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The applicants were charged with being found in a common gaming house without lawful excuse, and were convicted and fined. Afterwards they were charged with assisting the keeper of the house in conducting the business of betting that was carried on there. All that was necessary to support the second charge was to prove that the house was kept, by the person who kept it, for the purpose mentioned, and that the defendants assisted him. Now, on the proof of those facts, could they have been convicted on the first charge? Clearly not. If that had been all the evidence given on the first charge, the case must have been dismissed. That is sufficient to dispose of the application.

The decision of the Supreme Court, so far from being open to doubt, appears to be obviously right, and this application therefore should be refused.

BARTON J. and O'CONNOR J. concurred.

Leave refused.

Solicitors for applicant, *Crick & Carroll.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

LUKE AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

WAITE . . . . . RESPONDENT.
DEFENDANT,

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MELBOURNE, *March* 7, 8, 9, 10, 18.

Griffith C.J., Barton and O'Connor JJ.

Gift—Subscriptions—Failure of purpose—Resulting trust for donors—Contract to repay subscriptions—Consideration—Option to have money applied towards payment for shares in a Company—Appeal to High Court—Reversal of judgment on question of fact—Inference to be drawn from undisputed facts.

Money was subscribed by certain persons in Wilcannia in the form of deposits on applications for shares, at the rate of 1s. per share, in a proposed company, whose object was the locking of the river Darling. The greater

part of this money having been expended by the provisional directors of the proposed company on preliminary expenses in respect of surveys and other matters with a view to the formation of the company, and a special Act of Parliament being considered necessary, the directors sought to obtain in Adelaide subscriptions towards the objects of the company, and especially towards obtaining the special Act. At a meeting at Adelaide a committee was formed "to assist the projects of the Wilcannia merchants," and the committee resolved that C., the honorary secretary of the proposed company, should "canvass for subscriptions towards the amount required to obtain the special Act." The chairman of the committee thereupon signed a document stating that at a meeting of the committee C. "was deputed to canvass the city for subscriptions to further the objects of the company." C. then collected subscriptions from certain Adelaide merchants who were financially interested in the locking of the River Darling, and who signed their names to the document above-mentioned, the amounts of their subscriptions being set opposite their signatures. The subscribers were offered the option of having their subscriptions applied as deposit money upon application for shares in the company, but most of them refused to accept the option. The money so collected was paid by C. into a bank to the credit of the proposed company, and the committee in Adelaide was informed of this fact and offered no objection. The formation of the company afterwards fell through and was abandoned, and the moneys subscribed in Adelaide remained in the bank for about seventeen years.

Held, that the money subscribed in Adelaide was a voluntary subvention towards a project in which the subscribers and the receivers had a common interest, but as to which the subscribers declined to incur any future responsibility, and was therefore a gift to the original subscribers in Wilcannia from which neither a trust for, nor a contract to repay the money to, the Adelaide subscribers could be inferred.

Decision of the Full Court reversed.

Where money is subscribed to a projected company on the terms that the subscriber shall have the option to have his subscription applied as payment on application for shares, that option constitutes a valuable consideration for the payment of the money so as to rebut the implication of a resulting trust for the subscriber.

Rothschild v. *Hennings*, 9 B. & C., 470, followed.

The rule that an appellate Court ought not to disturb the conclusions of the Court appealed from on a question of fact has no application where there is no conflict of testimony, and the only question of fact is the proper inference to be drawn from the undisputed facts.

Thurburn v. *Steward*, L.R. 3 P.C., 478, followed.

APPEAL from the Supreme Court of Victoria.

An action was brought by Thomas Luke, Arthur Woodfall and Thomas Wakefield Chambers, against William Charles Palmer on

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behalf of the persons who had contributed money towards the payment for shares in a company proposed to be incorporated for the purpose of locking the river Darling, and Peter Waite, on behalf of the persons who had contributed moneys otherwise in aid of the objects of the proposed company, seeking a declaration as to who were entitled to a certain fund in the hands of the plaintiffs. The facts and the nature of the pleadings are fully set out in the judgment of *Griffith* C.J. hereunder.

Holroyd J., before whom the action was tried, gave judgment in favour of the persons represented by the defendant Waite, with costs against the plaintiffs.

On appeal to the Full Court (*Madden* C.J., and *Hodges* and *Hood* JJ.), this judgment was affirmed. The plaintiffs now appealed to the High Court.

Higgins K.C. and *Mann*, for the appellants. Upon the only evidence properly admissible, it is apparent that the money was given by the Adelaide subscribers for the general purposes of the company as long as they pursued the object of the company, viz., the locking of the river Darling. The questions from the plaintiffs' point of view are, first, were they justified under the circumstances in applying to the Court for directions as to the disposal of the fund, and secondly, with regard to the counter claim, have the Adelaide subscribers any right to complain of any irregularity in the expenditure of the money? Is it their money? The Adelaide subscribers intended to part absolutely with their money. Their intention was clearly expressed by the subscription list headed with a statement that Chambers was deputed to collect subscriptions "to further the objects of the company," and signed by each of the subscribers. No other document prior or posterior to that document should be looked at, except for the purpose of explaining the meaning of any words in that document. The only expression that needs explanation is "the objects of the company," and reference to another document shows clearly that its only object was the locking of the river Darling.

That being so, the money was either subscribed as an absolute gift to the company to aid it in achieving its object, or it was a gift for a public purpose. In the former case, if the object is not

achieved, there is no resulting trust for the subscribers, but the money belongs to the shareholders. In the latter case, if the purpose fails, there is again no resulting trust for the subscribers, but the Court will order the money to be applied on the *cy pres* principle as being in law a charitable gift: *Wilson* v. *Barnes* (1); *Attorney-General* v. *Lorimer* (2); *Cunnack* v. *Edwards* (3). As to what is a charitable gift, see *Attorney-General* v. *Heelis* (4); *Dolan* v. *Macdermot* (5). Where a trust is declared by a document, the same rule exists as to alteration of the trust as in regard to alteration of a written contract: *Lewis* v. *Lewis* (6); *Hill on Trustees*, p. 20; *Lewin on Trusts*, 10th ed., p. 51; *Free Church of Scotland* v. *Overtoun* (7). The only declaration of trust is that on the subscription list, and it stands until upset by the Court. This is not an action to upset the trust. If the claim of the Adelaide subscribers to the money is based on a contract, it could only be recovered as money paid on a consideration which has wholly failed, but here the consideration has not wholly failed. [They also referred to *Jorden* v. *Money* (8); *Chadwick* v. *Manning* (9); *Daniell's Chancery Practice*, 7th ed., pp. 987, 989.]

Bryant and *Cohen*, for the respondent. The plaintiffs by coming to Court acknowledge that the object of the trust has failed. The evidence shows that the money was subscribed for a special purpose which has failed, and what was not applied to that purpose belongs to the subscribers. The appellants are not trustees of this money unless they be trustees *de son tort*. If there is doubt as to the terms on which the moneys were originally subscribed, the Court may take into consideration subsequent statements of the donors. If this had been a gift, no matter what the motive of the gift was, the shareholders might at once have divided the money amongst themselves. This could not have been the intention of the subscribers. If the money was paid as part of a contract, it is a reasonable inference that part of the contract should be that, if the object failed, any money that was

(1) 38 Ch. D., 507.
(2) 3 W.W. & A'B. (Eq.), 82.
(3) (1896) 2 Ch., 679, at p. 683, *per* Lord *Halsbury* L.C., and at p. 685, *per* A. L. *Smith* L.J.
(4) 2 Sim. & St., 67, at p. 76.
(5) L.R. 5 Eq., 60; L.R. 3 Ch., 676.
(6) 2 Rep. Ch., 77.
(7) (1904) A.C., 515, at p. 617, *per* Lord *Halsbury* L.C.
(8) 5 H.L.C., 185.
(9) (1896) A.C., 231

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left should be repaid to the subscribers. This Court should not under all the circumstances reverse the findings of fact of the Judge of first instance. This is not a matter of trust, but is either one of contract or of something in the nature of a mandate without consideration. If it is a contract, the subscribers are entitled to recover the money as on a total failure of consideration; if it is a mandate the subscribers are entitled to revoke the mandate at any time, and recover the money remaining unexpended. The only time when a trust arose was when the plaintiffs wrongfully took control of these moneys. If there was only a partial failure of the contract, and the contract is severable, the Court will order the unexpended portion of the money to be repaid. If the subscription list amounts to a declaration of trust, the trustees are the Adelaide committee, and the *cestuis que trustent* are the subscribers, on whose behalf the committee entered into contractual relations with the company through Chambers. An appellate Court has the same reluctance to over-rule a Judge of first instance as to the inferences he draws from facts as it has in regard to his findings of fact. *R.* v. *Mollison* (1).

They also referred to *Lewin on Trusts*, 11th ed., p. 57; *Underhill on Trusts*, 6th ed., p. 115; *In re Abbott Fund* (2); *In re Printers and Transferrers Amalgamated Trades Protection Society* (3); *Kendall* v. *Granger* (4); *Attorney-General* v. *Clapham* (5); *Brown* v. *Andrew* (6); *Bullen and Leake on Pleadings*, 3rd ed., p. 44; *Taylor* v. *Lendey* (7); *Parry* v. *Roberts* (8); *New* v. *Bonaker* (9); *Fisk* v. *Attorney-General* (10).

Higgins K.C. in reply, referred to *Crabb* v. *Crabb* (11); *Kilpin* v. *Kilpin* (12); *Lewin on Trusts*, 10th ed., p. 172; *In re Curteis' Trusts* (13); *In re Slevin* (14).

Cur. adv. vult.

March 18. GRIFFITH C.J. The question for decision on this appeal, which occupied the Court for a time quite out of proportion to the

(1) 2 V.L.R. (L.), 144.
(2) (1900) 2 Ch., 326.
(3) (1899) 2 Ch., 184.
(4) 5 Beav., 300.
(5) 4 De G.M. & G., 591.
(6) 18 L.J.Q.B., 153.
(7) 9 East., 49.
(8) 3 Ad. & El., 118.
(9) L.R. 4 Eq., 655.
(10) L.R. 4 Eq. 521, at p. 528.
(11) 1 My. & K., 511.
(12) 1 My. & K., 520, at p. 539.
(13) L.R. 14 Eq., 217.
(14) (1891), 2 Ch., 236.

importance and difficulty of the case, is as to the proper inference to be drawn from facts which are not in controversy. The relevant evidence is in a very small compass, although it has been overlaid, and to some extent obscured, by a mass of irrelevant matter. I take the following statement of the preliminary facts from the judgment of *Holroyd* J.:—"In April, 1882, at a public meeting at Wilcannia, it was resolved that a company should be formed to be called the River Darling Navigation Co. Ltd. with a nominal capital of £200,000 in 200,000 shares of £1 each, and with the object of insuring continuous navigation between Wilcannia and Wentworth by locking the River Darling." (The exact terms were "having for its object the locking of the River Darling for the purpose of insuring continuous navigation between Wilcannia and Wentworth"). "Thirteen gentlemen were thereupon appointed provisional directors, with power to add to their number, and they were directed to take immediate steps to register the company under the *Limited Liability Act* of New South Wales. In order to provide funds for preliminary expenses they were requested to dispose of 50,000 shares in respect of which one shilling per share was to be paid upon allotment, with a guarantee that no further call should be made upon such issue until funds were required for construction. The plaintiff Chambers was asked and consented to perform the duties of honorary secretary. The provisional directors, who appear from the first to have been permitted to regulate their own proceedings and to manage the affairs of the company pretty much as they pleased, met on 1st May, 1892, when it was resolved that their ordinary meetings should be held on the first and third Mondays in each month at 8 p.m., and a temporary place of meeting was selected. It was further resolved that the honorary secretary should be empowered to receive all moneys and to pay the same to the credit of the company's account with the Commercial Banking Company of Sydney, to be operated upon by cheques signed by two provisional directors and countersigned by himself. The company so constituted was not registered under the *Limited Liability Act*, but the provisional directors began at once to agitate for the furtherance of their project, and after some tedious negotiations and delay, succeeded in obtaining from Mr. Gordon

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C.E. a valuable report showing that their scheme was practicable and estimating the cost of the work at £310,000. The project, however, encountered much opposition in Sydney, and at the end of 1883 the provisional directors had made up their minds that it would be useless to register the company as a limited liability company, and that it would be necessary to obtain an enabling Act of Parliament, which, while incorporating the company, should at the same time confer upon it all requisite powers for the execution of the contemplated works. But the funds of the company were nearly exhausted, and it was estimated that the cost of preparing the Bill and getting it passed by Parliament would amount to about £300. The provisional directors recommended that 16,000 shares, in addition to the shares, nearly 14,000, already taken up, should be offered to the public on the same terms as those previously issued, and that both those already issued and the additional shares should be considered as paid up to the amount of 10s. per share. Circulars were distributed to this effect, and it was hoped that the new promoters' shares would be mainly subscribed for by the residents in and about Wilcannia. These expectations were disappointed. Practically no response was made to the circulars, and the old shareholders had become so lukewarm or indifferent that a general meeting convened in February, 1884, to receive the report of the provisional directors together with a statement of the receipts and expenditure up to 31st January in that year, and to elect a fresh directorate was first of all postponed and afterwards abandoned in consequence of the insufficiency of the attendance. About six months afterwards Mr. Chambers was despatched on a mission to Adelaide to endeavour to obtain assistance from the merchants there. In the interval members who constituted the Board at the date of the report, seventeen in number, had caused a bill to be drafted, and had appointed a sub-committee of four to consider and correct it, and these gentlemen had made some progress with their labours.

"Whether they found the task beyond their powers or whether, the directors being obliged to employ solicitors to pilot the bill through Parliament, it was deemed prudent to leave the whole of the business in their hands is not clear, but, as Mr. Chambers

announced; the company was at a standstill for lack of money, and it is out of the result of his mission that the present action has arisen."

The later relevant facts are as follows: On 19th August, 1882, a meeting of merchants and others was held in Adelaide at the Chamber of Commerce, at which Chambers explained the nature of the proposed company's undertaking, and gave his estimate of its probable expenditure and revenue. It seems, although it does not distinctly appear in one report of his speech, that he informed this meeting that the immediate necessity of the company was to raise money to defray the cost of obtaining an Act of incorporation. A motion was then moved by a Mr. Harrold, and carried, that a committee, consisting of four other gentlemen and himself, should be formed in Adelaide "to assist the projects of the Wilcannia merchants," or according to another report, "to assist the provisional directors at Wilcannia in their scheme." After this motion had been carried, a Mr. Colton, Chairman of the Chamber of Commerce, is reported to have said that Chambers wanted the committee to work up an issue of 6,000 shares at 1s. each with a guarantee that no more shares (*quære* money) would be called up until the construction of the locks was commenced, and that those shares, in the event of the company being formed, were to be paid up to 10s. each out of the capital of the company (I assume that this means that they were to be treated as paid up to 10s.): that he would ask the representatives of some of the leading houses of business who were present whether this was not really a case in which they might subscribe a small amount even with the ultimate probability of losing it.

On 21st August the committee met, and a resolution was carried "that Mr. Chambers canvass the city for subscriptions with a view to get the £300 required to place the Act to incorporate the company before the New South Wales Parliament." A document was then drawn up in the following form, and signed by the chairman:—"At a meeting of the Adelaide committee of the River Darling Navigation Co., held at the office of Messrs. D. and W. Murray on Thursday, 21st August, 1882, Mr. J. W. Chambers was deputed to canvass the city for subscriptions to

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further the objects of the company." Armed with this document, Chambers made his canvas, and obtained sums amounting in all to £307 7s. from nineteen subscribers, each of whom signed his name at the foot of the memorandum above set out, adding the amount of his subscription. Chambers deposed, and his statement, which was corroborated by a contemporaneous memorandum in writing, was accepted by *Holroyd* J., that the subscribers were given to understand by him that, if they chose to join the company as promoters, they could have promoters' shares allotted to them to the value of their respective subscriptions, but that most of the donations were given as subscriptions. None of the subscribers ever sought to exercise this option. All the money, except £50 subscribed by Harrold's firm, was received by Chambers and paid by him to the credit of the River Darling Navigation Co. in the company's bank at Wilcannia. On 15th September he sent a copy of the deposit slip, together with a copy of the last balance sheet and report of the company and a rough draft of the proposed Act of incorporation to Harrold, who acted as honorary secretary to the Adelaide committee. On 1st October, Harrold acknowledged Chambers's letter of the 15th September without comment, and enclosed a cheque for £50, the amount of his firm's subscription, which also was paid to the company's credit in the bank.

On 13th October a meeting of the Adelaide committee was held, at which Harrold "reported receipt of the paying-in slip for part of the money collected by Mr. Chambers," and laid before the meeting "proposed draft of Bill to be laid before the New South Wales Parliament." It was then resolved that the secretary write to Chambers returning the draft and asking him to keep the committee informed of the progress made by the company from time to time. Harrold apparently did so, for on 24th December Chambers, acknowledging a letter from him of 31st October, after explaining the delay in replying by his absence from Wilcannia, informed Harrold that at a meeting of the provisional directors held on the previous evening his communication together with the remarks of Mr. Boothby (one of the Adelaide committee) upon the Act of incorporation were considered, "and as the draft of the Bill had so far met with the approval of your committee it was decided

to have it completed and printed in readiness for its being brought before Parliament next session." No other communication ever passed between the provisional directors and the Adelaide committee.

Upon these facts the question for determination is: Upon what terms was the sum of £307 7s. paid by the subscribers to, and accepted by, the provisional directors of the company? The respondent Waite, who is one of, and represents, the subscribers, contends that it was paid and accepted upon a trust to expend it for the purpose of defraying the cost of obtaining the proposed Act of incorporation and for no other purpose, or alternatively, upon trust to expend it for the general purposes of the company, with a resulting trust, in either case, for the donors as to any money not expended for the distinct purpose. The plaintiffs, on the other hand, contend that the money was paid and received as a voluntary donation from the givers to the company to aid them in carrying out their project, and that the circumstances negative any resulting trust. They also contend that, if there was any trust, it was to carry out the objects of the company, which were the locking of the river Darling, a project which, they say, may be carried on until it results in success or until all the money is expended.

Before considering these contentions it will be convenient to state how the question now arises for decision. The funds remaining at the disposal of the provisional directors when the sum of £307 7s. was paid to their credit had amounted to less than £20. Of the total sum increased by the subscriptions they expended fifty guineas in respect of their solicitors' charges for drafting the Bill. Soon afterwards, however, it was found that the prospects of getting the Bill through Parliament were hopeless. At this time some further small payments had been made, leaving a balance of £250 at the credit of the company. This sum was placed on fixed deposit bearing interest, and the deposit was renewed from time to time until it amounted to £438 3s. 5d. Nothing more was done until 1901, when the plaintiffs, at whose credit the money then stood, resolved to expend it on purposes which the respondent Waite contends were in violation of the alleged trust. After some correspondence the Adelaide sub-

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scribers, who from 1884 to 1902 had taken no steps, and made no inquiries as to the disposition of the fund, claimed to be entitled to the whole amount of £438. Some of the persons who had subscribed for shares in the proposed company also laid claim to the fund. The plaintiffs then brought their action against the defendant Palmer, as representing the persons who had subscribed for shares in the company, and the defendant Waite as representing the Adelaide subscribers, praying a declaration as to the ownership of the fund, which, after the expenditure now alleged to be a breach of trust, amounted to £245 18s. 10d. The defendant Palmer by his defence merely submitted that the fund should be distributed amongst the persons who had agreed to take shares in the company, or alternatively between them and the Adelaide subscribers. The defendant Waite claimed the whole fund for the Adelaide subscribers, and counterclaimed for so much of it as had been already expended for the purposes which he impeached. *Holroyd* J., before whom the action was tried, was of opinion that the money was given in trust to be expended for a special purpose which had been exhausted, and that there was a resulting trust for the donors of the fund as to all money not expended for that special purpose. He held that the expenditure impeached by Waite was in breach of trust, and adjudged the plaintiffs to replace the amount so expended and to bring into Court the sum of £245, and to pay the costs of the action and counterclaim. The Full Court, on appeal, affirmed his decision.

The question, as stated at the outset of this judgment, is as to the proper inference to be drawn from the facts. All the contemporaneous facts must be taken into consideration. To what rights then, if any, did the facts give rise in favour of the subscribers as against the company when they had paid their subscriptions, and what duties, if any, did the company owe them in respect of those subscriptions? Mr. Higgins relied mainly upon the terms of the memorandum to which the subscribers affixed their names, which described the donations invited as "subscriptions to further the objects of the company." The term "subscription" *primâ facie* suggests an absolute gift, without any implied reservation of a right to an ultimate refundment of the whole or part of the sum given. Again, the gift is

"to further the objects of the company," words which do not suggest that the givers were to retain any power of control over the fund, or over the persons to whom they gave it as to its expenditure, which they must have had if the gift were impressed with a trust. If the idea suggested by Mr. Colton at the public meeting of 18th August had been carried out, and the £300 had been raised by subscriptions for 6,000 shares, there can be no doubt that that sum would have formed part of the general funds of the company, and that the subscribers of it would have had no exclusive right to a distribution amongst them of such part as was not expended on the costs of promoting the Act of Parliament. And, if any subscriptions were given on the terms that the donors should have an option to have their subscriptions applied as payment of 1s. per share on promoters' shares, it is equally clear that those subscribers would have been in no better position. Indeed, the payment of the money on the terms that they should have such an option would be sufficient to constitute a valuable consideration for the payment: *Rothschild* v. *Hennings* (1). When there is a consideration for a payment the notion of an implied trust in favour of the person who makes it is excluded. In the cases in which the subscribers refused even to accept the offer of an option to take shares, the inference seems irresistible that they intended to make a free gift. In either case the facts negative the suggestion that the subscribers contemplated that they would in any event become entitled to a return of their subscriptions in whole or in part. Nor is there anything in the evidence to suggest that the subscriptions were not all given on the same terms, except as to the option to take shares. Again, the money when received by the company was paid into their common fund. The Adelaide committee, who were informed of the fact, offered no objection, and must be taken to have assented to the appropriation of the money for the purposes of the company.

In answer to these arguments reliance was placed on the words of the resolution of the Adelaide committee "with a view to get the £300 required &c." There is no doubt that the immediate necessity of the company was to raise a sum, estimated at £300, for the specific purpose of getting the Act of Parliament passed.

(1) 9 B. & C., 470.

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But the words of this resolution are, at best, ambiguous. They accurately express the immediate object in view which induced the soliciting of subscriptions, *i.e.*, to provide a fund which, it was expected, would be required for the specific purpose. But they are insufficient to establish an obligation on the part of the company, even assuming them to have accepted the money with knowledge of the terms of the resolution, to expend the money for that purpose only and to repay the unexpended balance. Such an obligation, if it existed, must have been contractual, for a mere representation of an existing intention would be ineffectual in law. If the parties had thought that such a contractual obligation existed, it is strange that it never occurred to anyone to suggest it until after the lapse of nearly 18 years, and that no inquiries were ever made as to the amount expended in promoting the proposed legislation. Moreover, this is not the case set up by the defendant Waite by his counter-claim. If it had been, the plaintiffs might well have thought fit to take advantage of the Statute of Limitations.

The committee was appointed "to assist the project of the Wilcannia merchants," and the memorandum to which the subscribers affixed their names, instead of following the resolution of the committee, described the subscriptions as given "to further the objects of the company," thus in effect reverting to the terms of the resolution of the meeting, and omitting any mention of the particular object for which, as it was thought, they would be required. The terms of the intervening resolution of the committee cannot, I think, be relied on as showing that the subscriptions were impressed with a specific trust for the legal and parliamentary expenses. With regard to the alternative trust suggested "to further the objects of the company," it is equally difficult to see any ground for drawing an inference that it was intended or contemplated by any of the parties that there was to be a resulting trust in favour of the donors. The substance of the transaction was this: The Wilcannia people had subscribed a sum of £660 towards a project for locking the Darling, which was regarded as of importance not only to themselves but to the Adelaide mercantile community, and which they hoped to carry out by means of a joint stock company of which they would be members, their subscriptions being applied as part payment for

their shares. Finding themselves in want of more money, they applied to the Adelaide merchants for assistance, and the latter came to their aid with a sum of £307 7s., refusing, however, in most cases, the option of having that sum applied in payment for shares in the company if successfully floated. I find it impossible to regard a gift made under such circumstances as anything but a voluntary subvention to a project which was regarded as one in which all the parties had a common interest, but as to which the givers declined to incur any future responsibility. In the case of such a gift there is neither a contract nor a trust. The objects of the company must be taken to have failed and come to an end many years ago; but, if there was no original contractual or fiduciary obligation, no ground for setting up such an obligation is afforded by the mere fact that the hopes and expectations of the parties were disappointed. It may well be that, if the provisional committee had refunded to the subscribers the money not required for the purposes for which it was expected to be wanted, they would have acted reasonably, and that no one would have offered any objection. But the hostile attitude taken up by the respondent by his counterclaim has put the plaintiffs to defend themselves by asserting their legal rights and denying the asserted rights of the respondent.

Another argument was addressed to us, founded upon written expressions of opinion contained in letters written by Chambers in 1901 and 1902, to the effect that the fund in question should go to the Adelaide subscribers. But it is clear that such expressions of opinion could not bind the subscribers to the company represented by the defendant Palmer.

It was pressed upon us that this Court ought not to disturb the conclusions of the Court appealed from on a mere question of fact. This is, no doubt, the general rule, but it has no application when, as in this case, there is no conflict of testimony, and the only question of fact is as to the effect of the facts proved in raising further inferences of fact: *Thurburn* v. *Steward* (1).

In my judgment the respondent has failed to show any right cognizable in a Court of law to any part of the fund. The

(1) L.R., 3 P.C., 478.

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counterclaim ought, therefore, to have been dismissed. With regard to the fund the subject matter of the action there should have been a declaration that it was held by the plaintiffs on behalf of the subscribers for shares in the proposed company. The defendant Palmer has not appealed from the judgment of the Supreme Court, but he is a party to this appeal, though he was not represented before this Court. This Court can, therefore, now make the proper order.

The respondent having no interest in the fund, it is not competent for him to raise any question as to the propriety or impropriety of the plaintiffs' dealings with it. I must not, however, be supposed to express approval of the manner in which it was, in fact, in part dealt with by the plaintiffs. No case, however, on this point is made by Palmer, and the Court is not called upon to consider it.

The result is that the judgments appealed from must be discharged, and there must be a declaration to the effect I have stated, and the respondent's counterclaim must be dismissed. With respect to costs, having regard to the nature of the action and the conduct of the plaintiffs, I do not think that the Court is bound to give them the costs of the counterclaim as against the respondent. I think that justice will be satisfied by giving them their costs of the action and counterclaim out of the fund, which, I understand, is now in Court. If there is any surplus, it should go in payment of the costs of the defendant Palmer, and any further surplus should go in payment of the costs of the defendant Waite up to counterclaim.

Liberty to apply should be reserved.

The respondent must pay the costs of the appeal to the Supreme Court, and of this appeal.

BARTON J. There is to my mind only one question in this case, and that is whether the moneys contributed by the Adelaide subscribers in August, 1884, were absolute donations to the funds of the then proposed River Darling Navigation Co. If they were not such gifts there was a resulting trust in favour of the Adelaide subscribers, if the facts establish that there is a failure of the purpose for which these subscriptions were raised. I am

of opinion that the moneys subscribed were given absolutely and finally to the provisional directors in August, 1884, as an addition to the general funds of the body called the shareholders of the proposed company. These shareholders had in 1882 raised in Wilcannia some £660 by subscribing for shares in the venture, on each of which shares they had paid 1s., and all of the funds except some £18 or £19 had been expended when in August, 1884, Mr. Chambers, the honorary secretary of the company, who is one of the appellants, visited Adelaide for the purpose of procuring monetary assistance for the company's project, which those who had associated themselves for its formation described in one of their resolutions at the time as "the locking of the River Darling, for the purpose of ensuring continuous navigation between Wilcannia and Wentworth." This object was of much interest to business men in Adelaide, for continuous navigability between the towns named would result in a large accession of traffic to and from that city. Mr. Chambers was therefore able to draw together a number of gentlemen at the Chamber of Commerce on the 19th of the same month. He made a speech giving them "particulars with regard to the scheme for locking the Darling." He dilated on "the prospect of the undertaking paying a fair rate of interest upon the outlay," and gave estimates of the probable cost of the works, fleet, and plant, and the probable annual expenditure and income from traffic. He spoke hopefully of the probable attitude of the Government of New South Wales, and asked the meeting "to appoint a committee to strengthen the hands of the directors in Wilcannia," meaning the provisional directors of whom he was one. The chair was occupied first by Sir Thomas Elder and then by Mr. David Murray. I mention Sir Thomas Elder's name because he was the head of the "Momba and Mount Murchison Proprietary," now represented by the respondent defendant Mr. Waite: and the name of Mr. Murray because he was not only in the chair at the public meeting, but was chairman of the committee appointed at that meeting. Mr. Harrold moved for the appointment of an Adelaide committee "to assist the project of the Wilcannia merchants." After he had done so, Mr. Chambers explained that the work of the company was merely preliminary,

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and "they could not do anything until they obtained an Act of Parliament," and he stated the facts concerning the formation of the company, which had not then and has not since been registered, and also showed on what terms shares might be obtained. If the New South Wales Government entered into the scheme and certain plans were handed over to it, no doubt the promoters would be recouped any preliminary outlay. (This statement, by the way, could scarcely have encouraged anyone at the meeting who afterwards became a promoter to look to any quarter than the Government for a recoup or return of his subscription.) After saying that "money was required to place the Act of Incorporation before the Sydney Assembly," Mr. Chambers expressed his confidence that, if the South Australian Government brought the matter before the New South Wales Government, their advocacy would have considerable weight, and added that it would be one of the duties of the proposed committee to agitate for the taking of that step. Then the motion for the appointment of the committee was carried. There is no evidence as to which of the subsequent subscribers attended this meeting, except that Sir Thomas Elder, Mr. Murray, Mr. Harrold, and Mr. Colton were there, and these four gentlemen afterwards became subscribers. But throughout the meeting there was no mention of subscriptions otherwise than for shares. Before the meeting separated, however, the then chairman, Mr. Murray, said he did not think they could do much to forward the movement, beyond signifying by that meeting that the project would benefit not only South Australia but the settlers in the vast country watered by the Darling. "It was altogether a matter for the New South Wales Government to carry out," he said, "and he had very little hope of a company being formed." . . . . "There was no harm in their saying that the scheme would be beneficial." The meeting would have wound up in this pessimistic tone had not Mr. Colton, the chairman of the Chamber of Commerce, pointed out that Mr. Chambers seemed to desire *the committee* to work up an issue of 6,000 shares at 1s. each, and he (Mr. Colton) "would ask the representatives of some of the leading houses of business who were present whether this was not really a case in which they might

subscribe a small amount, even with the ultimate probability of losing it." I have dealt at some length with the report of this meeting for the following reason. It was earnestly urged at the Bar that what took place tended strongly to show for what purposes and with what ultimate objects the Adelaide subscription was entered upon. It seems to me obvious that, if taken by itself, it shows that, what was in the minds equally of Mr. Chambers and of the Adelaide friends of the project, at that stage, was the idea of assisting the project, if at all, by subscribing for shares in a company. The idea of raising a subscription apart from the taking of shares, such a subscription as was afterwards collected, does not seem from the report to have entered the head of anyone at the meeting, nor does it appear to have been entertained until the committee met. Next we have the minutes of a meeting of that body, therein described as "the Adelaide committee of the River Darling Navigation Co.," which was held on the 21st of August. There were present Mr. Murray, in the chair, Mr. Harrold, who at once became honorary secretary, and three other gentlemen, whose names do not appear on the subscription list afterwards formed. But it was resolved "that Mr. T. W. Chambers canvass the city for subscriptions with the view to get the £300 required to place the Act to incorporate the company before the New South Wales Parliament." The gentlemen present may have considered the mere placing of such a Bill before Parliament as tantamount to the purpose commended to them by the meeting of two days before, namely, the "assisting the project of the Wilcannia merchants." Or they may have thought that the bringing on of a Bill was but a step in pursuance of the wider object. I do not care which, for there is no evidence that the subscriptions were obtained on the footing of the committee's resolution. It does not even appear that it came to the knowledge of any subscribers other than the two who were at the committee meeting, Mr. Murray and Mr. Harrold. But there was put in evidence for the plaintiffs as the succeeding exhibit a document which is clearly the most material piece of evidence in the case for determining the question of the terms on which the subscribers parted with their money. That is the subscription list itself, with the following important heading: "At a meeting of the Adelaide committee

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of the River Darling Navigation Co. held at the office of Messrs. D. and W. Murray on Thursday the 21st August, 1884, Mr. T. W. Chambers was deputed to canvass the city for subscriptions to further the objects of the company.

David Murray, Chairman.

List of Subscribers."

The heading, all except the chairman's signature, which is Mr. Murray's own, is in the handwriting of Mr. Chambers. And below the words "list of subscribers" are the signatures of all the firms and persons—nineteen in number—who furnished what have been called throughout the case the Adelaide subscriptions. This document expresses in my opinion the intention common to Mr. Chambers, who wrote the heading, to the chairman of the Adelaide committee, who signed the heading, and to all the subscribers signing beneath, headed by the firm of Mr. Harrold, the secretary to the committee. The intention expressed is that the subscriptions collected by Mr. Chambers are asked for and given "to further the objects of the company." Evidence as to the objects of the company is forthcoming. They are the locking of the River Darling, and the insuring by this means of continuous navigability between Wilcannia and Wentworth. Without extraneous evidence, the title, "The River Darling Navigation Co." pretty clearly indicates to anyone who knows or has heard anything of that river the object of making it at least reasonably navigable. True, to make it navigable will require locks. To enable locks to be constructed there must be the authority of an Act of Parliament giving the necessary powers to an incorporated company. And therefore the immediate object of the provisional company and its provisional directors is to obtain such an Act, if they are to do the locking. But that is all comprised in the term "objects of the company."

The intention then with which this money, amounting to £307 7s., was paid and received, is established by the "list of subscribers," for I find no admissible evidence in the case to qualify or vary it.

It remains to ascertain whether, from the purposes shown by the document or from the failure to achieve them, a trust results in favour of the subscribers. I will take it for the purpose of solving this question that the object of the proposed company has

failed. More than 20 years have elapsed since the applicants for shares declared themselves a company in their meeting at Wilcannia, and, if their own project has not been expressly abandoned, it may well be said to be dead. But does a trust therefore result in favour of the Adelaide subscribers? Not if the receipt of the money by Chambers and the provisional directors, who banked it with the ordinary funds of the company, was a receipt absolutely in trust for the shareholders, as they have been called for convenience all through the case. The circumstances of the payment and receipt of the money in Adelaide seem to me to carry the implication rather that the subscribers in that city parted with their money without reservation, and for ever, than that it was to come back to them if the project failed. There is no reason to suppose that they gave the money otherwise than in assistance of the company's project, or that the completion of that scheme was a condition of the retention of the money. There is no declaration of any subscriber at or before the time of his payment to show anything more than is conveyed in the "list of subscribers," and the words there used, "to further the objects of the company," appear to be more consistent with the passing of the subscriptions to the shareholders or to the recipients like any other donation in aid of a general purpose, than with the impression on them of a trust for the complete achievement of that purpose, or in the alternative for a reverter to the donors. Nor do I find any subsequent admission on the part of the shareholders or provisional directors which ought to be taken into account so as to alter the inferences arising from the antecedent and the contemporaneous facts. True, a letter from Mr. Chambers was put in, written to one of the shareholders eight or nine years after the subscription, and expressing, to use his own words, his "opinion that if any distribution of this money is made it must be among the Adelaide subscribers only." But this is an expression of legal opinion merely, and the determination of this case cannot be affected by the legal opinion of any of the litigants. The passage, though quoted as an admission, is not an admission of fact, and is not evidence at all on the question of the terms on which the money was paid. But are the plaintiffs then free from responsibility in respect of their possession of these subscriptions?

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Certainly not. They received them for the shareholders, and to the shareholders they are accountable. To say there is no trust for the Adelaide subscribers is not to say there is no trust at all. The clear alternative to responsibility to the one body is responsibility to the other. If the plaintiffs were bound to hold this money for the purposes of the company, and if they have spent any of it away from these purposes, it is to the shareholders and not to the Adelaide subscribers that they must account. Holding the opinions above expressed, I concur with the Chief Justice in his conclusions, and I also agree that the order which he has outlined will effect the proper adjustment of the rights of the parties and will deal equitably with the costs and the fund.

O'CONNOR J. A great deal of the evidence at the hearing was directed to proving a breach of trust on the part of the plaintiffs in dealing as they did with the moneys in their hands after, as it was said, the project of the company had been given up. Some time also was occupied in proving that the project of the proposed company had years ago come to an end. For the purposes of my judgment I assume that the project of the proposed company was abandoned years ago, and that the plaintiffs were liable to account to one or other of the two groups of persons represented amongst the defendants for unauthorized expenditure of the moneys in the company's hands, and that they became liable to hand over to that group of persons the moneys now remaining. But the real question for decision I take to be this: Is the defendant, Peter Waite, and the group of persons he represents, the Adelaide subscribers, entitled to call the plaintiffs to account for the moneys expended, and to demand from them payment of the money now in hand? That is entirely a question of fact, and the answer depends upon the proper inference to be drawn from certain circumstances and documents well established in evidence. Mr. Justice *Holroyd* in the Court of first instance drew the inference that the moneys were received from the Adelaide subscribers by Chambers, representing the Company, on trust to be expended for the purpose, in the first place of obtaining the passing of an Act incorporating the company and giving them necessary power, or, if that became impracticable, then for the purpose of inducing

the New South Wales Government to undertake the scheme for locking the Darling. The Supreme Court of Victoria on appeal drew the inference that the moneys were received from the Adelaide subscribers by Chambers as representing the company on trust for one purpose, and one purpose only—that of obtaining the passage of an Act of the New South Wales Parliament incorporating the company and giving it the necessary powers. Whether the money was paid over by the Adelaide subscribers with the intention of aiding in the accomplishment of any of these purposes mentioned, or of the wider purpose for which the plaintiffs contend, I find a difficulty in seeing any evidence that would justify the inference that the money was received clothed with the trust to carry out these purposes, or any of them, or with the resulting trust to hand over the money or the balance of it to the Adelaide subscribers if the purposes should be abandoned. Before the plaintiffs can be made liable to the Adelaide subscribers, it must be established that they hold the moneys on trust for the carrying out of some purpose, and that the purpose has failed, or that they entered into a contract to return the money if the purpose should be abandoned. It is clear that there was no declaration of trust or express contract to this effect; but it is said that, from all the circumstances under which the money was received, such a trust or such a contract may be reasonably implied. I think it will be admitted that the only facts material to be considered are those which existed on or before the 21st of August, 1884, when the money was handed over to Chambers. It was on that date, if at all, that the money became clothed with the trust or subject to the contract to which I have referred. The rights of the parties were then settled, and there is no evidence of anything having taken place afterwards to alter them. Statements written or verbal made after that date may, as admissions, be evidence against the parties who made them of what actually took place on or before the 21st August, 1884. Indeed some of the parties on both sides have written letters contradictory in some respects of their cases as put before the Court. Those admissions could only be used to establish facts existing in August, 1884, and it would, in my opinion, be unwise to attach any importance to statements made or written many

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years after the actual transactions, and at a period when the memories of the makers or writers must of necessity have become vague as to details. The only safe guide under such circumstances is to look at contemporaneous documents and records of the transactions made at the time or very shortly afterwards, and to see with what portions of the evidence of the witnesses they are most consistent, and to what inference on the facts they fairly and reasonably lead. The only documentary evidence of the terms on which the Adelaide subscribers paid their money is the subscription list signed by each of the subscribers. The material part of the document is the heading signed by the chairman of the Adelaide committee, which it will be noted is described as "the Adelaide committee of the Darling River Navigation Co." That contains the words "Mr. T. W. Chambers was deputed to canvass the city for subscriptions to *further the objects of the company*." That is the only evidence of any express terms upon which the moneys were subscribed. There is evidence of reasons for the necessity of subscriptions urged by Chambers at the meeting of the 21st August, 1884, of the resolution passed at that meeting, and of the resolution of the committee appointed by that meeting. But there is no evidence to connect these matters with the payment by subscribers except the subscription list to which their signatures are attached. There is only one other fact proved as to the terms upon which the money was subscribed. That occurs in Chambers' evidence. He states that the subscribers had the option of being allotted shares in the proposed company to an amount covered by their subscriptions, but that none of them had expressed a wish to avail themselves of the option. That evidence of Chambers is corroborated by an entry of his in the minute book of the company dated the 23rd December, 1884, four months after the money had been collected, in the following words: "The most of the above were given as subscriptions, but it was understood that, if any subscribers chose to come in as promoters, they could have promoters' shares allotted to them to the value of their respective subscriptions." Mr. Justice *Holroyd* finds expressly that the facts so mentioned in Mr. Chambers' statement have been proved. It would appear therefore from the

evidence furnished by the subscription list itself, and by the facts last mentioned, that the whole transaction may be thus described—the subscription of moneys by mercantile people in Adelaide "to further the objects" of a company whose business, when established, would be in effect the securing of continuous navigation of the River Darling—a project in which we may assume that the subscribers were as business men deeply interested—every subscriber in addition to the indirect advantage which a continuously navigable River Darling would bring him, being also entitled to the direct benefit, if he so wished, of becoming a shareholder in the proposed company to the extent of the interest represented by his subscription. That is a fair statement, I think, of what the facts amount to. Under these circumstances what is the position of these Adelaide subscribers? Are they in a position of persons who have merely made an unconditional gift of their money, or, can it be reasonably implied from the circumstances under which the subscriptions were given that they handed over their money to the provisional directors of the company clothed with the trust to return it if the project was abandoned? Or, again, was it a condition of the receipt of the money that the directors undertook to return it if the object for which the money was given was abandoned? I agree with my learned brother the Chief Justice that the allowing of the option was a consideration for the payment of the subscription which would prevent the implication of a trust, even if there were any circumstances from which a trust could otherwise be reasonably implied. But looking at the list of subscribers and its heading, and at the evidence we have of what took place before and at the time of the payment of the money to the company, I find it impossible to come to the conclusion that the defendant has established the implied trust or the implied contract upon which his case rests, or that there is any reason to doubt that the transaction was other than it would appear to be on the face of the subscription list—a free gift to the proposed company of a sum sufficient to help them over their then immediate difficulty, the raising of sufficient money to insure their incorporation by Act of Parliament, without which incorporation the work in which the subscribers were really interested, the locking of the River Darling, could not

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be begun, and without any intention or expectation on their part that, if the project was abandoned, the money would be returned. There is no need to express any opinion as to whether the plaintiffs could be called to account for unauthorized expenditure by the shareholders to whom the money now belongs. It is sufficient to say that the respondent Waite, as representing the Adelaide subscribers, has failed to establish that these moneys were held by the provisional directors of the proposed company upon any trust for the subscribers, or upon any obligation of any kind to return it to them on the abandonment of the enterprise. It follows in my opinion that Palmer and the shareholders in the proposed company are entitled to a declaration in their favour. As to the form of that declaration, and the order for costs, I entirely concur in the judgment of my learned brother the Chief Justice.

Appeal allowed with costs. Judgment appealed from discharged with costs. Respondent's counterclaim dismissed. Declaration that the fund the subject-matter of the action is held by appellants on behalf of the subscribers for shares in the proposed company. With certain other orders as to costs. Liberty to apply.

Solicitor for appellants, *J. Woolf*, Melbourne.
Solicitors for respondent, *Mills & Oakley*, Melbourne.

B. L.