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inseparable references to another or other offences and that the mere fact that they are made to a police officer after the prisoner is in custody is not enough to exclude them. We agree that this is so. But of course a Judge after admitting such evidence should by his direction do what is possible to prevent prejudice to the prisoner. We do not think this case raises this question in the form which makes it desirable to grant special leave.

Application refused.

Solicitor for the applicant, *A. Banks-Smith*, Crown Solicitor for Tasmania, by *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.

[HIGH COURT OF AUSTRALIA.]

METROPOLITAN GAS COMPANY . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

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MELBOURNE, *Sept.* 30; *Oct.* 3.

SYDNEY, *Nov.* 25.

Gavan Duffy C.J., Rich, Starke and McTiernan JJ.

Income Tax (Cth.)—Assessable income—Deductions—Superannuation fund—Contributions by company—Allowable deductions—Discretion of Commissioner—Power of High Court on appeal from assessment—Mandamus—Income Tax Assessment Act 1922-1929 (*No.* 37 *of* 1922—*No.* 11 *of* 1929), *secs.* 23 (1) (*j*), 51A.

By a trust instrument a superannuation fund was established for the purpose of providing pensions or retiring allowances to the employees of a company. The employees and the company contributed sums of money to the fund and the company claimed, under sec. 23 (1) (*j*) of the *Income Tax Assessment Act* 1922-1929, that it was entitled to deduct the payments made by it from its assessable income. The Commissioner disallowed the deduction on the ground that the "rights of the employees to receive the benefits, pensions or retiring allowances" had not been "fully secured" to them by the trust instrument

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within the meaning of that section. Clause 29 of the trust instrument which was objected to by the Commissioner provided that upon the dismissal of a contributor he should forfeit his right to a refund of all contributions made by him to the fund and should cease to have any right to participate in any of the benefits sought to be created by the trust instrument. The Commissioner objected also to clauses which provided that if a contributor took part in a strike he forfeited his right to a refund of his contributions or any participation in the fund, and that the directors of the company with the approval of the trustees under the instrument might make and alter rules for the administration of the fund, and to a clause providing for the disposal of the fund in the event of the winding up of the company.

Held:—

(1) By *Gavan Duffy* C.J. and *Starke* J., that a writ of mandamus commanding the Commissioner to consider its claim to the deduction was available to the company;

(2) By the whole Court, that the High Court had power to determine whether the Commissioner had exercised according to law his discretion under sec. 23 (1) (*j*) of the *Income Tax Assessment Act*;

(3) By *Gavan Duffy* C.J. and *Starke* J., that evidence given by the Commissioner as to his reasons for disallowing the deduction was admissible in the proceedings in the High Court;

(4) By *Gavan Duffy* C.J. and *Starke* J. (*Rich* and *McTiernan* JJ. dissenting), that it was within the Commissioner's function to consider whether clause 29 was, in all the circumstances of the case, so unreasonable as to lead to the conclusion that the rights of the employees were not fully secured.

(5) By the whole Court, that the other objections of the Commissioner to the trust instrument were unfounded.

Per Gavan Duffy C.J. and *Starke* J.:—The question which the Commissioner has to consider and upon which he must be satisfied, is whether the rights of the employees to receive the benefits, pensions or retiring allowances have been fully secured: it is not whether the stipulated rights have been secured in due legal form, but whether the Commissioner is satisfied that the actual receipt of the individual personal benefits, pensions and retiring allowances from the fund to which an employer has made contributions from his assessable income is fully secured.

Per Rich and *McTiernan* JJ.: Clause 29 merely provided conditions of the right conferred and went only to the nature and measure of the benefit, pension or retiring allowance, and not to the security of the right to receive them.

CASE STATED.

In an appeal by the Metropolitan Gas Company to the High Court from assessments of it for Federal income tax for the years 1927-1928, 1928-1929 and 1929-1930, and in proceedings by the Company for a writ of mandamus to compel the Commissioner to consider its objections to the assessments, *Starke* J. stated a special

case, which was substantially as follows, for the opinion of the Full Court :—

1. The Metropolitan Gas Company is a body corporate constituted under the Act No. 586 of the State of Victoria having a paid up capital of £1,300,000 divided into 260,000 shares of £5 each, and carries on and at all times material carried on the business or undertaking on a large scale of manufacturing and supplying gas to consumers throughout Melbourne and its suburbs and employs large numbers of workmen in its business or undertaking.

2. By a trust instrument dated 11th October 1926 and made between the Company of the first part, and the trustees named therein of the second part, and the persons whose names appeared in the schedule thereto of the third part, it was provided that there should be established a fund to be called " The Metropolitan Gas Company's Staff Superannuation Fund," into which should be paid the contributions of officers on the permanent staff of the Company and the payments into the fund by the Company under the said instrument, and from which should be paid the benefits thereby provided for, and that the fund should be vested in the trustees or their successors in the trust and held by them on the terms of the said trust instrument.

3. In the year 1927 the Company made a return, pursuant to the *Income Tax Assessment Acts* 1922-1927, of its total assessable income for the financial year 1927-1928 based on its income derived from all sources during the period 1st July 1926 to 30th June 1927.

4. Similar returns were made under the said Acts as amended from time to time for the financial years 1928-1929 and 1929-1930 based on its income derived from all sources during the preceding twelve months ending on 30th June 1928 and 30th June 1929 respectively.

5. In each of these returns the Company claimed to deduct so much of its assessable income which it set aside or paid as an employer of labour to " The Metropolitan Gas Company's Staff Superannuation Fund " established under the said trust instrument.

6. The amount so set aside or paid out of the assessable income of the said financial years was not less in each of the said years than the sum of £6,000.

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7. The Commissioner, after having tentatively allowed a deduction of £6,000 so set aside or paid out of the assessable income of the first of the said financial years in the assessment for that year because he had not then determined the right of the Company to deduct it, later by an amended assessment dated 12th May 1930 disallowed the deduction, and he disallowed the deductions claimed for the other two of the said financial years in the assessments for such financial years dated 19th April 1929 and 30th April 1930 respectively.

8. The Company was dissatisfied with its assessments to income tax made by the Commissioner in each of the said years and particularly with the disallowance of the deductions so claimed by it, and duly lodged with the Commissioner objections in writing against each of the said assessments, but the Commissioner disallowed the objections. The Commissioner informed the Company that it was competent for it to have its objections treated as appeals in accordance with the provisions of sec. 50 (4) of the Act, and that if the Company elected to have its objections referred to the Board of Review set up under the Act its written request must be accompanied by the prescribed deposit.

9. The Company elected not to have its objections referred to the Board of Review, but in writing requested the Commissioner to treat its objections as an appeal against each of the assessments and forward the same to the High Court, which he accordingly did.

10. On 8th June 1932 the Company obtained a rule nisi directed to the Commissioner to show cause why a writ of mandamus should not issue commanding the Commissioner to consider and determine the Company's objections according to law.

11. The reasons or grounds assigned by the Commissioner for his disallowance of the deductions claimed by the Company have been stated by him or officers of his department as follows :—

(*a*) The reasons or grounds assigned in a letter dated 14th May 1930 from the Federal Deputy Commissioner of Taxation to the Company, which letter accompanied the amended assessment dated 12th May 1930 for the first of the said financial years in which the disallowance of the deduction claimed in respect of that year was first made.

(*b*) The reasons or grounds assigned in mutual admissions made by the parties to the appeals, namely:—The Commissioner considered the question of allowing as a deduction from the assessable income of the Company for any year so much of such income as the Company contributed to the superannuation fund. After considering the provisions of the trust instrument the Commissioner, by reason of the provisions of clauses 29, 30, 37, 38, 42, 44 and 50 thereof and of each of such clauses, was not satisfied that the rights of the employees of the Company to receive the benefits, pensions and retiring allowances set out in the instrument had been fully secured and he accordingly was not satisfied that the fund had been established or the contributions made in such manner that the rights of the employees had been fully secured within the meaning of sec. 23 (1) (*j*) of the *Income Tax Assessment Act* 1922-1929. Apart from his dissatisfaction based upon the provisions of the said clauses of the instrument the Commissioner is and at all times material was satisfied that the fund had been established and the contributions made in such manner that the rights of the employees to receive the benefits, pensions and retiring allowances had been fully secured within the meaning of the section.

(*d*) The reasons or grounds assigned in affidavits of the Second Commissioner sworn 9th and 10th June 1932.

(*e*) The reasons or grounds assigned by the Second Commissioner in his cross-examination in these proceedings.

The reasons for the disallowance of the deductions set out in the letter of 14th May 1930 referred to in par. 11 (*a*) of the case were as follows:—"In connection with the disallowance of contributions to the staff superannuation fund, I have to state that the Federal Commissioner has advised that the undermentioned clauses of the trust instrument, as at present constituted, prevent the granting of an allowance under sec. 23 (1) (*j*):—Clause 29.—No provision is made for a dismissed person to receive his money back with or without interest. This means that the fund may be used as a means of additional punishment to employees. While this clause exists it cannot be said that the rights of the employees are fully secured because the right of any one of them can be totally destroyed by dismissal for any cause. Should the clause be eliminated there

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is nothing to prevent the Company making provision to recoup from the fund any moneys embezzled by the contributor or owing by him to the Company. Clause 30.—The remarks in respect of clause 29 apply here also. To obtain the benefit of the section, omission of this clause is necessary. Clause 37.—Alteration to or modification of rules should be submitted to this office for approval and an undertaking must be given that any rules or regulations made or altered in the future will be submitted to this Department before incorporation in the scheme. Clauses 38 and 44.—No provision has been made that a contributor elected by his fellow contributors should be a trustee. This is necessary from an income tax point of view, also that the opinion of the majority of the trustees should prevail in all matters. Clause 42.—This clause is approved subject to the the suggested amendment of clauses 38 and 44. Clause 50.—An alteration will be necessary to provide that, in the event of liquidation, the amount standing to the credit of the fund must be distributed wholly amongst pensioners, contributors and their dependants, or dealt with in some manner prescribed in their behalf."

The affidavits sworn on behalf of the Commissioner referred to in par. 11 (*d*) of the special case set out various reasons why the Commissioner was not satisfied that the superannuation fund had been established or the contributions thereto made in such a manner that the rights of the employees of the Company to receive the benefits, pensions or retiring allowances set out in the trust instrument had been fully secured within the meaning of sec. 23 (1) (*j*) of the *Income Tax Assessment Act* 1922-1929. The objections to the form of the trust instrument were substantially similar to those stated in the letter dated 14th May 1930 above set out.

The oral evidence referred to in par. 11 (*d*) of the special case which was given on behalf of the Commissioner was in substance that it appeared to him that the interests of the employees were not fully secured, when the Company had the right with the concurrence of the chairman of directors of the Company as the controlling factor in the trustees to insert regulations affecting the rights of employees, and that the Company had taken to itself a power which would have destroyed any rights that the employees had under the trust deed.

The clauses in the trust instrument by reason of which the Commissioner took exception to the form of the instrument were as follows :—" 29. Upon the dismissal of a contributor he shall forfeit his right to a refund of all contributions made by him to the fund and shall cease to have any right to participate in any of the benefits sought to be created by these presents. 30. If a contributor join in or take part in a strike he shall forfeit his right to a refund of all contributions theretofore made by him to the fund and shall cease to have any right to participate in any of the benefits sought to be created by these presents. . . . 37. The directors of the Company may from time to time with the approval in writing of the trustees make rules prescribing all matters required or permitted to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to these presents and in particular may make rules altering all or any of the regulations contained in these presents for the time being relating to the fund and may make new rules or regulations to the exclusion of or in addition to all or any of the rules or regulations for the time being relating to the fund and the rules or regulations so made and for the time being in force shall be deemed to be regulations in relation to the fund of the same validity as if they had originally been contained in these presents and shall be subject in like manner to be altered or modified by any subsequent rules similarly made. . . . 38. The trustees may meet together for the despatch of business adjourn and otherwise regulate their meetings as they think fit. A trustee may at any time convene a meeting of the trustees to be held at the office of the Company. In the event of a difference of opinion arising as to any question submitted at any meeting of the trustees the decision thereon of the trustee who then occupies the position of chairman of the board of directors of the Company shall prevail. . . . 42. The trustees in the exercise of the authorities and discretions hereby vested in them shall have an absolute and uncontrolled discretion and may exercise the same from time to time and at any time. . . . 44. The trustees of the fund shall be the member of the board of directors of the Company who is for the time being acting as the chairman of such board and the officer of the Company who is for the time being acting as

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secretary of the Company. . . . 50. If an order shall be made or an effective resolution shall be passed for the winding up of the Company or otherwise howsoever upon the determination of the purposes of this instrument the assets of the fund shall be realized by the trustees and the proceeds shall be applied under the advice of an actuary appointed by the trustees first to provide as far as possible the pensions and allowances of the then beneficiaries next in payment to existing contributors of the amounts contributed by them to the fund with compound interest added at a rate not exceeding five pounds per centum per annum and any balance remaining shall be dealt with by the trustees in accordance with a scheme to be determined by the trustees with the approval of the directors of the Company."

The questions for the determination of the Full Court were as follows :—

(1) In the circumstances hereinbefore set out is the writ of mandamus available to the Company ?

(2) Has this Court in the circumstances hereinbefore set out any jurisdiction or authority to inquire into the reasons or grounds for the decision or determination of the Commissioner that he was not satisfied that the Metropolitan Gas Company's Staff Superannuation Fund was established or the before-mentioned payments made in such manner that the rights of the employees to receive the benefits, pensions or retiring allowances provided under the said trust instrument were fully secured ?

(3) Was the evidence given by the Commissioner on his cross-examination aforesaid relevant to or admissible in the proceedings in which this case is stated or either of them ?

(4) Did the Commissioner in disallowing the said contributions to the said fund as deductions from assessable income (*a*) act upon any and what wrong construction of sec. 23 (1) (*j*) of the *Income Tax Assessment Act* 1922-1929, or of the said trust instrument ? (*b*) consider any and what fact or circumstance that he ought not to have considered for the purpose of his decision or determination under the said sec. 23 (1) (*j*), or omit to consider any and what fact or circumstance that he ought to have considered ?

Wilbur Ham K.C. (with him *Herring*), for the appellant. The fund which is created is to be made a permanent fund. The scheme is one which the parties have agreed to, and it is outside the Commissioner's sphere to criticize it. All that the Commissioner has to do is to see that the scheme is not illusory and that the rights of the employees are secured. If sec. 23 (1) (*j*) were intended to give the Commissioner a general supervision over such schemes it would be a piece of sociological or industrial legislation and not taxation. The last proviso in the paragraph shows that the Commissioner has to be satisfied only that the recipient was an employee in some business, that there was some contribution of money out of some particular year's income, and those are all the things he has to be satisfied about. On the natural meaning of the language of sec. 23 the Commissioner has to be satisfied only that the rights which the instrument purports to give to employees are secured, and he is not concerned to consider whether a better scheme would give them better rights, and as he has taken into consideration extraneous matters the Court will not substitute its discretion for his but will direct him to consider the matter according to law. The intention of the Legislature is that an employer who bona fide contributes to a superannuation fund shall be entitled to deduct such contributions from his assessable income.

Robert Menzies, A.-G. for Victoria (with him *Tait*), for the Federal Commissioner of Taxation. The Commissioner has to be satisfied that the interests of the employees are sufficiently protected under the scheme. The words "fully secured" at the end of the first proviso impose a duty on the Commissioner to ascertain whether the employees are sufficiently protected. It is necessary to ascertain whether the rights of the individual employee have been fully secured. The answer of the appellant is that the money has been secured in the bank. The proviso to sec. 23 is looking to payment out of the fund, not to payment into the fund. The words "fully secured" relate to the agreement itself and look to see if the person may reasonably expect to receive the pension. The fund cannot be secured to the individual if he is subject to dismissal when he will

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lose all his rights. It is the employee's right to receive the benefit which is being dealt with.

Wilbur Ham K.C., in reply. The argument that the directors might conspire to deprive the employees of the benefit of the deed depends on a misconstruction of the deed. Under this scheme the Company cannot be a beneficiary under any circumstances. The Commissioner has not exercised his discretion according to law. Any amendment of the rights of the parties must be confined to such amendments as could reasonably be considered to have been within the contemplation of the parties when the contract was made (*Hole* v. *Garnsey* (1)).

Cur. adv. vult.

The following written judgments were delivered :—

Nov. 25.

GAVAN DUFFY C.J. AND STARKE J. This was a case stated for the opinion of this Court in an appeal by the Metropolitan Gas Company under the *Income Tax Assessment Acts* 1922-1929, and in certain proceedings on a rule nisi for a writ of mandamus obtained by the Company and directed to the Commissioner. The facts are fully set out in the case. Shortly stated, the Metropolitan Gas Company carries on the business of manufacturing and supplying gas to Melbourne and its suburbs, and employs labour on a considerable scale. By a trust instrument, a fund called " The Metropolitan Gas Company's Staff Superannuation Fund " was established. The Company and its employees contribute to this fund in accordance with the provisions of the trust instrument. The Company, in each of the financial years 1927-1928, 1928-1929, 1929-1930, contributed to this fund a sum of not less than £6,000. It claimed each of these sums as a deduction in the respective financial years in its return of assessable income pursuant to the *Income Tax Assessment Acts* 1922-1929. The Acts provide by sec. 23 :—" (1) In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer from all sources in Australia shall be taken as a basis, and from it there shall be deducted . . . (*j*) so much of the assessable income as is set aside or paid by an employer of labour as or to a fund to provide individual personal benefits, pensions or retiring allowances for

(1) (1930) A.C. 472, at p. 500.

employees: Provided that a deduction shall not be allowed unless the Commissioner is satisfied that the fund has been established or the payment made in such a manner that the rights of the employees to receive the benefits, pensions or retiring allowances have been fully secured."

The Commissioner disallowed the deductions claimed, and the Company, as already indicated, appealed to this Court, and also obtained a rule nisi for a writ of mandamus to the Commissioner directing him to consider and determine according to law the Company's claim to the deductions.

According to the argument presented to us on behalf of the Company, the function of the Commissioner under this section is merely to satisfy himself that the instrument creating a fund or regulating its administration also makes sufficient provision for securing to every beneficiary the benefits to which he is entitled under it, so that in law he may obtain that which the instrument purports to give him. It was conceded that the Commissioner was entitled to consider whether a fund was established bona fide, giving real and not merely visionary rights or benefits to employees, but it was said that he was not at liberty to consider the reasonableness or propriety of any condition, whether precedent or subsequent, affecting the right of the employee to receive the benefit, pension or retiring allowance.

In our opinion the argument is unsound. The question which the Commissioner has to consider and upon which he must be satisfied, is whether the rights of the employees *to receive* the benefits, pensions or retiring allowances have been fully secured. It is not whether the stipulated rights have been secured in due legal form, but whether the Commissioner is satisfied that the actual receipt of the individual personal benefits, pensions and retiring allowances from the fund to which an employer has made contributions from his assessable income is fully secured. The Commissioner has a wide discretion: it is part of his function to satisfy himself that employees shall in fact get the benefit of the fund, that they are protected against unreasonable deprivation of benefits from the fund, that the management and investment of the fund are properly safeguarded, and so forth. This leads to a consideration of the reasons assigned

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by the Commissioner for refusing the deductions claimed. The Court has not to consider whether in its opinion the rights of the employees to receive the benefits, &c., under the trust instrument were not fully secured, but only whether the Commissioner has acted within the limit to which an honest man, competent to the discharge of his office, ought to confine himself. It is the Commissioner that must be satisfied, not this Court; but he must act "according to the rules of reason and justice, not according to private opinion . . .; according to law, and not humour": he must not act in a vague or fanciful manner, but legally and regularly (*Sharp* v. *Wakefield* (1)). The Commissioner based his view upon several clauses in the trust instrument, namely, 29, 30, 37, 38, 44 and 50. Clause 29 provides that upon the dismissal of a contributor he shall forfeit his right to a refund of all contributions made by him to the fund, and shall cease to have any right to participate in any of the benefits sought to be created by the trust instrument. In our opinion, the consideration of such a provision is within the function of the Commissioner. The dismissal is not conditioned upon misconduct, or any other cause, but forfeiture by the employee of his benefits follows simply upon the fact that he has been discharged from employment by the Company. An honest and competent man might consider that such a provision is unreasonable, and so be led to the conclusion that while it exists the rights of the employees are not fully secured. But we do not suggest such a conclusion. The question is one for the Commissioner to consider in all the circumstances of the case. Clause 30 declares that in case a contributor joins or takes part in a strike, he forfeits his right to a refund of his contributions or any participation in the superannuation fund. Strikes in connection with undertakings for the supply of light and water constitute a grave danger to the public (see *Employers and Employés Act* 1928, sec. 56), and involve serious losses to the undertakers. It is not an unreasonable stipulation that persons taking part in them should forfeit rights in any superannuation fund established by the undertakers. The Commissioner's objections to this clause cannot be supported. Clause 37 contains a power for the directors of the Company, with the approval in writing of the

(1) (1891) A.C. 173, at p. 179.

trustees under the instrument, to make and alter rules, including the rules relating to investment, scales of contributions, and the grant of benefits. Some such provision is necessary, but the objection is that the power is given to the Company, and that the trustees of the fund are the chairman and secretary of the Company. The trustees are, of course, in a fiduciary position under the trust instrument, and must exercise their powers honestly and reasonably in the interest of the contributors. Otherwise, we apprehend, they would be controlled by a Court of competent jurisdiction. The Commissioner's objection cannot be supported. Clauses 38 and 44 together provide that the chairman and secretary of the Company shall be trustees of the fund, and that, in the event of a difference of opinion arising as to a question submitted at a meeting of the trustees, the decision of the trustee who is chairman of the Company shall prevail. We can find nothing sinister or unreasonable in this clause. Trustees there must be, and it is difficult to understand why they should not be the chairman and secretary of the Company; or why the chairman's view should not prevail if there be a difference of opinion. The Commissioner's objection to these clauses cannot be supported. Clause 50 provides for the disposal of the fund on winding up. It is a necessary clause, but the Commissioner objects to the provision that any balance remaining after provision so far as possible of the benefits under the trust instrument to the then beneficiaries and payment to existing contributors of the amounts contributed with compound interest, shall be dealt with in accordance with a scheme to be determined by the trustees with the approval of the directors of the Company. The Commissioner has advanced the fanciful idea that the Company under this clause appropriates such balance to its own use. Again the reply must be that the trustees are in a fiduciary position, and in case of complaint would be under the control and direction of a Court of competent jurisdiction.

It only remains for us to indicate the formal answers that should be given to the questions stated in this case:—(1) Yes. (2) Yes. (3) Yes. (4) (*a*) and (*b*): The Commissioner did not act upon any wrong construction of the Act, but he wrongly applied the Act to the provisions of the trust instrument, in the manner stated in the reasons above set forth.

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RICH J. This was a case stated by *Starke* J. The substantial question out of which this proceeding arises is whether the taxpayer is entitled to deduct from its assessable income contributions paid by it to a staff superannuation fund. The fund was established by a trust instrument expressed to be made between the taxpayer company of the first part, two trustees of the second part and officers of the Company of the third part. The instrument provided for a large contribution from the taxpayer company, portion of which was payable at the rate of £3,000 per annum, and for contributions from the officers who should become contributors. Out of the fund so created, contributors are to receive pensions the amount of which is governed by age and length of contribution. Subject to a proviso upon which this case turns, sec. 23 (1) (*j*) of the *Income Tax Assessment Act* 1922-1928 provides for a deduction by a taxpayer of so much of the assessable income as is set aside or paid by an employer of labour as or to a fund to provide individual personal benefits, pensions or retiring allowances for employees. It cannot be denied that the contributions sought to be deducted were made to establish a fund which falls within this provision. No suggestion was made that the fund is illusory. Its reality and its correspondence to the description contained in the provision were uncontested. The taxpayer is, therefore, presumptively entitled to the deduction which must be made unless the prima facie right is defeated by the proviso. The proviso is as follows: "Provided that a deduction shall not be allowed unless the Commissioner is satisfied that the fund has been established or the payment made in such a manner that the rights of the employees to receive the benefits, pensions or retiring allowances have been fully secured." The Commissioner declared it to be his opinion that the fund had not been established in such a manner that the rights of the employees to receive the pensions were fully secured. Grounds were assigned for this conclusion which are explained and elaborated by means of a cross-examination of the Second Commissioner to which he was submitted. The question is whether the grounds upon which he appears to have acted are within the scope and purpose of the proviso and whether he exercised his discretion according to law. The

grounds were stated in various ways, as is only natural in a correspondence relating to such a question and in a cross-examination, but in substance they come down to four clauses of the deed. Clause 37 of the instrument is as follows :—" The directors of the Company may from time to time with the approval in writing of the trustees make rules prescribing all matters required or permitted to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to these presents and in particular may make rules altering all or any of the regulations contained in these presents for the time being relating to the fund and may make new rules or regulations to the exclusion of or in addition to all or any of the rules or regulations for the time being relating to the fund and the rules or regulations so made and for the time being in force shall be deemed to be regulations in relation to the fund of the same validity as if they had originally been contained in these presents and shall be subject in like manner to be altered or modified by any subsequent rules similarly made. For the purposes hereof all the provisions herein contained in clauses 6, 8, 9, 12, 13, 14, 15, 16, 24, 25, 26, 34, 48 and 50, shall be deemed to be rules or regulations in relation to the fund." The Commissioner appears to have apprehended that under this clause the directors might, with the approval of the trustees, abrogate the substantive right of a contributor or a class of contributors. This view is founded upon an erroneous interpretation of the provision which, in point of law, confers no such power (*Hole* v. *Garnsey* (1)). It is not the purpose of the provision to enable the destruction of any substantive right to pensions, and an exercise such as is apprehended would be not unlike a fraud on a power (*Vatcher* v. *Paull* (2)). Clause 50 provided for the fate of the fund in the event of the winding up of the Company. The Commissioner feared that under this provision the rights of the contributors might be defeated and the Company might divert to itself benefits otherwise secured to them. Without discussing the provision in detail it is enough to say that there is no foundation for the fear. Clauses 29 and 30 are as follows :—" 29. Upon the dismissal of a contributor he shall forfeit his right to a refund of all contributions made by him to the fund and shall cease to have any

(1) (1930) A.C., at p. 500.

(2) (1915) A.C. 372, at p. 378.

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Rich J.

right to participate in any of the benefits sought to be created by these presents. 30. If a contributor join in or take part in a strike he shall forfeit his right to a refund of all contributions theretofore made by him to the fund and shall cease to have any right to participate in any of the benefits sought to be created by these presents." The Commissioner considered that these clauses militated against the security required by the proviso. Indeed in relation to these clauses as well as many other provisions of the deed which, during the progress of this controversy, have been relied upon by him with diminishing force, he appears to have regarded himself as called upon to exercise a discretion directed to requiring a scheme conferring rights absolute and independent and without qualification upon the beneficiaries under the deed. In this he has, in my opinion, mistaken the meaning of the proviso. He is entitled to be satisfied that the receipt or enjoyment of the rights conferred upon the employees is secured to them by appropriate means. But, once it is conceded that the rights actually given or purporting to be given by the instrument in respect of the fund are such as to come within the main part of the provision, he cannot under the proviso insist that the rights must be increased or enlarged or if qualified made absolute before allowing the deduction authorized by sec. 23 (1) (*j*). Clauses 29 and 30 of the deed merely provide conditions of the right conferred, and go only to the nature and measure of the benefit, pension or retiring allowance, and not to the security of the right to receive them. The remaining grounds mentioned by the Commissioner are subsidiary and did not need separate consideration. In my opinion, he misconceived his function under the proviso, and accordingly his discretion was not exercised according to law and the assessment cannot stand. The procedure by objection and appeal is appropriate to set aside an assessment so founded (*Australian Mercantile Land and Finance Co.* v. *Federal Commissioner of Taxation* (1)). The power of the Court to inquire into the validity of the purported exercise of the Commissioner's discretion is in my opinion unquestionable under sec. 51A of the *Income Tax Assessment Act*. But this does not mean that the Court will always allow him to be cross-examined upon the motives and reasons

(1) (1929) 42 C.L.R. 145, at p. 154.

which actuated him. In my opinion, the facts and circumstances referred to in the case stated upon which he relied for the exercise of his discretion were irrelevant because, as to clauses 37 and 50 of the deed he was wrong in law in their effect and as to clauses 29 and 30 their effect was outside the scope and purpose of the proviso. The fourth question in the case stated should be answered accordingly. The second question should be answered: Yes, in order to ascertain whether he exercised his discretion according to law. These answers I think are enough to enable the learned Judge to dispose of the appeal, and it is unnecessary to answer the first and third questions.

McTiernan J. I have read the judgment of my brother *Rich*, and agree with it. The questions in the stated case should be answered in the manner stated in his judgment.

Order as set out at end of judgment of Gavan Duffy C.J. and Starke J.

Solicitors for the appellant, *Malleson, Stewart, Stawell & Nankivell.*

Solicitor for the Commissioner of Taxation, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.