion that the transaction in this case is within the words of the section. There is no dispute that the operations carried out involved a transaction in securities. The money which the sisters received in exchange for the shares which they sold was undoubtedly money in the possession of Gleeson Development Ltd. which was available to that company for distribution by way of dividend. If it could be transferred to the sisters in the form of capital in such a way that it would avoid payment of income tax, then "a tax advantage" would have been obtained by them. It was not a transaction carried out "for bona fide commercial reasons or in the ordinary course of making or managing investments". Indeed, it is plain that the transaction was carried out for the very natural purpose of avoiding the heavy taxation which would be incurred if the money was distributed as dividends. This brings the transaction at once within the definition of "tax advantage" in s. 43(4)(*g*) of the Act:

> " '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".

That is what the subsection says. The result is that the "tax advantage" can be "counteracted" by the means mentioned in s. 28(3).

A It also seems to me that it is impossible to say that the transfer of the shares as a result of the sales was not a "transfer of assets" within the wide definitions introduced into s. 28 by the provisions of subs. (2)(*d*). Mr. Goulding advanced an ingenious argument, but I did not find it convincing. I sympathise with the two sisters who will suffer such heavy demands for tax. All taxation is confiscation, and this is a very severe case.

B I agree that the appeal must be allowed.

Salmon L.J.—I agree, and but for the fact that we are differing from the learned Judge, I should have been content to add nothing to what has fallen from my Lords. The Respondents would not be caught by s. 28 of the Finance Act 1960 if they could bring themselves within the exception in subs. (1) by showing that the transactions in question were carried out

C "either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of them had as . . . one of their main objects, to enable tax advantages to be obtained".

This they did not attempt to do, and the natural inference is that they were unable to do so. If the Respondents did not carry out the transactions in the ordinary course of business or in making or managing investments, a strong D inference, on the facts of this case, is that they carried out the transactions with the object of gaining a tax advantage. The appeal really depends upon whether or not they succeeded in attaining this object.

The accounts of Gleeson Development Ltd. show that immediately prior to the transactions in question there was upwards of a £180,000 favourable balance in the company's profit and loss account and £130,000 in cash at the E bank. Clearly, on a most conservative basis, £121,000 could easily have been distributed to the shareholders by way of dividend, but it would have been liable to surtax in the hands of the Respondents, who were the only shareholders. They held in equal shares all the issued share capital in Gleeson Development Ltd. and M. J. Gleeson Ltd. Thus they controlled both companies. Each sold 22,000 of her shares in M.J. Gleeson Ltd. to Gleeson Development Ltd. for F £60,500. As a result of the transactions £121,000 in cash was paid to the Respondents out of the coffers of Gleeson Development Ltd., and that company, which was wholly owned by the Respondents, became the registered holder of 44,000 shares in M. J. Gleeson Ltd. If tax could thus be successfully avoided, the door would be wide open. Imagine two other companies, A and B, whose shares were wholly owned by the same persons. Each company has a flourishing business and G large accumulations of undistributed profits represented by cash at the bank, and also fixed assets worth even more than the cash balances. The profits had been left undistributed because the shareholders were large surtax payers. This is not uncommon. The shares in each company were properly valued at more than the amount of the fixed assets. If the construction of s. 28 adopted by the learned Judge is correct, the shareholders could draw out the whole amount of undistri- H buted profits in each company without incurring any surtax liability by the simple expedient of selling a block of their shares in company A to company B and *vice versa*. At the end of the day all the undistributed profits in both companies would have found their way out of the coffers of the companies into the pockets of the shareholders, and the shareholders would for all practical purposes

(Salmon L.J.)

enjoy the same control over the shares as they had enjoyed formerly. It seems to me that in such circumstances it would be an affront to common sense to say that no tax advantage had been obtained.

I of course appreciate that a limited company is an entirely separate entity from its corporators, and that even if there be only one corporator he has no legal or equitable property in the assets of the corporation. This doctrine is as well established as it is rigidly applied; indeed, it has been pushed to the length of holding that such a corporator has no insurable interest in the assets of the corporation—even though their destruction spells his ruin: *Macaura* v. *Northern Assurance Co. Ltd.* [1925] A.C. 619. This seems to me to be a strange result, especially as the rule that an insurance policy cannot be enforced by the assured unless he has an insurable interest in the thing insured was evolved only to prevent gambling and wagering transactions from being enforced in our Courts. It is perhaps time that the application of the doctrine stated in *Macaura's* case should be reconsidered. That authority is, however, binding on this Court. It compels me to recognise that the Respondents have no legal or equitable property in the 44,000 shares in M. J. Gleeson Ltd. which they sold to Gleeson Development Ltd. But it does not, in my view, inhibit me from regarding the realities of the situation when I consider what was the Respondents' object in entering into these transactions. Their object was clearly to obtain £121,000 in cash, free from surtax, out of the assets of Gleeson Development Ltd. which were available for distribution as dividends, and to retain control of the 44,000 shares in M. J. Gleeson Ltd. which were transferred to Gleeson Development Ltd. I have no doubt that the Respondents have attained all those objects and would be able to retain the tax advantage but for s. 28. They have received £121,000 which "represents the value of assets" which were "available for distribution by way of dividend". And they have paid no surtax on this sum.

It seems to me quite unrealistic for the Respondents to say that this is not a tax advantage because, if in the future Gleeson Development Ltd. were to sell the M. J. Gleeson shares and distribute the proceeds by way of dividend or distribute those shares *in specie*, the Respondents might be called upon to pay the tax again. It is highly unlikely that Gleeson Development Ltd. will distribute the 44,000 M. J. Gleeson shares or their proceeds by way of a dividend. In the meantime they have saved the surtax on the grossed-up sum of about £196,000. The amount of interest on this sum, whilst it remained in their hands, would be considerable. It seems to me, therefore, obvious that in any event the Respondents would in fact obtain a very real tax advantage within the meaning of those words as defined in s. 43(4)(*g*), and that they cannot lose it except by reason of the present proceedings.

The learned Judge bases his decision on this proposition[1]:

> ". . . . it is necessary to compare like with like . . . . . one cannot look at an actual transaction by way of sale, under which a member of a company transfers to the company property equivalent to the amount paid by the company to the member, and compare that transaction with a simple receipt by the member from the company without consideration. That is a transaction not only different in form but producing quite a different result."

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[1] *See* page 408 *ante*.

A The learned Judge went on to say that Mr. Bagnall sought to overcome the difficulty by contending that the result of the transaction was in substance the same as a simple payment by the company to the Respondents because they remained at one remove the beneficial owners of the shares in M. J. Gleeson Ltd. The learned Judge observed(1):

> "I do not think it is legitimate thus to disregard the corporate entity
> B of the company ..... I do not think I am entitled to treat this sale as being, in substance, the equivalent of a gratuitous disposition by the company."

No doubt the corporate entity of the company must be acknowledged and it is impossible to treat this sale as a gratuitous distribution by the company, but in my view this begs the question. As Lord Wilberforce pointed out in
C *Commissioners of Inland Revenue* v. *Parker*(2), s. 28 mounts a massive attack upon tax avoidance in many forms. I can see no good reason for concluding that the attack turns aside from all transactions in which the taxpayer is or appears to be giving some consideration for what he receives. In the present case it seems plain that the Respondents obtained a tax advantage, that the transactions in question (1) were transactions in securities, (2) were not carried
D out for bona fide commercial reasons or in the ordinary course of making or managing investments, and (3) had as their main object the obtaining of a tax advantage. Moreover, it is equally plain that the Respondents received a consideration, namely, £121,000, which was or which represented the value of assets available for distribution by way of dividend. The transactions were transactions in connection with the transfer of assets, and for the purpose of
E the section the transfer of assets is deemed to be equivalent to the distribution of profits. The company was under the control of not more than five people. Thus all the relevant requirements of s. 28(1)(*a*) and (*b*) and (2)(*c*) and (*d*) are met. Accordingly, the transactions are caught by the section.

I too have considerable sympathy for the Respondents, since after the amounts they have been paid are grossed up for surtax purposes there will
F be very little left for them. It may be that there are other ways in which they could have obtained much of the money locked up in these companies without incurring any surtax liability. Quite apart from a winding-up, they might have interposed a buyer between themselves and Gleeson Development Ltd., in which case the consideration which they received might not have been or represented the value of assets available for distribution by way of dividend;
G they might have taken a simple loan from the company. There are many things which they might have done. I have no doubt, however, that, unfortunately for them, what they did obtained a tax advantage which s. 28 takes away.

I would accordingly allow the appeal.

Bagnall Q.C.—There are two appeals before the Court. Will your Lordships allow the appeal in each case?

H **Danckwerts L.J.**—That seems right.

Bagnall Q.C.—The proper Order, I think, would be to restore the notice dated 13th November 1963 which was served under the section. The Special Commissioners cancelled the notice.

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(1) *See* page 409 *ante*. (2) 43 T.C. 396, at p. 440.

Danckwerts L.J.—You want it restored? A

Bagnall Q.C.—Yes. I ask for costs here and below.

Danckwerts L.J.—I think that must follow.

Goulding Q.C.—I cannot resist costs. I am instructed to ask your Lordships for leave to appeal in this case. The section is an entirely novel one.

Danckwerts L.J.—It is a difficult section and it is a large sum of money.

Goulding Q.C.—Yes, my Lord. B

Danckwerts L.J.—You can have leave.

Goulding Q.C.—I am obliged to your Lordship. There is one point of technicality on the record. I do not think either the notice of appeal or the Respondent's notice in each appeal was mentioned or read to the Court: it was not necessary, but in fact I believe both Respondents' notices were served out of time. So that the record is in order, will your Lordships give C leave to serve them out of time?

Danckwerts L.J.—I take it there is no objection to that?

Bagnall Q.C.—No, my Lord.

Danckwerts L.J.—Very well.

Appeals having been entered against the above decision, Mrs. Cleary's D case came before the House of Lords (Viscount Dilhorne and Lords Morris of Borth-y-Gest, Guest, Devlin and Upjohn) on 24th and 25th January 1967, when judgment was reserved. On 5th March 1967, judgment was given unanimously in favour of the Crown, with costs.

(1) *E. I. Goulding Q.C.* and *Neil Elles* for the Appellant. This appeal involves the interpretation of s. 28 of the Finance Act 1960 in relation to a certain set E of facts.

There are three vital points of distinction between *Commissioners of Inland Revenue* v. *Parker*(2) and the present case. (i) In *Parker* the transaction diminished the total assets of the company and correspondingly increased the assets of the individual taxpayers. Here, the transactions relied on made no difference whatever to the volume of the aggregate assets of the company or any individual. F (ii) In *Parker* the transactions diminished the company's fund of undistributed profits, whereas here the transactions made no difference to the company's fund of undistributed profits. (iii) In *Parker* the individuals concerned received the money paid out by the company by reference to their interests at an earlier date in the profits of the company. Here what determined the receipts of the individuals was the value of the investments sold to the company. G

There are three alternative submissions on the language of the relevant provisions of the Finance Act 1960, any one of which if accepted would entitle the Appellant to succeed. (1) No "tax advantage" was obtained within the meaning of the statutory definition in s. 43 of the Act. (2) The purchase money received by the Appellant was not, within the meaning of s. 28(2)(*d*), received "in connection with the distribution of profits of a company". Whether a payment is one H

(1) Argument reported by J. A. Griffiths, Esq., Barrister-at-law.
(2) 43 T.C. 396; [1966] A.C. 141.

A of dividend or not, for it to come within s. 28(2)(*d*) there must be at some point a diminution of the company's profits. Further, whether "distribution of profits" be read as such or as "transfer of assets", for this provision to apply there must be some element in the transaction different from or more than the mere receipt of consideration. In other words, the £60,500 in question here was not received in connection with its own transfer. (3) The purchase money received by the B Appellant was not, and did not represent, assets which were, or apart from anything done by the company would have been, available for distribution by way of dividend.

As to (1), if a shareholder in a company sells securities to the company at their true value there is no avoidance of an assessment or possible assessment to income tax. Before the sale took place the ordinary relevant assessment was C liable to be made if and when the company should pay a dividend, and after the sale it is still the case that an assessment is liable to be made on payment of a dividend.

As to the observation of Lord Denning M.R.[1] that there was no possibility of the company distributing the shares by way of dividend or of realising them and distributing the proceeds, possibilities were not the subject of any finding D by the Special Commissioners. Further, when Salmon L.J. states[2] that he was free to consider what was the Appellant's object in entering into these transactions, it is pertinent to observe that that object of the taxpayer is irrelevant under s. 28(2).

The words after "thereto" in s. 43(4)(*g*) do not enlarge the meaning of the words "the avoidance of a possible assessment thereto . . ."

E Lord Wilberforce said in *Commissioners of Inland Revenue* v. *Parker*[3] that s. 43(4)(*g*)

> "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 Revenue F is in a position to reply that if he had received what it is sought to tax *in another way* he would have had to bear tax."

Lord Wilberforce's observations on the facts of that case[4] must be considered and contrasted with those here. In applying the above principle to the present case can it be said that here there was the making of a profit or anything passing out of the company's coffers? The answer is in the negative. It is true that G cash left the company, but the Appellant gave shares in exchange. There was no alteration in the profit and loss account of the company.

The Crown are not entitled to succeed on the ground that the Appellant and her sister are the beneficial owners of the company. A company is a separate legal entity from its members: *Macaura* v. *Northern Assurance Co. Ltd.*[5].

Where there is the possibility of unjust double taxation that is a very H cogent reason for construing the Statute if possible in such a way as to avoid such a result: see *F. S. Securities Ltd.* v. *Commissioners of Inland Revenue*[6].

If the definition of "tax advantage" in s. 43(4)(*g*) covers this case then there is a real possibility of double taxation when a member of a company consisting

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(1) *See* page 412 *ante*. (2) *See* page 414 *ante*. (3) 43 T.C. 396, 441. (4) *Ibid.*, 441–2.
(5) [1925] A.C. 619. (6) 41 T.C. 666, 697, 699; [1965] A.C. 63.

of less than five persons sells shares to the company and receives cash and the company subsequently pays a dividend. This creates the strongest doubts whether the interpretation given to the section by the Court of Appeal is correct. A

(2) Here there has been no distribution of profits in any known legal or commercial sense; the profits still remain in the company.

When the type of transaction to which s. 28(2)(*a*) and (*b*) refer, and to which para. (*c*) is related, is seen, the conclusion is inevitable that the whole object of this subsection is to catch transactions which liberate profits in some way. If it had been the intention that this subsection should cover every kind of company transfer whatever the consideration one would have expected the Legislature to have used wide language. B

The application of the definitions in paras. (i) and (ii) to the phrase "distribution of profits" does not bring within the ambit of subs. (2)(*d*) a transfer of assets which results in no diminution of a company's fund of profits. C

The canon of construction applicable here is that to which Devlin L.J. referred in *Cherry* v. *International Alloys Ltd.*(1), namely, that all words that are general and not express and precise should be given the meaning which best suits the scope and object of the Statute without extending them to ground foreign to the intention: see also *Perry* v. *Astor*(2) *per* Lord Macmillan. Applying that principle to s. 28(2)(*d*), there is no liability under the subsection unless there was an antecedent agreement to sell. Alternatively, in interpreting the phrase "discharge of liabilities" there is the overriding requirement that it shall be a process or part of a process which is diminishing the company's fund of profits. D

The most striking of the anomalies which follow if the phrase "distribution of profits" in s. 28(2) is replaced by the expression "transfer of assets" throughout the subsection relates to the possibility of double taxation: for suppose that the Crown is right, then the effect of the statutory notice is to levy surtax in respect of the sum paid to the Appellant as though it formed part of the company's profits. Suppose the company then wished to sell shares in the M. J. company to a third party and to use the cash received for them in the purchase of other shares, there would on the Crown's argument be a second statutory notice leviable although the company's assets had not been diminished. Whatever "distribution of profits" may mean in the present context, it must connote more than the receipt of consideration. E F

The opening words of s. 28(2)(*d*), "in connection with the distribution of profits of a company . . . ", refer to something more than the payment under which the "person in question so receives", for if it were not so on the language of the subsection these words would be otiose; nor would there be any need, if the Crown is right, to separate paras. (*c*) and (*d*). G

It is to be observed that para. (*a*) is limited to cases where a person receives an abnormal amount by way of dividend, but it is not every case of that character which is caught by para. (*a*). If the receipt of a dividend was itself enough to signify a distribution of the profits of a company then the dichotomy envisaged by the opening words of that paragraph would be unnecessary. H

It is significant that s. 39(3) of the Finance Act 1966 adds a para. (*e*) to s. 28(2) of the Finance Act 1960, and that, unlike paras. (*a*), (*b*) and (*d*), it does not

(1) [1961] 1 Q.B. 136, 148. (2) 19 T.C. 255, 288; [1935] A.C. 398.

A begin with the words "in connection with the distribution of profits of a company" but with "in connection with the transfer . . . of assets of a company . . . " This shows that the Legislature did not consider that a transfer of assets came within the ambit of "distribution of profits" in s. 28(2)(*d*) of the Act of 1960.

(3) In a company's possession at a given time there are assets of varied character which are classified on the right-hand side of the company's balance B sheet and which include profits that have not been subsequently lost in trading or in distribution to members or capitalised. The value of these assets, therefore, includes the value of a dividend that could be made. But there is no classification of assets into assets available for dividend and assets not so available as assets for paying creditors or assets forming part of the capital. What is available for dividend is a certain value. The correct approach to this question is that adopted C by Viscount Dilhorne in *Commissioners of Inland Revenue* v. *Parker*[1]. An asset is not available for dividend until there has been an appropriation for that purpose. To hold otherwise would be a misuse of language for it would mean that any asset would be deemed available for distribution as dividend.

Neil Elles following. As to the Appellant's third contention, the relevant point of time is the moment of receipt. At this crucial point of time this sum did D not represent assets available by way of dividend, for the assets were fully represented by shares of the M.J. company. At the crucial point of time the £60,500 was not available for distribution by way of dividends, since this sum was outside the company's control. The intendment of this section was to mount a massive attack on tax avoidance schemes. There must be an element of transmogrification to bring the section into operation and it is inapplicable where the full E potential of tax liability still remains.

[VISCOUNT DILHORNE intimated that their Lordships desired to hear argument from the Crown only on the questions (i) the meaning of "in connection with the distribution of profits of a company", and (ii) the possibility of double taxation.]

J. A. Brightman Q.C., *J. Raymond Phillips* and *J. P. Warner* for the Crown. F As to the Appellant's submissions on the meaning of the words in s. 28(2)(*d*) "in connection with the distribution of profits of a company", these words were inserted so as to prevent a charge to tax arising if the consideration received by the person in question is not connected in some way with the transfer of a company's assets. Paragraph (*d*) operates partly by incorporating part of para. (*c*) and partly by reference to a definition clause. If the opening words of para. G (*d*) down to "applies" were omitted, and the paragraph ended at the words "money's worth" in sub-para. (iii), the paragraph would have a different ambit. Suppose a person received money representing the trading stock of a company but the sum was paid by a third party and not by the company, this transaction would fall within para. (*d*) of s. 28(2) but for the opening words. If by the transaction the person in question does not receive anything whatsoever from the H company, that is not a case to which para. (*d*) applies. This construction gives a perfectly intelligible meaning to the opening words of the paragraph.

The opening words are wide because the object of s. 28 is tax avoidance. The taxpayer has three safeguards: (i) he can show that the transaction was carried out for bona fide commercial reasons or in the ordinary course of making or

(1) 43 T.C. 396, 433.

managing investments and that the transactions had not as a main object the obtaining of a tax advantage: s. 28(1)(*b*); (ii) the right to obtain a clearance certificate: s. 28(10); (iii) the right to be heard on the appropriate adjudication: s. 28(6). In light of these safeguards there is no reason to limit the ambit of the plain words of s. 28(2) (*d*). A

It was contended that s. 28(2)(*d*) is not intended to apply where there is no diminution of the company's fund of assets, but no such limitation is to be found on the language of the paragraph. The expression in s. 28(2)(*d*)(ii) "references to distribution include references to transfer or realisation (including application in discharge of liabilities)" militates against such limitation, for a "discharge" of such "liabilities" would leave the net assets of the company unaffected. The object of s. 28 is to nullify a tax advantage. Further, there is no reason to suppose that the Legislature intended to exempt from the purview of s. 28 a transaction merely because it could be said that as a matter of law there was no consideration. B C

As to *Perry* v. *Astor*[1], it depends on the context of the enactment whether a gloss is to be put on the words of the section. It is emphasised that s. 28 is intended to prevent tax avoidance.

As to the possibility of double taxation, it may not be correct to use the term double taxation unless the same income is taxed twice in the same year, but even giving a broad meaning to the term there cannot be double taxation in the present case or in any comparable case under para. (*d*) unless those who control the company deliberately invite it. There can be no double taxation element here unless in some future year those who control the company decide to declare a dividend out of the accumulated profits. But that is not the guise in which the term double taxation is normally used. D E

J. Raymond Phillips following. The construction of the words "in connection with the distribution of profits" in s. 28(2) (*d*) contended for by the Appellant has been supported by reference to those words in s. 28(2)(*a*). But that paragraph is of no assistance, for para. (*a*) is dealing with two different situations: (i) where the cash has come from the company itself: that would arise in the ordinary case of dividend-stripping; (ii) where the cash does not come from the company as the essential part of the scheme but from the sale of securities: this is the kind of transaction known as bond-washing. F

Goulding Q.C. replied.

Viscount Dilhorne—My Lords, on 14th February 1963 the Commissioners of Inland Revenue gave the Appellant notice, in accordance with s. 28(4) of the Finance Act 1960, that they had reason to believe that s. 28 of that Act might apply to her in relation to the sale by her, on or about 24th July 1961, to Gleeson Development Co. Ltd. (hereafter called "the G.D. Co.") of 22,000 ordinary shares of £1 each in M. J. Gleeson Ltd. (hereafter called "the M.J.G. Co."). The Appellant then sent to the Commissioners of Inland Revenue a statutory declaration stating that, in her opinion, the section did not apply to her and giving the grounds for her opinion. The matter then came before the Tribunal appointed for the purpose, who held that there was a *prima facie* case for the Inland Revenue proceeding. The Commissioners of Inland Revenue then served G H

(1) 19 T.C. 255, 288.

A a notice under s. 28(3) of the Act, the effect of which was to claim that the Appellant was liable to surtax for the year 1961–62 on the basis that the amount of £60,500 which she received from the G.D. Co. on the sale to it of the shares in the M.J.G. Co. 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 tax had been deducted. The Appellant appealed against this notice to the Special B Commissioners, who allowed her appeal. The Crown then appealed to the High Court. Pennycuick J. dismissed their appeal. The Crown then appealed to the Court of Appeal, who allowed their appeal. The Appellant now appeals to this House.

At all material times the Appellant owned half the shares in the G.D. Co. and her sister owned the other half. The issued capital of that company con- C sisted of 200,000 1*s.* ordinary shares. The Appellant and her sister also owned on 31st December 1960 all the shares in the M.J.G. Co., which had an issued capital of 50,000 £1 shares. The balance sheet of the G.D. Co. shows that at 31st December 1960 there was a balance of £180,840 standing to the credit of its profit and loss account. This sum represented an accumulation of profits within the charge to income tax.

D On or about 24th July 1961 the Appellant and her sister each sold to the G.D. Co. 22,000 shares in the M.J.G. Co. for £60,500 cash. This was the full value of the shares sold. Before effecting this sale the Appellant did not, as she was entitled to do by virtue of s. 28(10) of the Act, inform the Inland Revenue of what she proposed to do and seek their determination that this section did not apply. The result of this transaction was, as Pennycuick J. E said(1), that

> "the sisters had together taken £121,000 in cash out of the company" —the G.D. Co. "They continued to own all the issued shares in the company, which now held 44,000 shares in the M.J. company previously held by the sisters."

If the amount of £121,000 has been distributed by way of dividend, as F it could have been, each sister would have been liable to surtax in respect of the £60,500 each received. The question that has to be decided is whether by virtue of s. 28 they are liable to pay surtax in respect of the receipt of that amount notwithstanding that it was received in payment for and was the full value of the shares they sold.

Section 28(1), so far as material, reads as follows:

G "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 unless he shows that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing H investments, and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained, this section shall apply to him in respect of that transaction or those transactions . . . "

(1) *See* page 405 *ante.*

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In this case the Appellant at no time sought to contend that the sale of the shares was carried out for *bona fide* commercial reasons or in the ordinary course of making or managing investments; nor did she contend that the sale had not as one of its main objects the obtaining of tax advantages. Consequently the section applies if the circumstances mentioned in any of the paragraphs of subs. (2) existed and if in consequence of a transaction in securities the Appellant obtained or was in a position to obtain a tax advantage.

A transaction in securities is defined in s. 43(4) of the Act as including

> "transactions, of whatever description, relating to securities, and in particular—(i) the purchase, sale or exchange of securities".

The word "securities" is also defined in s. 43(4) as including shares. In the light of these definitions it is clear beyond all doubt that the sale of the shares in the M.F.G. Co. constituted a transaction in securities within the meaning of this section.

A tax advantage is also defined in s. 43(4) as follows:

> " '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".

The Appellant has throughout contended that she did not obtain a tax advantage as defined. This contention succeeded before Pennycuick J. He said that(1):

> " . . . the apparent effect of the definition, so far as now in point, is to treat as a tax advantage a receipt upon which, if the taxpayer had taken it in one way, he would have paid or borne tax, but which he takes in some other way without paying or bearing tax upon it. For this purpose it is necessary to compare like with like; that is to say, one must look at the actual transaction which comprises the receipt and see whether, upon another form of transaction producing the same result, the receipt would have been taxable. One cannot for this purpose look at the actual transaction and then compare it with a transaction which, although containing a common element, produces a different result. So, it seems to me, one cannot look at an actual transaction by way of sale, under which a member of a company transfers to the company property equivalent to the amount paid by the company to the member, and compare that transaction with a simple receipt by the member from the company without consideration."

Pennycuick J. delivered his judgment before the case of *Commissioners of Inland Revenue* v. *Parker*(2) [1966] A.C. 141 was heard in this House. In that case Lord Wilberforce, referring to the definition of tax advantage, said, at page 178(3):

> "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

(1) *See* page 408 *ante*. (2) 43 T.C. 396. (3) *Ibid.*, at p. 441.

A that *the way in which he received what it is sought to tax* prevents him from being taxed on it; and that the Revenue is in a position to reply that if he had received what it is sought 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 B existence of the advantage is not established."

The definition does not require the contrast of like with like, as Pennycuick J. held, and to give it such an interpretation would narrow the scope of the section considerably. It is, I think, clear from what Lord Wilberforce said that Pennycuick J.'s view on this was not correct.

That the Appellant received £60,500 in such a way that she did not pay C or bear tax on it is not disputed. It could have been distributed to her by way of dividend, and if it had been she would have been liable to tax. There is thus in this case the contrast to which Lord Wilberforce referred. It is clear that in consequence of a transaction in securities she avoided a possible assessment to income tax, the possible assessment being that which would have been made if she had received the sum by way of dividend. She therefore obtained a tax D advantage within the meaning of the section.

It follows that if the circumstances mentioned in any of the paragraphs in subs. (2) were present, the section applies and the Crown are entitled to succeed. They contended that those stated in para. (*d*) of that subsection were present. That paragraph reads as follows:

> "in connection with the distribution of profits of a company to which E 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 material parts of para. (*c*) are as follows:

> "the person in question receives . . . a consideration which either is, or represents the value of, assets which are (or apart from anything done F 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".

Subsection (2) also states:

> "In this subsection—(i) references to profits include references to income, reserves or other assets, (ii) references to distribution include G 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".

It was not disputed that the G.D. Co. was a company to which para. (*d*) applied. The consideration for the sale of the shares received by the Appellant was money, and money which, apart from its payment by the company H for the shares, would have been available for distribution by way of dividend; and the Appellant received it in such a way that she did not pay tax upon it. Thus the circumstances mentioned in para. (*d*) were present if, but only if, the Appellant so received the consideration "in connection with the distribution

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of profits" of the company. It was strenuously argued that she had not done so. It was pointed out that in exchange for the money the company had obtained assets of equal value and that the amount available for distribution by the company had not been reduced. It was argued that there could be no distribution of the profits of a company without there being a diminution of the amount available for distribution. Further it was submitted that, if the Crown were right, there was a possibility of double taxation should the company distribute by way of dividend the value of the shares it had bought.

If one interpolates the definitions of the words "distribution" and "profits" contained in subs. (2), the words "in connection with the distribution of profits" become "in connection with the distribution, transfer or realisation (including application in discharge of liabilities) of profits, income, reserves or other assets" of the company. There was a transfer by the company of profits and of assets of the company. If the company entered into a contract to purchase the shares for £60,500, there was also an application of profits and assets of the company in discharge of a liability. Acceptance of the Appellant's contention that there cannot be a distribution of profits without a diminution of the amount available for distribution involves ignoring the definition of the words "distribution" and "profits" and reading into the section a qualification which is not there. Nor, if it be right that there is a possibility of double taxation, is there anything in the section to exclude its application in that event. The effect of the company's action, which was of course controlled by the two sisters who owned all the shares, was to reduce its cash by £121,000, and, unless s. 28 applies, to transfer it to them without their incurring any liability to tax. In the light of the definition of "distribution" and "profits" it is clear that the Appellant so received the £60,500 in connection with the distribution of the profits of the company.

In my view, for the reasons I have stated, the section does apply, and the Court of Appeal were right to allow the Crown's appeal.

In my opinion, this appeal should be dismissed.

Lord Morris of Borth-y-Gest—My Lords, the question in this case is whether the provisions of s. 28 of the Finance Act 1960 apply to the Appellant in respect of the transaction which was effected when she sold her shares for the sum of £60,500. It becomes necessary to extract from this somewhat sprawling section (with its buttressing extension clauses and with the interpretations denoted by s. 43 of the Act) the provisions that apply in such a case as the present. As a result of following that process it seems to me that, subject to certain exceptions, s. 28 applies to a person where, in connection with the distribution or transfer or realisation (including application in discharge of liabilities) of profits or income or reserves or other assets of a company under the control of not more than five persons, and in consequence of a transaction in securities, he receives (so that he does not pay or bear tax on it as income) a consideration (which may include money or money's worth) 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 if he is in a position to obtain or has obtained a tax advantage. Included in the meanings of a tax advantage is the meaning of a relief from income tax or the avoidance or reduction of an assessment to income tax or the avoidance of a

possible assessment to income tax, 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.

Amongst the exceptions is one which provides that the section shall not apply to a person if the transaction in securities was carried out, and any change in the nature of any activities carried on by a person (being a change necessary in order that the tax advantage should be obtainable) was effected, before 5th April 1960. Another exception, and one of manifest importance, is that the section will not apply to a person if he shows that the transaction or transactions in securities were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained.

The Appellant did not seek to bring herself within the last-mentioned exception. Her transaction was after 5th April 1960. The company (Gleeson Development Co. Ltd.) was under the control of the Appellant and her sister. The £60,500 was transferred to the Appellant. It was transferred at the agreed price on the sale of the shares.

It was submitted that, as upon a payment of £60,500 the company received shares which were worth that sum, there was no diminution of the value of the company's aggregate assets or of its fund of undistributed profits. There was, however, within the wide and comprehensive words of the section a transfer (or an application in discharge of liabilities) of money which formed a part of the assets of the company and which was available for distribution by way of dividend. It was submitted that, even after applying the meanings denoted in the section and in s. 43, it should not be held that there was a transfer of assets in a case where no diminution of the company's fund of profits resulted from what the company did. That, however, involves reading into the section words of qualification which are not contained in it.

The company could have distributed the £60,500 by way of dividend. Though there was no declaration of a dividend or appropriation for the payment of a dividend, the money was available for distribution by way of dividend. The £60,500 was a receipt accruing to the Appellant in such a way that she did not pay or bear surtax in respect of it. Because the money was received in that way rather than as a distribution by way of dividend there was the avoidance or reduction of an assessment to, or the avoidance of a possible assessment to, surtax.

The very wide words of the section seem to me to embrace the Appellant's transaction in securities, and, as there was no endeavour to seek exclusion within the words of subs. (1), the result follows that the section applied to the Appellant in respect of that transaction.

I would dismiss the appeal.

Lord Guest—My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend on the Woolsack. I have nothing to add.

I agree that the appeal should be dismissed.

Lord Devlin—My Lords, I concur.

Lord Upjohn—My Lords, this appeal depends upon the true construction of that complex section, s. 28 of the Finance Act 1960, interpreted, as it must be, in the light of s. 43 of that Act.

The relevant facts are of the shortest. At all material times the Appellant, Mrs. Cleary, and her sister, Mrs. Perren, were sole and equal shareholders in two property-owning and developing companies called Gleeson Development Co. Ltd ("G.D.") and M. J. Gleeson Ltd. ("M.J.G."), which had been founded by their father, Mr. Gleeson.

At 31st December 1960 the balance sheet of G.D. showed an excess of assets over liabilities (omitting hundreds) of £191,000. The assets consisted of fixed assets of £40,000, investments of a few hundred pounds, debtors of £30,000 and cash at the bank of £130,000. Against that the issued capital and capital reserve consisted of £11,000 and the profit and loss account of £180,000, and this latter sum, as the Special Commissioners found, represented an accumulation of profits within the charge to income tax. It was, therefore, quite clear that the sisters could have caused G.D. to declare a dividend which would have, in effect, extracted the sum of £130,000 from G.D. and put it in their pockets, but such dividend would have attracted surtax. It is not surprising, therefore, that that course was not pursued. The cash was extracted from G.D. as follows. The issued capital of M.J.G. was 50,000 shares of £1 each. On 24th July 1961 each sister sold 22,000 shares of her respective holding to G.D. for £60,500 cash. This transaction, as the Commissioners found as a fact, was a transaction for full value. Accordingly, the cash held by G.D. was reduced by £121,000 and its investments were increased by the holding of 44,000 shares in M.J.G., which, of course, in reality remained under the control and ownership of the sisters. This was a perfectly reasonable transaction which, apart from s. 28, could not have attracted any income tax. The Crown, however, claim that the sum of £60,500 received by Mrs. Cleary is, by virtue of that section, subject to surtax in her hands, and a like claim is made against Mrs. Perren, which it is agreed shall be determined by this appeal.

It is conceded that (1) the transaction which I have briefly described was a transaction in securities within s. 28(1)(*b*); (2) the transaction was not carried out for bona fide commercial reasons or in the ordinary course of making or managing investments so as to claim the protection of the latter part of that subsection thereby afforded to the taxpayer. For the purposes of this appeal the relevant parts of the section 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 . . . this section shall apply to him in respect of that transaction or those transactions . . . (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 [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, or is received in respect of future receipts of the company or is, or represents the value of, trading stock of the

company, 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".

It is not disputed that G.D. is a company under the control of not more than five persons and is therefore a company to which para. (*d*) applies.

The Crown seeks to bring the transaction within para. (*d*), and if that is established it is agreed that the complicated subsequent provisions of the section apply and that Mrs. Cleary and her sister are bound to pay surtax upon the respective sums of £60,500 which they have received.

Section 43(4)(*g*) is in these terms:

" '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".

The Special Commissioners reached the conclusion that the sum of £60,500 received by Mrs. Cleary from G.D., being the full value of the shares in M.J.G. sold by her to that company, was not received by her either in connection with a transfer of assets or otherwise so as to be received within the meaning of para. (*d*), and they allowed Mrs. Cleary's appeal. The Crown appealed, and this came before Pennycuick J., who disagreed with the reasoning of the Special Commissioners and held that the transaction whereby cash was paid by the company was within the transfer of the assets contemplated by para. (*d*). However, he dismissed the appeal on the ground that Mrs. Cleary did not obtain a tax advantage as defined in s. 43(4)(*g*). The Crown again appealed, and the Court of Appeal reversed that decision and held that the transaction fell within para. (*d*) and that Mrs. Cleary had obtained a tax advantage as defined in s. 43(4)(*g*). Those are the problems which your Lordships have to decide.

It was submitted to your Lordships that no tax advantage had been gained, for this transaction was merely a sale of assets to a company at their true value. Before the sale an assessment was liable to be made if the company paid a dividend by way of cash out of its profits available for that purpose. After the sale a dividend might still be paid, although no doubt assets would have to be sold in order to raise the necessary cash. That is perfectly true. It was further urged that, in contrast to *Commissioners of Inland Revenue* v. *Parker*[1] [1966] A.C. 141, there had been in this case no diminution of assets at all. Cash had been diminished but that had been replaced by other assets. That is also true. Accordingly, so it was argued, after the transaction in question an

(1) 43 T.C. 396.

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assessment remained possible, so that the words of s. 43(4)(*g*) were not satisfied, and an assessment remained and remains possible until it becomes impossible by declaration of dividend and the reduction of the sum of profits in account (£180,000) accordingly. I should mention here, though I think it is irrelevant, that the danger of action by the Crown under s. 245 of the Income Tax Act 1952 was removed by the issue of clearance certificates in respect of the income of G.D. and M.J.G. for the year ended 31st December 1962.

My Lords, this question depends upon the proper construction of the words "avoidance of a possible assessment thereto" in s. 43(4)(*g*). I think light is thrown upon the proper construction of those words by the words which follow:

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

Clearly, "avoidance of a possible assessment" was not merely directed to the reduction of the figure of profits in account available for distribution but to the reduction of physical assets for that purpose. In this case there was a sum of cash available for payment of a dividend in cash; the result of the transaction was to remove the possibility of that sum of cash being used to declare a dividend. True, other assets might be realised in the future so as to provide money for payment of a dividend, but it seems to me quite clear that the definition is aimed at just such a transaction as this. The sisters have managed, by a perfectly fair transaction, to extract cash from the company without declaring a dividend, and thereby they avoided a possible assessment upon them which would have been made had a dividend been declared. Accordingly, in my judgment, this point fails.

I turn, then, to the question of the construction of s. 28(2)(*d*). It was common ground before your Lordships that a transfer of cash is comprehended in the phrase "a transfer of assets" and your Lordships need not, therefore, consider the case in your Lordships' House of *St. Aubyn* v. *Attorney-General* [1952] A.C. 15. Paragraph (*d*) is a difficult paragraph, and the difficulties are not diminished by the great breadth of the language used by the draftsman in paras. (i), (ii) and (iii). They cannot possibly be described as definition clauses; they are "artificial inclusion" clauses. I say "artificial" because the draftsman has paid no attention to the proper use of language, in relation to companies and their finances, which has been accepted by lawyers and accountants alike for a very long time. For example, in para (i) he has treated profits, which are "sums in account" (£180,000 in this case) on the left-hand side of the balance sheet, as synonymous with "other assets", which are physical or realisable assets on the right-hand side of the balance sheet. He seems to think "income" and "reserves", which are really sums in account, are properly described as "other assets". This gives rise to a degree of difficulty in the construction of the section. Counsel for the Crown has submitted that, applying these artificial inclusion clauses, the paragraph must be spelt out as follows: "In connection with the distribution, transfer or realisation, including application in discharge of liabilities, of profits, income, reserves or other assets of a company to which this paragraph applies, the person in question so receives . . . that he does not pay or bear tax on it as income . . . a consideration in money or money's worth which either is, or represents the value of, assets which are (or apart from

A anything done by the company in question would have been) available for distribution by way of dividend or is received in respect of future receipts of the company or is or represents the value of trading stock of the company". For the purpose of this appeal I agree that para. (*d*) must be read in this way.

The opening words of the paragraph, "in connection with the distribution of profits", I find difficult to understand, and I confess I did not find the explana-
B tion for the presence of those words offered by Counsel for the Crown very convincing. On Mrs. Cleary's behalf it was submitted that the whole object of subs. (2)(*a*), (*b*) and (*c*) was to make it clear that the section was only dealing with a distribution of profits which diminished the assets of the company as in the *Parker* case[1]. It was further submitted that the definitions in paras. (i) and (ii) did not embrace a transfer of assets which does not result in a company's
C fund of profits in account being diminished. Relying on the observations of Devlin L.J. in *Cherry* v. *International Alloys Ltd.* [1961] 1 Q.B. 136, at page 148, your Lordships were urged to give words the meaning which best suits the scope and object of the Statute without extending them to ground foreign to the intention. So, it was argued, the object of para. (*d*) was to prevent the taxpayer receiving profits in an untaxed form. In this case there was no receipt
D of profits: it was a pure transaction of sale and purchase of shares which had nothing whatever to do with Mrs. Cleary's position as a shareholder in the company. I cannot accept these arguments. It seems to me that the wording of para. (*d*), expanded in the manner I have mentioned, is literally satisfied. There has been a transfer of assets of G.D. to the "person in question", Mrs. Cleary. Mrs. Cleary has received a consideration in money and has received it so that
E she does not bear tax on it as income. Those assets which she has received are assets which would be available for distribution by way of dividend.

Finally, it was argued on the part of Mrs. Cleary that the consideration mentioned in para. (*d*) must be a consideration of the nature mentioned in para. (*c*), that is to say, a consideration which either is or represents the value of assets which are available for distribution by way of dividend. And it was
F (somewhat faintly) urged there can be no assets or anything representing the value of assets available for distribution by way of dividend until there has been some appropriation for that purpose. With all respect to that argument I fail to understand it; not even the declaration of a dividend would appropriate the cash of £130,000 to that purpose.

So for these reasons I agree with the Court of Appeal.

G This may seem a harsh conclusion, as indeed it is, but this is a matter for Parliament. It must always be remembered that this section does not hit, and is not intended to hit, a bona fide commercial transaction or the management of investments in the ordinary course, unless a main object is to obtain a tax advantage. Furthermore, there are certain other built-in safeguards of which the taxpayer can avail himself. By virtue of subs. (10)(*b*) the taxpayer can inform
H the Commissioners of Inland Revenue of his intention, and can get a ruling from them as to whether, in their opinion, it falls within the ambit of s. 28. Then, if the transaction is challenged by a notice given by the Commissioners of Inland Revenue, the taxpayer can (and in this case did) file a statutory declaration by

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[1] 43 T.C. 396.

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virtue of subs. (4), and then there is an appeal to a tribunal constituted as mentioned in subs. (7), who are empowered to determine whether or not there is a *prima facie* case for proceeding in the matter. A

For these reasons I would dismiss this appeal.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it. B

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

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Winckworth & Pemberton.]