[HIGH COURT OF AUSTRALIA.]

AVON DOWNS PROPRIETARY LIMITED . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

H. C. OF A. 1949.

SYDNEY, *May* 4, *Aug.* 3.

Dixon J.

Income Tax (Cth.)—Assessable income—Deductions—Private company—Accumulated losses—Majority of shares sold to other persons—Claim to deduct losses—Statutory requirement—Shares carrying twenty-five per cent of voting power to be beneficially held on last day of year of income by persons who beneficially held shares carrying not less than twenty-five per cent of voting power on last day of year in which loss incurred—"Beneficially held"—"Held"—"Member" of the company—Facts to be established to satisfaction of the commissioner—Decision of the commissioner—Review by the court—Income Tax Assessment Act 1936-1944 (*No.* 27 *of* 1936—*No.* 28 *of* 1944), *ss.* 80 (2), (5), 187 (*b*), 197, 198 (2), 199.

Under s. 80 (5) of the *Income Tax Assessment Act* 1936-1944 it is for the commissioner, and not the court, to be satisfied of the state of the voting power at the end of the year of income. His decision is, however, liable to review if he does not address himself to the question formulated by sub-s. (5), or if his conclusion is affected by some mistake of law, or if he takes into consideration some extraneous reason or excludes from consideration some factor which should affect his determination. The fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. Proof of the precise particular in which he has gone wrong is not necessary, it is enough that it is apparent that in some way he must have failed in the discharge of his exact function according to law.

Section 80 (5) is concerned with voting; therefore it should be treated as using the terminology of company law with the meaning attached to it in company law. For the purpose of this provision shares are "held" by the persons on the share register.

A transferor of a share who has been paid the consideration for the transfer does not hold the share beneficially but holds it simply as a passive trustee until the registration of the transferee's name on the register.

The expressions "voting power" and "member of a company" discussed.

H. C. OF A. 1949.

AVON DOWNS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

APPEAL under *Income Tax Assessment Act*.

Avon Downs Pty. Ltd. appealed, pursuant to ss. 187 (*b*), 197, 198 (2) and 199 of the *Income Tax Assessment Act* 1936-1944, to the High Court against an assessment to income tax based upon income derived by the company during the year ended 30th June 1944.

The appeal was heard by *Dixon* J. in whose judgment the facts are sufficiently set forth.

Teece K.C. and *Ashburner*, for the appellant.

Hannan, for the respondent.

Cur. adv. vult.

Aug. 3.

DIXON J. delivered the following written judgment:—

This is an appeal by a taxpayer pursuant to ss. 187 (*b*), 197, 198 (2) and 199 of the *Income Tax Assessment Act* 1936 as amended from an assessment to income tax based upon income derived during the year ended 30th June 1944. The taxpayer is a private company within the meaning of Div. 7 of Part III. of the Act.

Within the four years next preceding the year of income the company incurred losses amounting to £6,196. This sum the company claimed as an allowable deduction from its assessable income pursuant to s. 80 (2). If the deduction had been allowed the taxable income of the company would have been reduced to the negligible figure of £147. The deduction would be allowable but for sub-s. (5) of s. 80. Because of that sub-section the commissioner disallowed the deduction. It is a provision that was placed in the Act during the year of income, viz. 1943-1944. A practice had arisen, so it is said, of turning to account the existence of losses in unsuccessful private companies. If the proprietor of a profitable business wished to obtain a substantial deduction from his next year's assessable income and could find a private company which during the three or four previous years had incurred a large enough accumulated loss, he had only to induce the shareholders to transfer their shares to him. He could then vest his business in the company and claim the past loss as a deduction from the profits of his next accounting period. Apparently this procedure was practised widely enough to cause the legislature to introduce a provision excluding cases where the identity of the holders of the shares carrying the voting power, or of at least seventy-five per cent of them, had changed since the loss had been incurred. This is done by sub-s. (5) of s. 80. It provides that no loss incurred by a private company

in any year prior to the year of income shall be an allowable deduction unless the company establishes to the satisfaction of the commissioner that, on the last day of the year of income shares of the company carrying not less than twenty-five per cent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than twenty-five per cent of the voting power on the last day of the year in which the loss was incurred. No doubt the condition that the shares should be held beneficially was considered necessary to prevent the sale of the beneficial interest without a formal transfer, or at all events registered transfer, of the actual shares, so that the continuing shareholders would be reduced to the status of dry trustees or nominees.

In the present case a sale of the greater part of the shares of the taxpayer company was effected just before the close of the year of income. There was no purpose of utilizing the losses as deductions from the profits of another business. On the contrary it was intended that the losses should be deducted from the profits of the year of income about to close. No doubt the prospect of the company's paying little or no tax in respect of those profits was reflected in the selling value of the shares.

The issued capital of the company consisted in 3,907 shares of £1 each. During the years in which the losses were incurred and during the year of income now in question up to the transaction by which the greater part of the shares were sold, G. A. Vivers held 1,001 shares and Jack L. Vivers 2,900 shares. Of the remaining six shares, four were held by Beryl I. Vivers and one each by two accountants.

The transaction was embodied in a document or documents dated 14th June 1944. By an agreement of that date between the five shareholders, described as the vendors, and three gentlemen named McCauley and two named O'Neill, described as the purchasers, the vendors agreed to sell and the purchasers to purchase 2,907 shares in the company for a total sum, subject to adjustment, of £17,078. The price was based on the assets and liabilities of the company and for the purpose of adjusting the named price a final statement of the assets and liabilities was to be prepared. But the purchase money named, viz. £17,078, was payable on 14th June 1944 and was in fact paid on that day. A schedule to the agreement showed the number of shares each of the vendors was to transfer and the amount he or she was to receive. Beryl I. Vivers and the two accountants were to transfer the six shares they held between them. But G. A. Vivers was to transfer 743, leaving him with 258 shares. Jack L. Vivers was to transfer 2,158, leaving him

H. C. OF A. 1949.

AVON DOWNS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

DIXON J.

with 742 shares. On the same day transfers accordingly were executed. By an arrangement, however, between G. A. Vivers and Jack L. Vivers the former transferred his remaining 258 shares to the latter for a consideration of £258 expressed to be paid. The transfer was executed upon the same day. As part of the transaction a dividend of seven and one-half per cent (£293) was declared and paid to the vendors. By the agreement between the vendors and purchasers it was provided that the 1,000 shares retained by the former should be converted into eight per cent cumulative preference shares. It was also agreed that the articles of association should be altered and that they should provide that the purchasers should become the directors in place of the existing directors, who were G. A. and Jack L. Vivers. The necessary resolutions carrying all this into effect were passed on 14th June 1944. Among the new articles of association adopted was one dealing with voting power. The article provided that upon a poll every member present in person or by proxy or by attorney should have one vote for every share held by him and in addition one vote for every pound (£1) lent by him to the company and for the time being owing. The purchasers had before 30th June 1944 advanced £2,000 to the company, four of them £450 each and the fifth of them the balance of £200. If, therefore, they had become, before 30th June, members of the company in respect of the 2,907 shares they acquired, they would, by virtue of the article, have been on that date entitled among them, on a poll, to 4,907 votes, while Jack L. Vivers would have been entitled only to 1,000 votes. But under s. 80 (5) it was necessary that the voting power carried at that date by the shares held by Jack L. Vivers should be twenty-five per cent of the total voting power. For he was the only remaining shareholder who had held shares carrying twenty-five per cent of the voting power on the last days of the respective years in which the losses were incurred. The answer made by the taxpayer company to this position is that before 30th June 1944 none of the purchasers had become a " member " within the meaning of the article of association.

It is claimed for the company that before that date none of the transfers was registered and the name of none of the purchasers had been entered in the share register. Reliance is placed upon the requirement of company law that to be a member of a company the name of a person must be entered in the register of members: s. 36 (2) of the *Companies Act* 1936 (N.S.W.). It was conceded that until registration the transferors were trustees of the shares for the transferees and I do not think it was disputed that the latter could

compel the former to exercise the votes which the shares carried as the transferees might direct. But the votes carried by the shares could not be increased by the loans until the transferees became "members." The article would not operate to increase the votes of a member because he was a dry trustee for a lender. If the vendors could exercise 1,000 votes against only 2,907 of the purchasers' that would be twenty-five per cent of the voting power.

The foundation of the foregoing contention of the company is the allegation that in truth and in fact the transfers were not registered before the critical date and the names of the McCauleys and the O'Neills did not appear in the register of members. It was necessary to establish the facts to the satisfaction of the commissioner in order to fulfil the condition imposed by sub-s. (5) of s. 80. Unfortunately the company made a bad beginning in providing the commissioner with a basis for being so satisfied. With the return of income derived in the twelve months ended 30th June 1944 the company included a list of its shareholders as at that date. The list showed the three McCauleys and the two O'Neills as holders of the 2,907 ordinary shares, Jack L. Vivers as the holder of 742 and G. A. Vivers of 258 preference shares. In a footnote it was stated that each shareholder owned the shares shown opposite his name in his own right and not as nominee for any other party, but the 258 shares shown as owned by G. A. Vivers were sold to him by Jack L. Vivers on 14th June 1944; that payment of the consideration money was effected on that day, but that the transfer was not registered in the books of the company until after 30th June 1945. The return was dated 15th September 1944.

The assessment was not made until 28th May 1945. The commissioner during the preparation of the assessment requested some further information. In response the accountants for the company in March and April 1945 wrote letters to him which made the matter even worse. One letter set out what purported to be a resolution passed on 29th June 1944 by the board of directors. The letter said: —On 29th June 1944 "It was resolved that the following transfers be and are hereby effected and the secretary be instructed to make the necessary entries in the share register." Then followed particulars of the transfers by the vendors to the respective purchasers. A similar resolution was passed on 3rd November 1944 with reference to the transfer of the 258 preference shares by G. A. Vivers to Jack L. Vivers; so said the letter, which set out the text of the resolution. Another letter gave the names of the lenders of the £2,000 and the amount each had lent. The letter then proceeded, "Each of the foregoing is a shareholder of the Company and his Christian names

H. C. OF A. 1949.

AVON DOWNS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

and address appear in the list of shareholders attached to the 1944 return." The commissioner, it appears, had the articles of association before him, or at all events a copy of the material article, and he refused to allow the deduction claimed. He could not do otherwise on the facts stated by the company. For they plainly amounted to a statement that the purchasers were members in respect of 2,907 shares and had lent £2,000. That meant 4,907 votes against 1,000. But evidence was called upon the hearing of the appeal before me to show that these facts were wrong. The evidence explained the purported resolution of 29th June 1944 as depending upon an unconfirmed minute of a meeting that never really took place. There were five directors, the three McCauleys and the two O'Neills. The chairman, Mr. A. L. M. McCauley, carries on business with his brother as accountants. His brother is also a director. He said in his evidence that on Thursday, 29th June 1944, a third member of the board happened to call at the office and the three of them discussed the company and the transfer, which, as he had been told earlier by their solicitor, the Commissioner of Stamp Duties was still holding. Two days later, on Saturday, 1st July, the press announced that the Government contemplated issuing a regulation restricting the transfer of shares. Upon reading this he attempted without success to communicate with their solicitor. He then asked his brother and the third director whether they were agreeable to treat the informal meeting of Thursday as a board meeting. To this they agreed. Apparently a minute was drawn up and placed in the minute book. When the public officer, who had not been changed, obtained the minute, he accepted all this and prepared the return accordingly. Indeed he was told by Mr. A. L. M. McCauley to treat the transfers as having been approved by the directors on 29th June. Upon receipt of the assessment the circumstances were examined again, legal advice was obtained and representations were made on behalf of the company to the officers of the Commissioner of Taxation; and on 27th June 1945 objections were lodged to the disallowance of the deduction claimed.

A letter accompanied the notice of objection. It stated that the new shareholders had not been entered in the share register before 30th June 1944 and were therefore not entitled to vote. The letter described how a new share register had been bought on 11th August 1944 and handed to the firm of McCauley & McCauley. Without the authority of the directors, a clerk of that firm some time later had made entries recording the transfers. The old register had remained with the accountants' firm, a member of which continued to be the public officer. In that register up to 27th June 1945 the

transfers had not been recorded. The letter went on to say that the board of directors had never dealt with the transfers. The letter referred to the extract from the minutes of the meeting on 29th June 1944 which was before the commissioner and said that the company was advised that the minutes were not valid because no notice of a directors' meeting had been given to all the directors, they were not all present, the decisions were quite informal and they should not have been recorded as resolutions.

On 27th June 1945, before the objections were lodged, Mr. A. L. M. McCauley and the public officer had an interview with some of the commissioner's senior officers. They produced the company's share register, the original and authentic book. They showed them the last entries and the absence of any entry of the transfers to the purchaser or of the transfer of the 258 shares from G. A. Vivers to Jack L. Vivers. They said they would have a meeting of directors that day to approve the transfers and direct their registration. Some blank pages were initialled by one of the officers. Shortly after on the same day the directors met. The minutes record a resolution preceded by a recital. It is as follows:—"Whereas doubts have arisen as to the efficacy of the purported Resolutions appearing on the Minute Book . . . dated 29th June 1944 and as the Transfers referred to have not been registered It was Resolved that the following transfers be and are hereby effected and the Secretary be instructed to make the necessary entries in the Share Register." Then follow particulars of the transfers.

Another resolution was passed to the effect that the 258 shares be transferred from G. A. Vivers to Jack L. Vivers and that the secretary prepare fresh certificates and make the necessary entries in the share register. It is not clear why this particular resolution was passed unless because so much time had elapsed since the resolution of 3rd November 1944 without an entry being made in the register and because the minutes of the meeting had not been confirmed. On 27th June 1945 the transfers were registered immediately after the directors had passed the resolutions and the names of the shareholders were entered in the share register upon the initialled folios of the book. Next it was taken down to the offices of the commissioner for their inspection and verification. The notice of objection was then sent in.

The commissioner disallowed the objections. He gave no reasons and it does not appear what view of the facts he took or whether he took any other view of the law than that upon which the objections rested. I myself am prepared to accept the explanation given before me of the purported minute of the supposed meeting

H. C. OF A. 1949.

AVON DOWNS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

DIXON J.

of directors of 29th June 1944 and I am prepared to accept the evidence that before the end of the year of income no entry was made in any share register of the company of the names of the transferees pursuant to the transfers of 14th June 1944.

But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.

For the taxpayer company reliance was placed upon what was said in the Privy Council upon discretions in *pari materia*, both in *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.* (1), and in *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (2). What was said by *Macfarlan* J. in *Perpetual Executors Trustees & Agency Co. (W.A.) Ltd. (John Turnbull Trust)* v. *Federal Commissioner of Taxation* (3) was also relied upon. But the only error suggested is that the commissioner did not perceive, and give effect to, the significance of the word " member " in the crucial article of association. The proposition that for want of entry in the register, and I suppose, in addition, for want of anterior approval of the transfers by the directors and a valid instruction to enter the names in the register, the transferees were not members, was persistently forced on the attention of the commissioner. I use the word " commissioner " to include the officers concerned in the determination of the matter. It was done by the interviews, by

(1) (1947) A.C. 109, at pp. 122, 123.
(2) (1940) A.C. 127, at p. 136.
(3) (1935) 3 A.T.D. 132.

the letter of 27th June 1945 and the notice of objections. The legal result was clearly explained. I do not know why it should be assumed that the commissioner disallowed the objections because of some misconception of the issue or of some error of law. In effect the contention is that he would not allow the deduction either because he thought that a person might be a member of a company before his name is entered on the register or because he thought that under the article it was enough that the person for whom the registered shareholder was a trustee, had lent money to the company. But these alternatives are by no means exhaustive. There are other possibilities. It is useful to divide up the composite issue formulated by sub-s. (5) into its components and to express them in terms of the facts of this case. The first step is to fix upon the persons who may be considered to fulfil the double condition of " beneficially holding " shares at the end of the years of loss and beneficially holding shares at the end of the year of income. It has been assumed that the answer in the present case must be that nobody except Jack L. Vivers and possibly G. A. Vivers can fulfil the double condition. Certainly they alone had twenty-five per cent of the voting power at the end of each year of loss. Clearly the McCauleys and the O'Neills did not. The four shares transferred by Beryl I. Vivers and the two by the accountants do not matter, but strictly while the transferors remained on the register they were trustees for the transferees. Let it be supposed that between them the two Vivers " beneficially held " 1,000 preference shares as at 30th June 1944. I shall give reasons later for the conclusion that the 258 preference shares standing in the name of G. A. Vivers were not held by him " beneficially " and were not " held " by Jack L. Vivers at all. But for the moment let that pass. On the supposition stated the two Vivers between them had under the article a voting power of 1,000 votes at 30th June 1944. The next inquiry must be whether " the voting power " is more than four times this figure. What is meant by " the voting power " ? On 30th June 1944, the purchasers could not themselves have voted at all without first taking a formal step. But they had it in their power to take that formal step, without depending on anything but their own joint action. The formal step was to meet as directors and to cause their names to be written in the register as transferees of the shares. Indeed in strictness they could not even attend a meeting without doing so except by obtaining a proxy. But the formal step was open to them at any moment. It was a step which would occupy only a time reckoned in minutes. It would have resulted in 4,907 votes on their side. It is a step that neither the Vivers nor anybody

H. C. OF A. 1949.

AVON DOWNS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

DIXON J.

else could have prevented them from taking at any moment they chose. If the commissioner had taken the view that in this situation they in fact did possess a "voting power" of 4,907 because nothing but a formal act depending on their own volition stood in the way of their exercising that number of votes, I should not be prepared to say he was wrong. There is nothing to suggest that he did take such a view and I do not feel called upon to say whether or not if he did so it is a tenable application of the words "voting power." My purpose in mentioning the matter by way of illustration is to show on what a very little step the question whether the total voting power in the company was 3,907 votes or 5,907 votes depends. For the question for the commissioner on this point was whether the McCauleys and O'Neills had stopped in time or had proceeded far enough to warrant the statement that they had a "voting power" of 4,907 votes. Actual entry in a book used as a share register would of course be enough. But so would some act that would operate to preclude the question of their membership as between them and the company. The company, up to the making of the assessment, had supplied the commissioner with information which could mean only one thing, namely, that as between the company and the McCauleys and O'Neills they were full members. When the shoe was found to pinch, the commissioner was invited to adopt the contrary view and to do so on the faith of explanations which, however circumstantial, were necessarily *ex parte*. I do not know why he must be taken to have been filled with confidence in the later version, why he must be assumed to have entertained no doubt that the earlier version had no justification in the actual facts or why he must be taken to be reasonably satisfied that he had been told everything and there was no further fact which would show that before 30th June 1944 the position had become such that all parties would have been precluded from denying that the purchasers were "members." In the circumstances a commissioner can hardly be considered unreasonable if he fails to rid himself altogether of misgivings and refuses to be satisfied that the issue is established. I do not regard it as of any importance that I myself would be prepared to accept the explanation and believe that there was no directors' meeting on 29th June 1944 and no entry of the purchasers' names in the share register. The evidence given on the hearing was fuller and more satisfying than the letter of 27th June 1945. In any case the commissioner was entitled to entertain some scepticism and in the circumstances to be sceptical and silent. At all events I am not prepared to find that the commissioner's refusal to be satisfied upon the issue

formulated by s. 80 (5) is due to any such misapprehension, mistake, misconception, unreasonableness or miscarriage of judgment as would authorize me to interfere and set aside his conclusion.

But if it fell to me to decide whether upon the facts and the law the conditions have been fulfilled which under sub-s. (5) of s. 80 must be satisfied before a private company can deduct its past losses, I should decide the question against the taxpayer company for a reason depending upon the words " beneficially held." As I have indicated already my opinion is that the 258 preference shares still standing at 30th June 1944 upon the share register in the name of G. A. Vivers cannot be added to the 748 standing in the name of Jack L. Vivers so as to make up the 1,000 shares necessary to form twenty-five per cent of the shares each carrying one vote. Beneficially the 258 shares belonged to Jack L. Vivers, but until his transfer was registered and his name placed on the share register he could not be said to " hold " them within the meaning of s. 80 (5). They were " held " by G. A. Vivers ; but he was a trustee for Jack L. Vivers and therefore did not hold them beneficially.

First as to the meaning of the word " held " in such a provision. What it means in the legislation relating to companies has been examined judicially. In *Re Wala Wynaad Indian Gold Mining Co.* (1) *Chitty* J. dealt with the word. The question arose under s. 40 of the *Companies Act* 1867 (Imp.) by which a contributory could not petition for winding up unless he filled one or other of certain qualifications. The material qualification was that he " held " shares for at least six months during the previous eighteen months. *Chitty* J. decided that it meant that he must have been on the register as shareholder for at least six months. His reasons were based on the sections of the Act of 1862. I shall quote the passage in full. His Lordship said :—" The 25th section of the Act of 1862, which requires a register of members to be kept, uses the term ' held ' with reference to the shares which appear against a member's name on the register. The words which occur in sub-sect. (1) of that section are ' the names and addresses,' &c. of the members of the company with the addition, in the case of a company having a capital divided into shares, of a statement of the shares ' held ' by each member. That plainly shews that the term ' held ' has no specific force, but shares are held by the person in whose name they are registered.

Then there is the 26th section, in which similar terms occur. ' The number of shares " held " by each of them,' which means simply the number of shares in respect of which they appear on

(1) (1882) 21 Ch. D. 849.

H. C. OF A. 1949.

AVON DOWNS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

the register. There are other sections which I will not refer to in which the term 'held' is used, and used as I consider in that sense only.

Table A, which I merely refer to for the purpose of elucidating this proposition, uses the term 'holder' and 'held' not infrequently and in no other sense except the sense of a registered owner. I will take one or two of the articles of table A for instance. Article 1 speaks of several persons 'registered as the joint holders;' article 2 specifies the shares 'held' by him. I take these as illustrations. There are many others, for instance in article 9, where the form of transfer is given 'subject to the several conditions on which I "hold" the shares.' There are other articles to the same effect. Take 27 as to offering the shares to members, where the term 'held' also occurs. I believe there are several others, but I do not think it necessary to refer to them. In the particular articles before me, I find similar expressions. Take article 72: 'Every shareholder shall have one vote for every entire number of five shares "held" by him.' That plainly means those shares which stand in his name on the register. Nothing can be more plain than that. No one can vote at a meeting where the company's capital is divided into shares except those who are on the register as holders of shares. Article 74 also has the same expression, 'The shares which if "held" by one person' and so on. I think then that the true meaning of the word 'held' in the 40th section of the Act of 1867 is simply that the contributory has had his name upon the register as the holder of the shares for the period in question" (1). Then *Chitty* J. says:—"I use now myself the term which is common in the courts, 'a shareholder,' that means the holder of the shares. It is the common term used, and only means the person who holds the shares by having his name on the register" (2).

Section 80 (5) is concerned with voting. Its purpose is both to exclude nominees from the enumeration of voting power and to take in those who are members of the company and vote independently of control. There is therefore every reason to treat the provision as using the terminology of company law with the meaning attached to it in company law.

It remains to apply the word "beneficially." It might be imagined that its meaning could occasion no doubt. But in s. 80 (6) (*a*) you find the remarkable expression "beneficially held by the trustee of his estate." There I think it must be intended to convey the idea that the trustee of the estate holds it as part of the estate and not for some person claiming adversely to the

(1) (1882) 21 Ch. D., at pp. 852, 853. (2) (1882) 21 Ch. D., at p. 854.

beneficiaries. In other words, if the testator was a nominee, his executor is to be in no better position than he is. It seems to me that a transferor of a share who has been paid the consideration for the transfer, holds simply as a passive trustee until the registration of the transfer and the entry of the transferee's name on the register. He could not be said to hold "beneficially." I am therefore of opinion that shares carrying twenty-five per cent of the voting power were not held beneficially by Jack L. Vivers and G. A. Vivers on 30th June 1944.

Both for this reason and because no ground has been shown for interfering with the commissioner's judgment, I think that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Allen, Allen & Hemsley.*

Solicitor for the respondent, *H. F. E. Whitlam,* Crown Solicitor for the Commonwealth.

J. B.