[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . APPELLANT;

AND

CLARKE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 12-14, 17-21, 24.

SYDNEY, *Nov.* 24.

Isaacs A.C.J., Higgins and Rich JJ.

Income Tax (Cth.)—Assessment—Income "derived" by taxpayer—Profits from dealing in shares in companies—Gift of profits—Power of Commissioner to amend assessment in case of fraud or attempted evasion—Income Tax Assessment Act 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918), *secs.* 3, 10, 18, 25, 35, 52 (*a*)—*Income Tax Assessment Act* 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *secs.* 2, 39, 51A.

High Court—Federal jurisdiction—Appeal from Judge of Supreme Court sitting without jury—Power to review findings of fact.

The taxpayer was assessed for Federal income tax in respect of profits arising from dealings in shares in companies. He objected to the assessment on the ground that those profits were received by or on behalf of various members of his family. The Commissioner of Taxation disallowed the objection, and the taxpayer appealed to the Supreme Court of Victoria. Some of the shares in question had been registered in the names of members of the family, and other shares in the names of persons who were not members of the family, while some members of the family had no shares registered in their names. In cases where shares were registered in the names of persons other than the taxpayer the scrip certificates were accompanied by a blank transfer form signed by the person in whose name the scrip was issued, and the scrip remained in the custody of the taxpayer until the shares were sold by him. Evidence was given on behalf of the taxpayer that the profits on the sales of some shares were distributed by him among the members of his family, but there was no evidence that any specific scrip had been treated as the property of any particular member of the family. The Supreme Court allowed the taxpayer's objection, and the Commissioner appealed to the High Court.

Held, by *Isaacs* A.C.J. and *Higgins* J. (*Rich* J. dissenting), that the objection had been properly disallowed by the Commissioner :—

By *Isaacs* A.C.J., on the ground that, in the circumstances of the case and having regard particularly to evidence which, in prior proceedings in relation to an assessment of a son of the taxpayer, had been given by the taxpayer and other witnesses who were called in both the present and the prior proceedings, the Supreme Court should not have accepted the evidence called on behalf of the taxpayer as discharging the burden, which was on him, of proving that the assessment was wrong :

By *Higgins* J., on the ground that in the circumstances the findings of fact of the trial Judge should not be disturbed, and that on the facts so found the taxpayer had failed to show that the shares in question belonged to the members of his family or any of them, inasmuch as (1) there was a mere voluntary promise by the taxpayer, who did not do all in his power to make the transfer of shares perfect, and equity would not order the gift to be completed ; (2) equity would not treat that imperfect gift as if it were a declaration of trust ; and (3) the subject of the promise—the specific shares intended to be given—was neither identified nor identifiable.

Per Isaacs A.C.J. :—Whether anyone, other than the person beneficially entitled, "derives" income, within the meaning of the *Income Tax Assessment Act* 1915-1918, is dependent on circumstances. A person in fact carrying on and controlling a business and appearing to the outer world as the owner "derives" the income produced by the business, and it is immaterial that he is accountable to another in respect of that income.

Power of the Commissioner of Taxation to amend an assessment where he has, within the meaning of sec. 2 of the *Income Tax Assessment Act* 1922-1925, "reason to believe that there has been an avoidance of tax owing to fraud or attempted evasion," considered.

Observations as to the power of the High Court, on appeal from a Judge sitting without a jury, to review the Judge's findings of fact.

Decision of the Supreme Court of Victoria (*Mann* J.) reversed.

APPEAL from the Supreme Court of Victoria.

By an amended assessment dated 16th April 1926 Alfred Clarke was assessed by the Federal Commissioner of Taxation for income tax for the year ending 30th June 1920 in respect of profits arising from dealings in shares in companies. Clarke objected to the assessment on the ground (*inter alia*) that the sum in question was received by or on behalf of various members of his family. The Commissioner having disallowed the objection, Clarke appealed to the Supreme Court of Victoria. The appeal was heard by *Mann* J., who upheld the objection.

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The Commissioner now appealed from that decision to the High Court.

The material facts appear in the judgments hereunder.

Sir Edward Mitchell K.C. and *Herring*, for the appellant. The burden was on the respondent to establish his objection, and he has failed to do so. His evidence was quite inconsistent with that given by him in prior proceedings before *Starke* J., and was not worthy of belief. The learned Judge should not have accepted his evidence, and this Court can and should review the findings of fact (*Scott* v. *Pauly* (1)). The evidence, even if accepted, does not establish any gift of, or trust in relation to, the shares. At the most there was a mere voluntary promise by the respondent that he would distribute the proceeds of sale among his family. The shares and the proceeds of sale remained his property up to the time of distribution. The respondent was carrying on the business of dealing in shares, and the profits derived from that business must be treated as the income of the respondent. What he did with that income is irrelevant. [Counsel referred to *Scott* v. *Brown, Doering, McNab & Co.* (2); *In re Wait* (3).]

Owen Dixon K.C. (with him *Walker*), for the respondent. The primary Judge accepted the evidence of the respondent, and his findings should not be disturbed. The main question was as to the credence to be given to the evidence, and, as the learned Judge, who saw the witnesses, accepted the evidence, this Court is not in a position to come to a different conclusion. The evidence does not justify the assumption that the respondent was carrying on a business of dealing in shares, and therefore the profits were not income at all.

[RICH J. referred to *Foreman* v. *Commissioners of Taxation* (4).]

In any case, the profits were not income "derived" by the respondent, as the shares and the proceeds of sale were always treated as the property of the family. All the dealings were

(1) (1917) 24 C.L.R. 274, per *Isaacs* J. at p. 278.
(2) (1892) 2 Q.B. 724, per *Lindley* L.J. at p. 729.
(3) (1927) 1 Ch. 606, at pp. 618, 622, 624.
(4) (1898) 19 N.S.W.L.R. (L.) 197.

conducted by the respondent on behalf of the family and not on his own behalf; so that he had no beneficial interest in the profits. The Commissioner had no power to make the amended assessment as the period of three years provided by sec. 2 of the *Income Tax Assessment Act* 1922-1925 had expired when that assessment was made. The cases of "fraud or attempted evasion" referred to in the section are cases of fraud or evasion in connection with the original return of income. In this case the Commissioner's "reason to believe" was based on matters arising at a later date, and it did not enable him to act under the section. [Counsel referred to *Halsbury's Laws of England*, vol. I., p. 192; *Underhill's Law of Trusts and Trustees*, 7th ed., p. 1; *Grant* v. *Grant* (1); *Baddeley* v. *Baddeley* (2); *In re Breton's Estate*; *Breton* v. *Woollven* (3); *Matthews* v. *Matthews* (4); *Strong* v. *Bird* (5); *Graham* v. *Green* (6); *Martin* v. *Lowry and Inland Revenue Commissioners* (7); *In re the Income Tax Acts* [*No.* 4] (8); *Blockey* v. *Federal Commissioner of Taxation* (9); *Income Tax Assessment Act* 1915-1918, secs. 33, 34; *Income Tax Assessment Act* 1922-1925, secs. 37, 38.]

[ISAACS A.C.J. referred to *Hardoon* v. *Belilios* (10).

[HIGGINS J. referred to *Kekewich* v. *Manning* (11); *Halsbury's Laws of England*, vol. XV., p. 429; *Real Property Act* 1915 (Vict.), sec. 40; *Lewin on Trusts*, 11th ed., p. 547.]

Sir Edward Mitchell K.C., in reply. The Commissioner can amend the assessment at any time if he has reason to believe that there has been fraud or attempted evasion. There is no reason why the language of sec. 2 of the Act of 1922-1925 should be restricted as contended by the respondent. [Counsel referred to *Blockey* v. *Federal Commissioner of Taxation* (9); *Californian Copper Syndicate (Limited and Reduced)* v. *Harris* (12); *In re Spanish Prospecting Co.* (13); *Companies Act* 1915 (Vict.), secs. 413, 414; *British and*

(1) (1865) 34 Beav. 623.
(2) (1878) 9 Ch. D. 113.
(3) (1881) 17 Ch. D. 416.
(4) (1913) 17 C.L.R. 8, at p. 14.
(5) (1874) L.R. 18 Eq. 315.
(6) (1925) 2 K.B. 37, at p. 38.
(7) (1927) A.C. 312, at p. 316.
(8) (1899) 25 V.L.R. 679; 22 A.L.T. 39.
(9) (1923) 31 C.L.R. 503.
(10) (1901) A.C. 118, at p. 123.
(11) (1851) 1 DeG. M. & G. 176.
(12) (1904) 5 Tax Cas. 159.
(13) (1911) 1 Ch. 92.

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American Telegraph Co. v. *Albion Bank* (1); *Strong* v. *Bird* (2); *Maitland on Equity*, p. 74; *Jones* v. *Lock* (3); *Heartley* v. *Nicholson* (4).]

Cur. adv. vult.

Nov. 24.

The following written judgments were delivered :—

ISAACS A.C.J. This is an appeal from a decision of the Supreme Court of Victoria under the Federal *Income Tax Assessment Act* 1915-1918, allowing an objection by the respondent by which he claimed that he was not taxable personally in respect of a sum of £39,915 included in his assessment as assessable income. The ground of the objection given effect to was that that sum was received by or on behalf of various members of his family. It was not actually decided whether the sum was assessable income at all, the learned primary Judge referring to certain considerations raising doubt in his mind on that point. At the same time he held clearly that the sum of £7,499—the residue of the profits distributed by the respondent after providing for moneys belonging to two outsiders—was taxable as income. In that there cannot be any doubt the learned Judge was right, and my only difficulty is to see, even on the assumption that the £39,915 belonged beneficially to the family, how it stands in any different position with regard to its character. The decision appealed from embraces a number of findings of fact and conclusions of law and the Commissioner appeals generally from all that are adverse to his assessment. I am greatly indebted to learned counsel on both sides for their able and thorough exposition of the voluminous and disconnected material and the complicated issues that have to be considered, for in the circumstances which, happily for the community, are of a most unusual character, there is no royal road to the determination of this appeal, short of a virtual abdication of our function as an appellate tribunal. Having had the advantage of that assistance, a careful examination of the evidence leaves me with but little hesitation as to the proper conclusions.

(1) (1872) L.R. 7 Ex. 119.
(2) (1874) L.R. 18 Eq. 315.
(3) (1865) L.R. 1 Ch. App. 25.
(4) (1875) L.R. 19 Eq. 233.

The issues in their larger aspects may be conveniently grouped as follows :—(1) Was the sum of £39,915 or some part of it income derived by anybody or was it all merely realized, that is, transformed into money ? (2) Were the Badak shares, or some of them, which produced portion of that sum the property of the respondent at the time they were sold ? (3) Were the Bux shares or some of them which produced other portion of that sum his property at the time they were sold ? I take these in order.

(1) *Capital or Income.*—The Act provides by sec. 39 of the 1922-1925 Act (sec. 35 of the 1915-1918 Act) that in a proceeding of this nature the Commissioner's assessment is to be taken prima facie as correct. It follows, therefore, that the burden of proving to the satisfaction of the Court that the sum in question was not income, but capital transformed, and that it was not his income, rests on the respondent. The justice of that burden cannot be disputed. From the nature of the tax, the Commissioner has, as a rule, no means of ascertainment but what is learnt from the taxpayer, and the taxpayer is presumably and generally, in fact, acquainted with his own affairs. The onus may prove to be dischargeable easily or with difficulty according to circumstances. Where, as here, a taxpayer has failed to keep any records of considerable dealings while engaged in profit-making transactions relied on by him to avoid the taxation ordinarily incident to such profits, and where, as here, he has entangled those transactions, and has given discordant, and in some cases inconsistent, accounts and explanations of them, the onus is of the heaviest character. I make these observations with general reference to all three groups of issues.

On the first issue, the pertinent facts seem to me to stand out very clearly—I am tempted to say "luridly." To call these moneys the mere transformation of a capital investment by realization on a favourable opportunity, as we were invited to do on behalf of the respondent, is, in my opinion, quite unreasonable. To transform capital, you must at least have capital to begin with; but when one examines in their naked form the methods pursued in order to gather in the huge amounts constituting the fund from which the sum now in dispute was drawn. it is seen that the capital or

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property supposed to be realized or transformed was illusory. As to one portion in particular—the Bux shares—supposed to represent a concession or expected concession of tin-bearing land in Malay, there was no substratum firmer—as the parties concerned well knew—than some inexpensive paper and ink in Melbourne and the credulity of impressionable and trustful speculators on the Stock Exchange. The methods employed, restricting that term for the moment to the outward and visible means of disposing of the supposed property were those ordinarily adopted by a person engaged in trafficking in shares. Brokers on the Exchange were employed, shares were sold singly or in small numbers at a time and in repeated transactions from day to day and several times a day, and this was carried on over a period of a few months, and purchases were made as part of the scheme adopted to create what is called a market. No sane individual, having regard to the nature of the interests bought and sold and the way in which the affairs of the syndicates and companies involved were conducted, would believe for a moment that the parties in possession—if I may use that term—intended to hold their interests or to work them as a true mining proposition, or to regard them as an investment in the accepted sense, or their disposal as a simple realization. The Badak and Bux shares producing the amount in contest were part of a larger number disposed of by the respondent and, at all events, upon his instructions. He states in a document furnished to the Commissioner that his operations resulted as follows:—Badak profit, £44,308 18s. 8d.; Bux profit, £38,664 7s. 3d.; Badak Jungle, £8,734 6s. 11d.—a total of £91,707 12s. 10d. Of this, part, it appears, belonged to two of his associates, named Orton and Scarborough. Orton received £24,527 14s. 3d. and Scarborough £20,842 19s., leaving as the share of what the respondent calls "Clarke and Family," £46,336 19s. 7d. In another document furnished by him a few days later, he subdivides the sum of £46,336 19s. 7d. in the following manner:—To his wife and family (except two sons, Alfred Sylvester Clarke and Leslie Victor Clarke) a sum of £22,979 3s. 2d. net, consisting of gross £14,369 8s. 2d. for Badak shares and gross £9,009 15s. for Bux shares, and deducting £120 for Badak shares and £280 for Bux shares. As to the two

sons mentioned, he stated they received net £16,753 10s., being £17,393 10s. for Badak and Bux after deducting £640. His statement concluded thus :—" Total profit—Badak-Bux and Badak Jungle—Clarke and Family, £46,336 19s. 7d. Less profit paid to the members of family as above, £39,732 13s. 2d. Balance being Alfred Clarke's share of profit £6,604 6s." Howsoever the interests are severable, the total profits on the whole series of transactions are represented as the final outcome of a common campaign in which the various parties mentioned participated. As already stated, Clarke's share, found to be £7,499, is definitely determined to be assessable income; and from this there has been no appeal. As to Scarborough, the learned Chief Justice in an appeal upon the very point held that his share of the same general collection of profits was subject to taxation and at least as income derived from personal exertion. Speaking for myself, I can have no doubt that Clarke's share is taxable as income, and, following the implication in the judgment of the Chief Justice in Scarborough's case, I would add that if not the proceeds of a business it is income derived from property, that is to say, either property in fact or property by irrebuttable imputation. Does the rest of the sum of £46,336 19s. 7d. stand in this respect on any footing different from Alfred Clarke's admitted share or from Scarborough's share of the total profits ? That necessitates an inquiry as to the real nature of the two enterprises called Badak and Bux.

The Badak venture began when a company was formed in May 1918 and registered in June of the same year under the no-liability provisions of the Victorian *Companies Act* 1915. It was formed to acquire a concession of about 100 acres of supposed tin-bearing land in Malay which had been obtained by Orton. There was provided a nominal capital divided into 100 shares of £10 each, 50 of those shares being for the vendors and 50 for the public. Clarke took up 2 shares by purchase and got, as he says, 2 more as a gift from an original syndicator named Williamson. On 13th November 1918 an agreement under seal was entered into between Orton and the Badak Company No Liability whereby, in consideration of 50 shares paid up to £10 each, he agreed to transfer his concession to the company and that until transfer he would use and mine the lands for

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the company, and that while in the company's employ all concessions to be acquired by him should be held by him for the benefit of the company. In November 1918 the share capital was doubled. Apparently, however, the shares were dead stock on the market for another year, no sale being recorded until the following November. So little were they thought of that Orton himself, who was in Malay, would not pay for some 20 shares that had been allotted him and paid for by Clarke. About October 1919, however, some reports were sent in by the Badak Company, and soon after there appears to have begun the movement that culminated in the successful accumulation of profits referred to. Clarke says in his evidence :—" Things were not looking too good with the Badak, there had been one or two poor reports : they were jumping up and down and I told my sons it would be wise to sell one each. They simply told me to sell them. I cannot remember it. I cannot remember whether I gave instructions to the broker or whether they did. I believe I did, but I would not like to swear to it." There is no doubt he did. He got the accounts, the sale notes and the cheques. The shares realized £148 10s. each in November 1919. In that month the company increased its capital to 600 shares, being 200 more for the public ; 200 being held in reserve. This notwithstanding the " poor reports." The movement indicated by the sale mentioned (22nd November) violently proceeded. The market became inflamed. On 9th December another Badak share was sold in the same way for £173 10s. On 15th January 1920 two more sold for £693 each, one for £795, and so on until the comparative decline of the market in April 1920. In that month the concern was floated into a limited liability company of 75,000 shares of £1 each, of which 5,000 realized in June £2,433 4s. 2d. In the meantime another enterprise was set on foot in circumstances that would be scarcely credible were they not authenticated beyond question. Tracing it in broad and essential outlines it is as follows : —In April or May 1919 Scarborough was deputed by Clarke to go to Malay to see some land about which Orton had written and which was situated adjoining the Badak land. Clarke had arranged to pay Scarborough's expenses, which it was thought would reach about £200. According to evidence which *Mann* J. accepted, the

respondent's two sons, A. S. Clarke and L. V. Clarke, agreed to be associated with their father in this expedition. At that time Badak was not shown to be a success. Clarke was still a brewer on a comparatively small scale, his sons were brewery employees and one was £18 odd in his father's debt. But as on another issue this association with Scarborough is made the starting-point for the main legal argument to sustain the whole burden of attributing henceforth to these two sons the right—adverse to the respondent—to the huge sums they received in respect of Bux shares, the sequel, and particularly the immediate sequel, must be narrated. This immediate sequel is important, and no mention whatever is made of it in the oral evidence of the two sons or in the judgment under appeal. The two sons apparently overlooked it, or more probably were unaware of it. But it existed and is quite inconsistent with their case—and the respondent's case—regarding the Bux shares. It appears that the original idea—if it ever really existed—of the father and his two sons forming at joint expense a family syndicate of three to send off Scarborough was abandoned. Certainly a new syndicate was formed for that very purpose. *It was not a* 16 *share syndicate*, nor was it then intended to be a 16 share syndicate. The written evidence and the respondent's own oral testimony when applied to the written evidence make this clear beyond cavil. With the aid of Trembath, a broker, Clark by April 1919 formed a syndicate, called the Bux Tin Mining Syndicate consisting of 12 shares. Scarborough was a member. He had arranged with Clarke that he, for Orton and himself, should besides expenses and maintenance have a one-fourth interest in whatever syndicate and in whatever company was formed for the purpose. Accordingly 3 shares were allotted free to him. Nine other shares were held by various persons, Clarke taking 4. These shares were £30 shares of which £25 was to be paid up at once, leaving £5 at call. Apart from himself, not a single member of Clarke's family was a member. The two sons were adults. If they were to be original members or otherwise "subscribers" no reason has been suggested or can be suggested why they were not named. Clarke sold a half share to a man named Rees for £12 10s., that is, cost price; and apparently this was paid by Rees contributing that sum to the common fund.

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On 16th April the syndicate of 12 shares was complete and the full sum of £225 was paid up. This sum was placed to the credit of the syndicate in the Commercial Bank on 24th April. On that date began payments out to and for Scarborough, namely, on 24th April £67 10s. for his boat fare, on the 30th a cheque to his wife for £50 and another to himself for £50, and a third for £50 for travelling expenses, and some small sums for cables to Orton. The record of the receipts and disbursements of the Bux Syndicate is a valuable piece of testimony. Now, neither the respondent nor his sons assert they ever had any conversation about this syndicate of 12 shares. But it appears from the respondent's evidence on this occasion that though the original number of shares was fixed at 12, the syndicate was opened again to admit someone in Sydney. Looking at the written record of the syndicate in Trembath's book it is clear that it was on 8th May that the reopening took place. Two new partners were introduced, one of them for one share and the other for two shares. But this made 15 shares so far, and an automatic consequence ensued. Scarborough had to receive another share, and this appears on the record. It was in this way that the 16 share syndicate came into existence. Again no trace of the reopening and reconstitution of the syndicate can be found in the son's evidence or elsewhere than as I have mentioned. If they were on an even footing with their father from the first their silence is incomprehensible. When Scarborough left Australia is not distinctly stated, but it must have been about this time. It will later be seen how impossible it is to fit in with these actual occurrences the fundamental account in the evidence, which has been made the basis of the judgment as to the two sons' Bux interests. I have now to proceed with the narrative as it affects the first issue. Mr. Trembath's book, which seems to have been faithfully kept, contains two records of meetings of the syndicate of 16. On 25th November three days after the Badak share sale referred to—a meeting of the Bux Syndicate took place. The importance of this meeting can hardly be over-estimated. Clarke and Scarborough (*inter alios*) were present. Scarborough, as it there appears, had been to Malay, with the result recorded. He returned about the middle of October. As to Scarborough's mission the

minutes deserve quotation. They run thus:—"Correspondence was received from Mr. G. Shaw, the Inspector of Mines at Kedah on 23rd July 1919, stating that the application for lease had been received, also on 23rd September 1919, which was received 22nd November 1919, by Mr. Scarborough stating that at present *they had decided to withhold alienation of mining land*, until the progress of operations at Jeneri has made it clear that it is possible to work land in this locality without prejudice to agriculture. Should you care to submit your application at a later date it will be considered in the light of the result at Jeneri.—(Sgd.) C. A. Shaw, Superintendent of Mines, Kedah." Scarborough, it is stated, made some explanation which was received as "highly satisfactory." He also stated he had left a signed application in the hands of an agent to be forwarded when he deemed it necessary, and also had deposited 25 dollars in the Penang Bank for that purpose. We hear nothing more of that application. Clarke's own evidence shows that he regarded Scarborough's application as refused and for a reason that could not easily or quickly be removed. At the same meeting the remaining £5 per share was called up and made payable on 19th December, a date important in another connection. These minutes were confirmed on 23rd January 1920, when the next meeting was held. Before reaching that meeting, it is well to recall that the position of affairs so far disclosed is that the Bux Syndicate has no property—none *in esse*, none in immediate prospect, none to be hoped for unless official policy should be altered or satisfied by proofs that in the nature of things could not be furnished for a considerable time. "Investment" in any real, that is, honest, sense was impossible. Thus Clarke in his evidence:—"Q. No property was ever acquired for the Bux Syndicate? A. Only later on. Q. Was it in fact acquired later on? A. I understand they had the prospect of a licence, but that was very much later." And then he refers to the refusal of Scarborough's application. The next meeting took place on 23rd January 1920, when the syndicate had no property or anything that could reasonably be called property, beyond £10 1s. 1d. to its credit in the Bank and 25 dollars at Penang. Clarke was present. He moved, and it was resolved, that "A syndicate be formed of £50,000 capital in 2,000 shares of £25. 1,000

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shares fully paid up to the vendors and promoters, including any increase of capital. 1,000 shares issued at £5 per share, the sum of £5,000 to be placed to the credit of the Bux Tin Company, and Mr. I. Murchie, legal manager. The allotment of shares as follows:—350 fully paid up shares to vendors; 650 fully paid up shares to syndicate: 1,000. 1,000 shares to be offered to the syndicate of £5 per share and the remaining two paid shares to be given to Mr. Trembath for services rendered." Then comes this astonishing note: "*The property consists of* 500 *acres immediately adjoining the* 100 *acres which*" (sic) "*the Badak Co. which is now being check bored by Mr. Wilson.*" One naturally asks "what property? and who were the vendors?" The "promoters" we know, and Clarke first. The 350 shares went to him, Orton and Scarborough. We know, also, rather by indirection, that, there being in the syndicate 12 contributing shares, the 650 paid up shares were applicable at the rate of 54 to each share. The same policy was pursued with regard to the 1,000 £5 shares. So that as a fact vendors and promoters as such got 700 paid up shares of which Clarke had one-third—he says by agreement; and the other shares had attached to them 54 paid up and 54 contributing in the new scheme. An indenture, bearing date 21st January 1920—apparently a slip for the 23rd—was executed between ten of the individual syndicators of the one part (as vendors) and Murchie, as trustee for the new no-liability company to be incorporated. The recital is: "Whereas one of the vendors" (Scarborough) "*is the applicant* for a tin-mining lease or concession in the valley of the Sungei Jeneri State of Kedah in the Malay Peninsula of approximately 500 acres adjoining the lease or concession held by Thomas West Orton of Badak Mining Syndicate No Liability on the western boundary at the Sungei Hai and *such application has been lodged with the Malay Government* and whereas the *vendors have agreed to complete the said application* and to sell and when obtained to grant transfer and assure the *said lease or concession to the said trustee* as hereinafter mentioned." Then follow the testatum and the other parts of the deed. So far as appears, the official attitude in Malay remained unchanged. No circumstances are suggested warranting the representations conveyed by the recital. No comment could

do justice to the moral quality of the mind sanctioning the recital in such circumstances. The company was incorporated on 17th February 1920. The company adopted the agreement on 15th June 1920. But in the meantime all material events had happened and the adoption was practically the adoption of an empty shell. The project was placed on the market before registration of the no-liability company, indeed, numbers were sold from 28th January to 9th February. The market was already in a most excited state with Badak shares and apparently the anticipated registration of the Bux Company No Liability. Speaking of Badak and Bux shares, Clarke says that in January "you could sell thousands of them at £100 a piece at that particular time." The registration on 17th February of the new corporation with the mythical substratum was made under the provisions of the *Companies Act* 1915. The actual documents of registration are not before us in evidence, but the statute prescribes what is requisite. There must be a statutory declaration before a justice of the peace equivalent to an oath and describing the "property" of the company intended to be mined upon. Some "property" must have been described—what else than as recited? Now Clarke, the prime mover in the transaction, stated in answer to *Mann* J., that when the company was registered it was "well known that Scarborough was going over to endeavour to get the property that he had *previously* put in an application for." What does that vague statement mean? Does it mean that the public believed Scarborough had gone over to perfect an assured title or complete a pending application, or does it mean that the public were content to pay fabulous sums well knowing they had as yet no property at all and might never have any? To get the company recognized by the Stock Exchange, however, and so dispose more readily of the shares, Clarke arranged with Murchie to put on the register the names of his wife and four of his younger children for 25 shares each or 125 in all. This is said to be a "*pro forma*" registration. I do not quite understand that expression in the circumstances. It was either to complete an intended gift more generously than at first intended, or it was an act of deception and fraud. But the main fact is that on 17th February extensive sales of Bux shares began again, at first at

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£56 a share, rising on the same day to £138 10s. The sales went on and purchases took place, the market being skilfully manipulated with the wonderful pecuniary success that has been related.

Now, recalling the subject of the first issue—capital or income—and putting aside for the moment the legitimate relevance of these facts to the trustworthiness of the respondent as a witness, we have to ask for what purpose was all this procedure adopted? Was it by way of investment of capital? Was it to acquire property to hold? When all the circumstances are weighed in the common balance of human experience, I find it impossible to doubt that from its inception to its effectuation, the Bux enterprise was fashioned and carried out for the purpose of Stock Exchange business operations. And, without unnecessarily descending to details respecting the Badak enterprise, it ran closely connected at all material times with the Bux. The ventures were highly profitable, but of a character that cannot possibly, without doing a great injustice to the intelligence and moral standards of the community, be regarded as ordinary investments and their realization. *Mann* J. speaks of the "dubious" nature of the two companies with which the respondent was so closely associated, and regards the manner in which the shares were disposed of as "judicious realization." Even while making full allowance for the graciousness prompting these euphemisms I cannot help feeling that some important factors were missed from the calculation. I entertain no doubt that to regard the moneys in question as the mere realization of capital is unjustified. The results were certainly profitable, and in a way which should at least require them to share the responsibility to the Treasury which the more ordinary and humble trading profit has invariably to bear. I ought not to pass by the doubt expressed by the learned primary Judge as to the application of the word "derived" to the profits here in question. Learned counsel for the respondent stressed this view. It is that no one can "derive" profits that belong to another or are intended for another as owner. No doubt a manager does not "derive" his employer's profits. But it is dependent on circumstances whether anyone, other than the person beneficially entitled, "derives" income within the meaning of the Act. A person in fact carrying on and controlling a

business and appearing to the outer world as the owner "derives" the income produced by the business for the purpose of the income tax. His accountability to another is beside the point. "Derived" only means "obtained" or "got" or "acquired." All income is derived from something and by someone. The mere fact, if it were a fact, that Clarke acquired these profits for his family, would not be decisive of whether he "derived" them or not. Par. (*a*) of sec. 52 of the Act 1915-1918 shows that income may be "derived" by an "agent" in his representative capacity. As to the facts that touch this phase it may be well once and for all, and subject only to the special considerations which the two other issues include, to state the general nature of Clarke's relation to the profits. There can be no doubt that in the active and operative designing and carrying out of the Badak and Bux schemes he was the chief and dominant personality. From the very nature of the plans laid down and followed, divided action and independent operation in the market would have meant failure. Unco-ordinated buying or selling would soon have defeated the arrangements. If other members of the family had been simply given shares to do as they liked with, even in opposition to their father, Clarke's plan of campaign would have been frustrated. From first to last his hand was on the helm, he regulated speed and direction, he controlled the receipt and discharge of cargo, and settled all accounts until the final port of destination was reached. That is why his family are personally and conspicuously absent from the Bux Syndicate —why they have no voice in selecting co-adventurers, and are kept apparently in ignorance of its stages of formation. He exercised all rights, whatever these were; he "sold for everybody," to use his own graphic phrase; he locked up in his office safe all scrip, including 1,024 Bux shares of which 700 were Orton's, Scarborough's and his own, besides 324 which he attributes to his family but which are indistinguishably mingled with the rest. One son, as employee, had access to the safe for other purposes; Clarke, however, took out whatever scrip he pleased, he claimed and exercised the right of distribution at pleasure, and he caused his wife and others to be registered for purposes foreign to them. He instructed the brokers to sell, he received or directed the application of the proceeds,

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he kept bonds said to belong to members of his family as long as he pleased, he cut off coupons and cashed them, and then gave the cash to his donees; then he cut off the coupons and handed the coupons direct instead, until he got "tired" of cutting off coupons. Apparently he was working all through in the general interests of his family as well as in his own. He was certainly unselfish towards them, but his plan demanded his control and dominance, practically despotic. So, judging by his actions he retained all power, or thought he did, until actual distribution of proceeds. As events turned out I think his power stopped in some cases earlier than he imagined; but unless by law, by the legal effect of what he did, his power of ownership determined earlier, it continued on to actual distribution of proceeds. This conclusion is emphasized by what has happened since 1920. When in consequence of the conspiracy proceedings the Commissioner's attention was attracted to the matter and he proceeded to investigate, it was always the respondent who took charge of the matter: he prepared the material for cases for counsel, he wrote the explanations, and the family simply sat back and allowed the respondent to persuade the Commissioner, if he could, and in any way he could, that they were not responsible for income tax. All these facts, though of course not decisive, very materially strengthen the statutory prima facie presumption that the assessment is correct, and that the respondent derived the income in his own right whatever he did with it afterwards.

I pass to the other issues. Before entering upon those issues an important question arises: How far am I at liberty to consider for myself the truth of the respondent's story as to his dealings with his family? The learned Judge who saw and heard him believed him on "prolonged observation"; and that despite what the learned Judge considered "dubious" share transactions. No doubt, as a general rule, credence so given is to be accepted by a Court of appeal not personally seeing the witnesses. But I am satisfied both on principle and authority that there is no rigid formula that stands in the way. Such a formula might baffle justice instead of assisting her. Whether a Court of appeal can, consistently with its duty, reverse a conclusion of fact by a primary Judge depends entirely on the circumstances, even where among

those circumstances he has given or refused credence to oral testimony. The nearest approach to a formulation of a rule as to judicial conduct in appeals from a primary Judge is found in *Mersey Docks and Harbour Board* v. *Procter* (1), where Viscount *Cave* L.C. says: "In such a case it is the duty of a Court of appeal to make up its own mind, not disregarding the judgment appealed from and giving *special weight* to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly." "Special weight," of course, is not equivalent to blind adherence, and in order to throw light on this part of the question reference must be made to other decisions. In *Riekmann* v. *Thierry* (2) the House of Lords found it necessary to recall the standard of duty which a Court of appeal is bound to observe in such circumstances, because of some expressions of Judges to the effect that the primary judgment is presumed to be right. Lord *Halsbury* L.C., with the express concurrence of Lord *Macnaghten* (3), stated in clear terms the function of a Court of appeal, including the weight to be attached to a primary finding of fact. I have in *Dearman* v. *Dearman* (4) so fully quoted the Lord Chancellor's words that I do no more than say they amount to this: the Court of appeal, while giving all due weight to a finding based *inter alia* on demeanour, must still proceed so far as it justly can to form its own judgment. In *Dearman's Case* other cases are quoted, including *The Glannibanta* (5) and *Smith* v. *Chadwick* (6), which support that view and also draw a distinction between the facts established and the inferences to be drawn from them. The latter are much more freely within the competence of the appellate Court (*Dominion Trust Co.* v. *New York Life Insurance Co.* (7)). In *Ruddy* v. *Toronto Eastern Railway Co.* (8) Lord *Buckmaster* L.C. (for himself and Lords *Dunedin*, *Parker of Waddington*, *Parmoor* and *Wrenbury*), speaking of the judgment of a trial Judge, said:— "From such a judgment an appeal is always open, both upon fact

(1) (1923) A.C. 253, at pp. 258, 259.
(2) (1896) 14 R.P.C. 105.
(3) (1896) 14 R.P.C., at pp. 116, 117.
(4) (1908) 7 C.L.R. 549, at pp. 559, 560.
(5) (1876) 1 P.D. 283, at p. 287.
(6) (1884) 9 App. Cas. 187, at p. 194.
(7) (1919) A.C. 254, at pp. 257, 258.
(8) (1917) 33 D.L.R. 193; 21 Can. Ry. C. 377, at p. 378.

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and law. But upon questions of fact an appeal Court will not interfere with the decision of the Judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is *some good and special reason* to throw doubt upon the soundness of his conclusions." Some illustrations are given. In *Khoo Sit Hoh* v. *Lim Thean Tong* (1) Lord *Robson* for the Privy Council recognized the duty of the appellate Court, and also of the Judicial Committee, to consider even the credibility of witnesses. He points out that their Lordships must of necessity be "greatly influenced" by the opinion of the trial Judge. He states the familiar reasons. Then Lord *Robson* observes that a Court of appeal will "hesitate long" before it will disturb findings of a trial Judge "based on verbal testimony" unless the primary Judge has clearly failed to take account of (a) "particular *circumstances or probabilities material to an estimate of the evidence*," or (b) "has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially *inconsistent with itself, or with indisputable fact.*" To that, which is obviously not exhaustive, might be added "or inconsistent with prior statements of the same witness." In 1915 Sir *George Farwell* (speaking for the Judicial Committee) in *Bombay Cotton Manufacturing Co.* v. *Motilal Shivlal* said (2):— "It is doubtless true that on appeal the whole case, including the facts, is within the jurisdiction of the appeal Court. But *generally speaking* it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect to their *credibility be put aside on a mere calculation of probabilities* by the Court of appeal. In making these observations their Lordships have no desire to restrict the discretion of the appellate Courts in India in the consideration of evidence. They only wish to point out that *where the issue is simple and straightforward* and the only question is *which set of witnesses is to be believed*, the verdict of a Judge trying the case should *not be lightly disregarded.*"

(1) (1912) A.C. 323, at p. 325. (2) (1915) L.R. 42 Ind. App. 110, at p. 113.

In 1919, in *Clarke* v. *Edinburgh Tramways* (1), the House of Lords had to consider the subject, and I select the views of two of their Lordships. Lord *Buckmaster* said: "When a case depends upon the *simple determination of a plain question of fact* it is not desirable that Courts should seek too anxiously to discover reasons adverse to the conclusion come to by the learned Judge who has seen and heard the witnesses and determined the case upon comparison of their evidence." Lord *Wrenbury* said: "It is no doubt my duty as this case comes not from a jury but from a Judge to accept the responsibility of saying what is the result of the evidence; but in so doing the finding of the Judge who saw the witnesses *weighs strongly*—not so strongly that I may confine myself to asking myself why he was wrong, but to the *extent that I may, as an appellate Judge, properly recognize that the Judge of first instance stood in a position of advantage* which I myself do not enjoy." Lord *Atkinson* and Lord *Shaw* also delivered judgments not quite in the same terms, but I do not think these are really inconsistent with what has been quoted, or lay down any rigid rule. In 1925 Lord *Dunedin*, delivering the judgment of the Privy Council in *Wilson* v. *Kinnear* (2), said:—"It is quite evident that the Judge did not believe Mrs. Kinnear. Had the verdict been the verdict of a jury their Lordships think that it could not have been set aside. But the judgment of a Judge is in a different position. A Court of appeal is not to consider whether there is any evidence on which the verdict could be reasonably based; it has to consider whether it on the evidence would have come to the same conclusion, and that is what the appeal Court did." Their Lordships ultimately did not agree with the Court of appeal, but formed their conclusions on the evidence and not on the doctrine of a closed door. There are cases, such as Admiralty cases, dependent on special skill, weather conditions, sudden positions of vessels, nautical tactics—matters outside the range of ordinary human experience—and in such cases in an especial degree much depends on the credibility and apparent character of the witness who testifies. The case of the *S.S. Hontestroom* v. *S.S. Sagaporack and S.S. Durham Castle* (3)

(1) (1919) 56 S.L.R. 303.

(2) (1925) 2 D.L.R. 641, at p. 646.

(3) (1927) A.C. 37.

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is an instance. Lord *Sumner's* judgment sets out the duty of an appellate Court very clearly as to such cases. But even in a case of that description two learned Lords, *Phillimore* and *Blanesburgh*, differed on the facts as they considered them for themselves. But, to use Lord *Sumner's* expression, the "*estimate of the man*," which is the all-important point as to one branch of this case, is not here dependent merely on the prolonged observation of the primary Judge. There are tests in this case, as will be seen, not dependent on psychology, but on unquestionable physical acts—representations, oaths and conduct generally, much of which has been already narrated. In a case of this character—not one of special knowledge, as Lord *Sumner* in the *Hontestroom Case* (1) indicated, but one of common life and experience—I see nothing which absolves me from the duty of examining for myself some serious questions of fact. On the contrary, I find a good deal which on the broad ground of justice requires me to do so. More particularly is that so since I do not find that the learned primary Judge has given any opinion upon some of those important considerations. Besides the "dubious" transactions on the market, which he certainly did consider to some extent, though not, I think, sufficiently, since he considered them only dubious, there are even more cogent reasons for doubting the respondent as to which no mention is made in the reasons for judgment. Weighty grounds for questioning the veracity of the respondent, that certainly demand positive treatment, are apparently passed by unnoticed, and transactions that to my mind are most questionable are termed "judicious realizations." I may say at once it is not necessary to review the findings in many instances. For the most part, the words of the witnesses may be accepted, leaving, as is undoubtedly permissible, the inferences to be drawn as well by the appellate Court as by the primary Judge; and in other cases the matter becomes a mere question of law. In the instance where, as I think, the facts may and should be reversed, "the good and special reasons" will be indicated in the appropriate connections.

(2) *Badak Shares.*—The Badak shares have to be regarded separately as they concern Mrs. Clarke and the younger members of the family and the two sons, A. S. Clarke and L. V. Clarke.

(1) (1927) A.C., at p. 49.

(*a*) *The Wife and Family.*—The respondent's case rests on his alleged "gift" of the shares. And so *Mann* J. has found. There is no suggestion on this branch of a trust. Nor could there be, taking the words of the respondent which have been accepted. Asked as to a conversation with his wife or family with reference to these shares, he said:—"*In a casual* way, Yes." He goes on to say:—"I *promised* two of these to the wife. . . . I told her I took up a few cheap shares, and was *going to give her two.*" That is all strange language from a man who controlled the market, and not in the least like a present gift. His evidence which follows is most indecisive. He says:—"*I think* I promised the wife two. I *think* I said she should have another two." His wife is equally vague. She says: "As far as I can remember my husband came home and told me he had bought me two Badak Syndicate shares." The evidence of Elsie and Edgar and Leslie all speak of gift but in the future. Whatever was his intention it was, however, effected when he transferred to his wife Alice and his son Edgar shares by the ordinary method of registration by the company. That, assuming an intention to make a gift, completely divested him *qua* those shares. If any trusteeship henceforth existed as to these shares, Alice and Edgar were the trustees for the interests of the rest of the "family"—which term does not include A. S. Clarke or L. V. Clarke. Any power of control by the respondent thereafter existing must have been by virtue of some reservation from the gift, which, if valid, would make it imperfect as a gift—that is, there would be no gift. That, however, appears to be precisely the intended position according to the respondent's evidence. Cross-examined as to the shares in his wife's name, he spoke very distinctly as to the nature of the transaction of which the registration was part. The evidence stands thus:—"Q. Can you tell me now from your recollection how many shares were put in the name of your wife, Alice Clarke, in the Badak Syndicate? A. I think she had four altogether. . . . I treated them more like a pool than anything else. . . . *I claimed the right that having given them I should distribute them as I thought fit.* Q. What you did in fact was this: that when you caused money to be paid into each account you would determine what would be paid to your children

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respectively and to your wife *after the brokers had sold*? A. I suppose so—Yes. I had no hard and fast rule for it." In fact there were some members of his family who had no shares registered in their names. And again, as the admitted figures show, the proceeds were distributed quite irregularly. The learned primary Judge, after drawing an inference as to the purpose of the registration of the shares of Alice and Edgar adds: "But he always regarded his wife and the younger members of his family as in a pool together and *intended to reserve the right and did exercise the right* to apportion the real benefits amongst them." The position then as to the "family" Badak shares was: (1) no trust; (2) either a complete gift of specific shares, the produce of which alone belonged to the "family," or (3) no gift of shares at all, that is, no gift at all except of proceeds which until given were his own (see *Anning* v. *Anning* (1) and *Richards* v. *Delbridge* (2)). The respondent should fail on this branch.

(*b*) *The Sons' Badak Shares.*—This is comparatively insignificant. But the evidence, as accepted, shows an intended gift—not a trust—completed by registration of specific shares. Assume, if you will, he arranged to sell his sons' shares. The fact remains that he did not do so. He sold his own on his own account, as between him and the broker, and *voluntarily* handed the proceeds thereof to his sons, after being paid into his own account. On this he fails also.

(3) *Bux Shares.*—The third issue relates to the Bux shares, and this also divides into two branches. The governing passage as to these shares in the judgment appealed from summarizes the general language of the respondent in his evidence. In substance it founds on the agreement between the respondent and his two sons to send Scarborough to Malay, the outcome being the 16 share syndicate, the purchase by Clarke of 4 shares—that is, 1 for each son, A. S. and L. V. Clarke, and 1 for the wife and family, the sale of his own share, and his self-denudation of all interest in the syndicate. Subsequent events are read and treated as consequential on that fundamental position. The conclusion arrived at is that an implied trust arose in each case as to the two sons and also as to the rest of the family. Without difficulty his Honor also finds that the sales

(1) (1907) 4 C.L.R. 1049.

(2) (1874) L.R. 18 Eq. 11.

of Bux shares of which the proceeds were received by the sons were effected by their express authority, and that, as the respondent told his wife and family he was selling for them, those sales also must be taken to be theirs. *Mann* J., however, found what is abundantly clear: "In no case can the sum received be connected with the sale of a share or shares of which the person receiving the money was at the time of sale the registered owner." He finds also that the registration of the 125 shares was merely *pro forma* and meant nothing as between the family. Again, and I suppose as a sort of confirmation, the learned Judge finds that A. S. Clarke and L. V. Clarke severally repaid to their father the £30 he expended for the original syndicate shares, thus retrospectively connecting the sons with that syndicate. The respondent relied on that position to show that his two sons *ab initio* held an interest adverse to him, commencing with Scarborough and ending with the distribution of money. As regards the wife and family he relied on a voluntary trust arising out of his benefaction immediately after the formation of the original enterprise. With respect to very much of the foundation on which the structure of the sons' adverse rights rests—I refer to their relation to Scarborough and the share syndicate—that has already been shown to be unsubstantial. But once that disappears, the respondent's case on this branch fails, for neither gift, purchase nor voluntary trust has been urged. If any one of these had been, it must have failed for the same reasons as apply to other parts of the case. But the matter goes further. The circumstances within our reach on this appeal are such as to make it one of those exceptional cases where credence ought to be reviewed. When we come to test what Lord *Sumner* calls the "estimate of the man" there is material which does not usually fall within the reach of an appellate Court. However reassuring the demeanour of the respondent may have appeared to the learned primary Judge, certain hard facts are undeniable. The respondent accordingly, as his interest for the moment seemed to point the way, has from time to time told different and inconsistent stories, even on oath, and his chief confirmatory witness, A. S. Clarke, has sworn statements practically irreconcilable with his present testimony. As to Leslie's evidence, so far from being supported by such documentary

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proofs as exist, it appears as a matter of inference to be directly opposed to those proofs. On the whole there seem to be in abundant measure "the good and special reasons" which Lord *Buckmaster* conceded as justifying the appellate revision of a primary finding of fact. I shall consider the two branches separately:—

(*a*) *Wife and Family.*—The evidence of the respondent points to an intended gift. "*I would give her one* and . . . the others . . . *could have* an interest with her." That is, if anyone were to be a trustee, it was the wife after the gift was made. Before *Starke* J., in 1926, the respondent swore: "I said I was *going to give* one of these to the wife and members of the family." It was all in the future. In February 1920, when the 125 shares were registered in the name of the wife and four children, it is said the registration was "*pro forma.*" I am inclined to draw the same inference, if that means a sham. But why *pro forma* as far as they were concerned? Why not register them, if at all, for shares that belonged to them? The answer is: there was no trust, only a promised gift, and the fruit was not yet ripe. It is also a significant fact, as pointed out by Sir *Edward Mitchell*, that the wife received the whole of the Bux proceeds attributed to this branch. There was no pool as to this. These facts, added to the control exercised by the respondent over the bonds, show there was nothing in the nature of a trust and nothing in the nature of complete gift until the actual distribution of the profits. On this branch also the respondent fails.

(*b*) *The Two Sons' Bux Shares*—As against the claim of original adverse rights of the sons against their father by reason of their being his co-adventurers *ab initio*, the fact is—and it is a serious fact—that in March 1926 the present respondent swore the direct opposite. The Crown was endeavouring before *Starke* J. to maintain the liability of A. S. Clarke to income tax for (*inter alia*) the amounts he received in respect of these shares. As a step, and to show trafficking, the Crown sought to prove that A. S. Clarke had *purchased* the original syndicate share from his father, and that the subsequent realization had been effected by the father on behalf of A. S. Clarke. The then respondent maintained: (1) that the proceeds were only realization of capital and (2), incidentally,

that there was no purchase or speculation amounting to trafficking, but a gift, without any obligation to pay for it. The evidence of the present respondent on that occasion was as follows:—"I purchased four shares"; and then: "Q. Did you sell or agree to sell to your two sons? A. When that conversation took place *I really had four shares.* Q. When was that? A. April or May 1919. Q. Were they both there? A. Yes. Q. What was said? A. I said I was going to give one of these shares to the wife and members of the family. I said to the boys: '*You can have one each.*' Q. At what cost? A. I didn't say anything about the cost at that time. There was no payment at that time. Q. What was said about their paying for it? A. I never said anything. The suggestion came from them. They said: 'Oh no Dad, we will pay you for it.'" On the same occasion, A. S Clarke was examined. He said:—"I knew a syndicate was being formed. . . . My father applied for shares and he told me *I could have one.* Nothing was said about payment at that time. *Afterwards* payment was mentioned and father said:—'That is all right. Wait and see how it goes.'" As to eventual payment the present respondent was pressed and this was his then story:—"Q. Did they pay you the £270 and the £30? A. Not that I remember. Q. Will you swear they didn't? A. I wouldn't swear that. They didn't pay me in cash. I will swear that. His Honor: You cannot remember? A. No. Q. There are no accounts to help you? A. None whatever." Later: "In the Bux I had *given* them that share and they offered to pay for it, but I would not swear they paid for it." As to the instructions to sell the shares—the respondent also testified:—"Q. When the shares were sold were the account sales rendered to the members of your family? A. No, they all went to me." Again: "Q. Do I understand you to say that your two sons did themselves receive from the brokers the proceeds of the sales of the Bux shares? A. *No, they received it from me.* They were really *sold on my account* on their behalf. *They were all included in my sales.* Q. Did you give your broker instructions in writing or verbally? A. 'Phone and verbally. Q. You did not say 'Sell on behalf of so-and-so'? A. Usually they asked me if I could let them have some. Q. *There was nothing*

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to indicate on whose behalf they were sold? A. *No.* Q. The brokers would send down a cheque for the amount and you would send down certain scrip? A. Yes. Q. Did you consult with the members of your family which scrip went along? A. At the time I did." At that trial A. S. Clarke, said: "Father sold all the shares on our behalf." Now, the full force of that evidence is perceived only when it is known what statements had been made before the trial of March 1926. In a case for opinion prepared on the direct instructions of the respondent and with the authority of his sons, it had been stated that the father had subscribed for 4 shares in the Bux and had *invested* £120 in it, and that "one share was *given* to Mrs. Clarke and family, one each to Alfred S. and Leslie V. Clarke *at cost*" &c. Then in a later case for opinion prepared in connection with the assessment of A. S. Clarke it was stated:—"Clarke Senior applied and paid for 4 of these. *Later on* he let A. S. and L. V." (? have) "one each *at cost price*." Shortly before the trial in 1926, the then appellant, A. S. Clarke, gave to the Crown written notice to admit that in 1919, he had "purchased . . . one share in a syndicate known as Bux for . . . £30." On this, as the origin of a commercial venture the Commissioner built. But when it came to the trial both father and son, as has been seen, steered clear of any commercial character so far as the Bux were concerned and rested it from the son's standpoint purely on gifts of property. The strategy was successful. The Crown was in the hands of the Clarke family and could get no further. The learned Justice (*Starke* J.) said to counsel for the Crown:—"I do not think you will get it any further, Sir Edward. It has made it more clear to my mind that these sons never purchased any shares at all. I am inclined to think they never got any. I think this family is a very attached family." The judgment was reserved. In order that no judgment should create *a res judicata* should the Crown desire to assess the father, opportunity was given to the Crown to withdraw the then assessment. That was done and A. S. Clarke went free—and in view of the three years' bar must remain free—substantially, though not technically, on the opinion created by the respondent and his son that the proceeds were the personal receipts of the present respondent. It needs no seer to

divine how different the position would now be if the same story had been told to *Mann* J. No demeanour can be more than plausible or chameleon-like that can sustain at different times two such diametrically opposed versions as were told within little over a year. And, be it observed, the memory of the respondent was a full year fresher than in 1927. *Mann* J. attaches importance to the time that had elapsed as accounting for imperfect explanations. But the water had been running under the bridge nearly all the time. The evidence shows that there was a constant and urgent need of stirring the memory of every member of the family. And it shows the pliability of the memory of the respondent and his two sons to meet the demands of the moment. Each varying stimulus brought forth its own special response, and these were discordant. This is strikingly exemplified with regard to the alleged payments of £30 each by A. S. Clarke and Leslie V. Clarke for these shares. At a comparatively early stage in the history of these assessments a case for opinion had been prepared in which it was stated that the two sons had *subscribed* £60 towards the Scarborough expedition, and that hence flowed the Bux Syndicate and proceeds. At the trial before *Starke* J., A. S. Clarke was faced with this. He said :— " I do not remember paying £60 towards sending a man to report. I can find no trace of it. After sale of Bux shares my brother and I *allowed* our father to retain the cost of the contributing shares." That last statement, obviously referable to a sum of £540 practically retained, is, on its face, entirely opposed to the present attitude in several respects. The £60—that is the two £30—we find quite repudiated and notwithstanding a prior allegation to that effect. Why this backing and filling ? But at the trial before *Mann* J., though purchase was abandoned, so also were " gift " and " voluntary trust " ignored for obvious reasons. The whole case was pinned to original adverse rights rooted in the Scarborough expedition. The £60 allocation was revived on material and with incidents which, to my mind, are wholly inadequate to sustain the burden. The respondent himself was certainly cautious as to this and quite indistinct, though he might, as the principal business man of the concern and after having by conversation stimulated the recollection of his sons, have been expected to be precise. A. S. Clarke, however,

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recalls his payment in an extraordinary way. Though no record of these vast and varied transactions has been kept, and though in or about April 1920 all the other brewery accounts were destroyed, one book survived. It is a ledger in which the accounts between Clarke senior and the various members of his family were kept and balances shown. A. S. Clarke is shown to have been in credit £120 8s. on 30th June 1919 and to be so still. Leslie V. Clarke is shown to have been in debit on that date £18 7s. 10d. and to be so still. One can scarcely imagine that this book escaped attention during the many years this income tax agitation has proceeded. But no other existing line or word is suggested as having aroused the slumbering recollection of the two brothers. A. S. Clarke founds his newer belief on the fact that he used to write up the books of the brewery, at times including ledger accounts, and he believes he was debited in some book now destroyed. Apart from the curiosity of taking the trouble to make entries in books of a moribund concern, and that were about to be destroyed, it is certainly strange that the one place where the debit ought to be found, or where the balance should have been corrected—the surviving ledger —is silent. The explanation appears to me to stand so much opposed to prior statements, to accountancy, and other probabilities, and inherently so thin—not a distinct and definite statement—that I do not accept it. The explanation of Leslie is, if anything, more transparent, although *Mann* J. thinks it is supported by the probabilities. How can a ledger still showing a debit balance support a statement that the debit balance was extinguished? He says he was "credited" somewhere with a cheque for £148 10s.; where or how we are not told. It was said to be in November 1919. But if he were "credited" with £148 10s. he got the whole of it. Then he says he got the whole of it, less £30, by £100 cash, after deducting the £18 (about) he owed his father. There is no trace of the £100, no entry to support the story, and particularly the sum of £18 7s. 10d. still stands to his debit in the very place where it should have been shown to have been extinguished if matters proceeded on the strict business basis we are asked to accept. One very curious question presents itself, as suggested by Sir *Edward Mitchell*. If Leslie was credited with £148 10s. in November 1919,

and especially if this fund was looked to for Bux recoupment, why did Clarke himself pay the final £5 calls in December 1919? With regard to the instructions to sell the shares, I have already referred to the evidence of the respondent and A. S. Clarke before *Starke* J., when the responsibility of A. S. Clarke was in issue. Before *Mann* J., without quoting the evidence in detail, certain points are clear. The respondent admits he was instructing Trembath the broker. Trembath does not corroborate his story as to the conversation leading to the sale. He says: "I have no recollection of orders from A. S. Clarke to sell." Trembath clearly looked to the father as the vendor and regarded the sons merely as the father's substitutes or messengers. Trembath's ledger shows every transaction to be for the father. Some subsequently written references to "Clarke Brothers" were obviously to indicate the destination directed by the respondent. One small ledger account in the name of Clarke Brothers was, as Trembath says, "opened probably on the father's instructions." His evidence is quite opposed to that of Leslie with respect to the person instructing him. After giving full weight to the impression evidently made upon *Mann* J. by the demeanour of those witnesses, and making, as I believe, full allowance for the advantage which that learned Judge possessed, I have no real hesitation in concluding that their own statements and acts at different times and under different aspects of liability are stronger than mere appearances and attitudes in the box, and must be given superior influence if Justice is to be properly served. The "estimate of the man" can in this case be made by more positive tests than the necessarily conjectural one of personal appraisement. Those positive tests are within our reach, and extend from the launching of the Bux upon the Exchange onwards through the exploitation of the share market and the conflicting stories told to the Commissioner and to the Courts. That does not necessarily lead to rejection of the last version. It has its chance with the others: they may all be false, but, as they cannot all be true, if one be true the latest may be that one. But having once reached the point where the estimate of the respondent's veracity by observation is not conclusive, then his story is to be considered by the light of all the circumstances conjointly, not omitting the weight to which he

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is entitled of a favourable impression in fact on the primary Judge. But also not omitting the important fact that by his former evidence on oath he assisted to secure a great benefit to one of his family—and incidentally to another—at the expense of the public Treasury.

On the whole I arrive at the conclusion that he did not divest himself of the property in the shares until sale. He was the one member of the family "familiar," as *Mann* J. says, "with mining affairs and in close touch with other speculators and brokers"; and he did not intend to present his family with unripe fruit. He intended to gather it first, when ripe, and give them the proceeds. It may be that the law impresses on some of his acts an effect he did not contemplate, but his intention was as I have stated.

Reason to believe Evasion.—An objection was raised by the respondent that the assessment was incompetent because it was an assessment of income more than three years after the income year, and without the Commissioner having any reason to believe evasion. The chief ground was that the three years ended in 1924. I agree with that. But it was said that the attempted evasion must have been not later than 1921. With that I do not agree. The attempted evasion might take place at any time during the three years, thus misleading the Commissioner during any part of the period open to him to assess unconditionally. But there is another answer. While the Commissioner is directed not to assess unless he has reason to believe attempted evasion or fraud, sec. 39 of the 1922-1925 Act (sec. 35 of the 1915-1918 Act) plainly makes the assessment unchallengeable. The Act so far trusts the Commissioner and does not contemplate, in my opinion a curial diving into the many official and confidential channels of information to which the Commissioner may have recourse to protect the Treasury. In any case, on the facts the Commissioner in this case had more than sufficient reason for his belief and I will not waste time in detailing it (see *Moreau* v. *Federal Commissioner of Taxation* (1)).

Assessment as Representative.—I do not find it necessary to determine what might have been a very necessary point. Suppose the respondent had derived the whole £39,915 as representative of various interests and not for his own personal benefit, is it the

(1) (1926) 39 C.L.R. 65.

only possible order for the Court to make on a proceeding of this nature to allow the appeal *simpliciter* and leave the Commissioner to make any new assessment he can? In view of the three years' limitation that might work great public wrong. and one due entirely to the circumstances being specially, if not solely, within the knowledge of the taxpayer. Although it is not necessary to determine it, yet as it was referred to in the course of the argument I shall very shortly state why it is open to consideration. Where an action is brought to recover tax the assessment is conclusive (sec. 39). That is a strictly legal enforcement of an ascertained right—regarded for the purpose as conclusively settled. Whatever relief is desired must be obtained on what is called "appeal." This appeal—so called—is really original jurisdiction to correct the assessment and bring it, as an essential factum of liability, into conformity with the requirements of the law, so that whatever liability exists it may be adjusted properly by a true factum. If the assessment were against A personally, and his objection were that it was in respect of representative income—trust income—I see no reason why the Court should not under the ample powers of sec. 51A, sub-sec. 5 make the necessary alteration. So if part of the sum were trust income, I see no difficulty in the Court doing what the Commissioner should have done. An assessment is only the ascertainment and fixation of liability (see *R.* v. *Deputy Federal Commissioner of Taxation* (*S.A.*); *Ex parte Hooper* (1)) Suppose A were assessed as trustee of X and Y, and it became in complicated circumstances necessary to determine whether the income beneficially belonged to X alone or to X and Y jointly or severally. If the Court thought it was partly for X and partly for Y, would the whole assessment be void, and let both X and Y after three years escape; or could the Court declare separate assessments? These are considerations which it might have become necessary to determine had the view taken in the Supreme Court been upheld as to any of the branches dealt with.

In the view I take it is not necessary to decide that.

In my opinion this appeal should be allowed and the assessment confirmed.

(1) (1926) 37 C.L.R. 368, at p. 373.

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HIGGINS J. The question before us, emerging from this indigestible mass of lengthy, loosely rendered, confused evidence, is as to the right of the Commissioner to treat the moneys derived from the sale of Badak and Bux shares, so far as the moneys were distributed among the taxpayer's wife and children—(distributed with the taxpayer's sanction and in nearly all cases directly through his hands)—as being proceeds derived from his business in his year of income June 1919 to June 1920. In addition to his business of brewing, &c., it is clear that the taxpayer carried on the business of share-jobber and mining speculator from 1892 onwards. As he says himself, he "dabbled" in such speculations (the extent of his dabbling for merely one year appears in a statement forwarded to the Commissioner dated 25th May 1923), although in his first statement for the purpose of assessment he did not mention this particular business. It is now conceded that part of the proceeds of this business, so far as regards the Badak and Bux shares, to the amount of £7,499, must be included in his taxable income; but it is objected by the taxpayer that the remainder of the proceeds, to the amount of £39,915, was "received by or on behalf of" his wife and eight children named. The point which he takes is that the proceeds belonged to them, not to him, because the shares which were sold belonged to them. Roughly speaking, of course, all these huge gains were due ultimately to the skill and efforts of the taxpayer; but we have to confine our minds to the proceeds of these speculations derived in the year 1919 to 1920; and I shall assume, as the parties assume, that any proceeds of such shares as the members of the family owned cannot be treated as proceeds of the father's business, cannot be included in the returns of his taxable income.

We have nothing whatever to do in these proceedings with the doubtful nature of the devices by which the gains were made, or with the exploitation of greedy and credulous persons—a story which may recall the story of the South Sea Bubble of 200 years ago. We have nothing to do with the peculiarities attending the Bux Syndicate, the big sales made of interests although it had no property for mining, or the devices by which registration of the company was obtained. We have simply to find whether the proceeds that went to the family, or any of them, were exceptions

from the proceeds of the taxpayer's business. To the external world, to the brokers, to the vendors of shares, to the purchasers, to the officers and members of the syndicate or company, the transactions of the taxpayer as to the shares would appear to be ordinary transactions of his business as a mining speculator. With a very few exceptions due to defined causes, the sale notes were made out in the taxpayer's name, the proceeds went into his account; the brokers applied to him to know whether he had any shares to sell: the taxpayer's will dominated throughout. The arrangements on which the taxpayer relies were arrangements internal to the family. But if any proceeds were the proceeds of shares which the wife or children owned, they are to be treated (I understand) as exceptions; if none are proved to be proceeds of such shares, the Commissioner's assessment must stand. Appropriations in favour of one's family are not allowed by the *Income Tax Assessment Act* 1915-1918 as deductions from the assessable income of the taxpayer (sec. 18).

It has to be borne in mind that the assessment as made by the Commissioner is prima facie evidence that the amount and all the particulars of the assessment are correct (sec. 35); so that the burden of showing that the assessment is wrong falls upon the taxpayer. The learned Judge of the Supreme Court (*Mann* J.) had held that this burden has been satisfied; and the Commissioner appeals.

Now we are to a great extent relieved of the burden of determining whether the taxpayer is to be believed or not, by an express finding of the primary Judge who saw and heard the witnesses. The finding is that the Judge was "satisfied of the substantial truth of the" taxpayer's "story as regards his dealings with his family. Prolonged observation of the" taxpayer "in the witness-box has chiefly led me to that conclusion." For my part I think it is our duty (and on this point I agree with my brother *Rich*)—it certainly is my intention—to accept this important finding implicitly. Not that this concludes the matter; but, as I understand the practice of the Courts and the rules of the game, we ought to treat the taxpayer as a truthful witness in his evidence in these proceedings, however inconsistent we find his evidence in the proceedings in 1926 before another Judge (*Starke* J.), when the Commissioner sought to

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assess the eldest son; and however inconsistent we think his statements in the cases laid before counsel for advice. In the proceedings before *Starke* J., the present taxpayer took the attitude that his sons A. S. Clarke and L. V. Clarke did not pay him anything for the cost of the Bux shares; in these proceedings he says that he "thinks" that they did pay him but not at the time:—"I think there was a contra account. I think they said they would. I think that is correct." That is a serious discrepancy, and all the more serious as his attitude in each set of proceedings favoured his immediate purpose. But it may be that Mr. Clarke, after further reflection, was giving honestly his more matured opinion on the second occasion; and, as we are not precluded by the finding from drawing our own inferences from the facts, I think it the safer course to accept loyally that finding (*Dominion Trust Co.* v. *New York Life Insurance Co.* (1); *Cooper* v. *General Accident, Fire and Life Assurance Corporation Ltd.* (2)). My view is that, even accepting Clarke's evidence as that of a truthful man throughout this present case, there was no valid gift or trust of the shares, at all events to or in favour of Mrs. Clarke or any of the six children other than A. S. Clarke and L. V. Clarke.

I propose to deal first with the alleged gift of shares to Mrs. Clarke and the six children, as the position is clearer. Clarke describes the conversation thus:—"It would be early in 1919, I think about February or March. The substance of it was that I had bought four shares pretty cheap, in January or February I think" (I shall assume that he mentioned the name of the Badak Syndicate), "and I said to the wife 'You can have two of them and I will get the others a share when they come along.' I think either in January or February of 1919 I took up four shares—not through the Exchange—through Savage, I think. I *promised* two of these to my wife. I told her I took up a few cheap shares, and was going to give her two, and I would get some more for other members of the family. I think I got two more in May. . . . I told other members of the family I had taken the last two shares of Orton's, and put them in Edgar's name" (Edgar was the second son). ". . . They were in Edgar's name like a pool for the whole family, the wife and

(1) (1919) A.C. 254. (2) (1922) 2 I.R. 214.

the other six children. I acquired shares for my children. I think I had eight" children. "Question.—Did you give any more to your wife and family? Answer.—From time to time I had one or two. In the second issue they received a good few—if I remember rightly. Taking up to May there were four—two to the wife and two to Edgar. Well, these four would be entitled to four more. And then A. S. and L. V. would be entitled to four, and that would make it twelve. Question.—What do you mean by that? Answer. —The second issue. I say, A. S. and L. V. being entitled to four, that they stood back and left the others to have them."

On evidence so loose and hesitating as this we are asked to find a definite, complete gift of shares to the wife and six children, not a mere promise to give. I turn to the evidence of Mrs. Clarke, and her memory is not clearer: "As far as I can remember my husband came home and told me he had bought me two Badak Syndicate shares and was going to pick up more for other members of the family from time to time, which he did." I turn to the evidence of the eldest daughter, Miss Elsie Clarke; and she says:—"Father just told me that he had bought a Badak Syndicate share. That was in the year 1919. I heard him say he had *promised* the other members of the family one each. I think my mother got two syndicate shares. . . . Asked whether I have any recollection of further transactions in Badak Syndicate shares, I say no, *I do not remember any more conversations.* About shares in Bux Syndicate, father said I had an interest in the Bux Syndicate. *I cannot say that he said what interest I had.* . . . He just said I had an interest. With regard to any of the family I do not remember what interest he said they had. I remember the sale of the shares. Later on I received a sum of money" (£350 from the father, by banker's cheque, she thinks) " . . . I do not know what shares were sold for that £350. I received some bonds also, namely, £2,000 worth. I lodged them in the bank later on. I have always received the interest on these bonds. I have used the £350 and the bonds for my own benefit."

It will be noticed there is a *promise* on the part of the father to give one share to each member of the family—a promise which implies individual gifts not a collective gift.

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Now, a mere benevolent intention of a husband and father towards his wife and family, even if confined to the limits of a specific speculation, does not operate as a gift which can be recognized at law or in equity. Not only must the gift be definite as to subject and object, but there must be words of present gift; and the transfer of the property must be as complete as the donor can make it, considering the nature of the property. I start from the principle, laid down in *Milroy* v. *Lord* (1), which applies to shares in a company. There M. executed a voluntary deed purporting to assign 50 shares in a bank to L., as trustee for the plaintiff. The shares were transferable only by entry in the books of the bank (as here by registration), but no such transfer was made. It was held by the Court of appeal that, although the dividends had after the deed been remitted to the plaintiff, there was no valid gift. *Turner* L.J. said (2):—"In order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may . . . be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must . . . be resorted to, for there is no equity in this Court to perfect an imperfect gift." It was plain, the Lord Justice said, that it was not the intention of the settlor to constitute himself a trustee of the shares: "If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust." In accordance with this case *Jessel* M.R. put the position with his usual lucidity, in *Richards* v. *Delbridge* (3):—"A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance

(1) (1862) 4 DeG. F. & J. 264.
(2) (1862) 4 DeG. F. & J., at p. 274.
(3) (1874) L.R. 18 Eq., at pp. 14-15.

or assignment of the property, and thus completely divest himself of the legal ownership, . . . or the legal owner of the property may, by . . . declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may . . . deprive himself of its beneficial ownership. . . . It is true he need not use the words, 'I declare myself a trustee,' but he must do something equivalent to it, and use expressions which have that meaning; . . . for a man to make himself a trustee, there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise." In these cases, no difficulty arose as to the *subject* of the alleged gift—in *Milroy* v. *Lord* (1) there was a definite certificate bearing a definite certificate number for the 50 shares; and in *Richards* v. *Delbridge* (2) the subject of the alleged gift was a definite lease and the business stock in the leased premises. But there was no *completed* gift, and there was no declaration of trust constituting the donor a trustee of the legal title. These cases are perfectly consistent with *Kekewich* v. *Manning* (3), where a voluntary gift was upheld; for the voluntary donor had there done everything which was in her power to make the gift complete. Funds were there held by trustees in trust for a mother for life, and afterwards for her daughter absolutely. The daughter made a voluntary settlement of her interest on her marriage; and it was treated as a valid assignment, enforceable, because the daughter could not, during her mother's life, transfer the legal title or compel the trustees to transfer it. This case affirmed the principle of the universal assignability of property, whether by voluntary gift or otherwise; and also the principle that a mere promise without valuable consideration will not bind legally or equitably (and see *Williams on Personal Property*, 15th ed., p. 381).

To my mind there appear to be three considerations at least, which are fatal to the contention of the taxpayer that these shares belonged to the wife or to the children or any of them:—(1.) There was a mere voluntary promise; the taxpayer did not do all in his

(1) (1862) 4 DeG. F. & J. 264.
(2) (1874) L.R. 18 Eq. 11.
(3) (1851) 1 DeG. M. & G. 176.

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power to make the transfer of shares perfect; and equity will not order the gift to be completed (see, in addition to the authorities already cited, the following, among numerous cases: *Ellison* v. *Ellison* (1); *Antrobus* v. *Smith* (2); *Edwards* v. *Jones* (3); *Nanney* v. *Morgan* (4); *Ex parte Todd*; *In re Ashcroft* (5); *In re Richardson*; *Shillito* v. *Hobson* (6); *In re Earl of Lucan*; *Hardinge* v. *Cobden* (7); *In re Patrick*; *Bills* v. *Tatham* (8); *In re Griffin*; *Griffin* v. *Griffin* (9). (II.) Equity will not treat an imperfect gift as if it were a declaration of trust—as if the giver intended to retain his rights but to impose on himself an onerous obligation (see *Richards* v. *Delbridge* (10) and *Heartley* v. *Nicholson* (11)). (III.) The subject of the promise—the things intended to be given, the specific shares—was neither identified nor identifiable (see *Malim* v. *Keighley* (12); per *Selborne* L.C. in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (13); per *Rigby* L.J. in *In re Williams*; *Williams* v. *Williams* (14); *In re Wait* (15)).

The position is, substantially, that the taxpayer kept a number of certificates in Badak and in Bux in his office safe, most of them in the name of the legal manager, Murchie, in trust, but having a blank transfer endorsed. They had been put into the safe from time to time by Clarke, but there was no earmarking of the certificates as for Orton or for Scarborough, or for Clarke himself or for any of the family. The safe, as the Judge states, contained scrip which the appellant held on behalf of himself, one Orton and one Scarborough, most if not all of it in the name of Murchie the secretary of the company. This practice of having shares in the name of the manager is due to the Victorian provision as to mining companies (see *Companies Act* 1915, sec. 304). Under sec. 319 of that Act, no share shall be deemed to be transferred unless and until the name of the transferee is entered as such transferee in the register (and see sec. 29). Each share must be numbered and identifiable by its number or otherwise (secs. 325, 320). It is clear that the taxpayer

(1) 2 Wh. & Tud. Eq. (8th ed.), 853, 867.
(2) (1805) 12 Ves. 39.
(3) (1836) 1 Myl. & Cr. 226.
(4) (1887) 37 Ch. D. 346, at p. 352.
(5) (1887) 19 Q.B.D. 186.
(6) (1885) 30 Ch. D. 396.
(7) (1890) 45 Ch. D. 470, at p. 474.
(8) (1891) 1 Ch. 82.
(9) (1899) 1 Ch. 408.
(10) (1874) L.R. 18 Eq. 11.
(11) (1875) L.R. 19 Eq. 233.
(12) (1794) 2 Ves. Jun. 333.
(13) (1873) L.R. 6 H.L. 352, at p. 363.
(14) (1897) 2 Ch. 12.
(15) (1927) 1 Ch. 606.

had power to transfer the legal title to any specific share—from his own name, if it was in his own name, from Murchie, if Murchie held for him; and this transfer was not made.

Mann J. says: "All scrip remained in his hands with blank endorsements and could therefore be treated as bearer securities." I confess that I do not understand this statement of law, as to transfers of shares, in the face of sec. 319 of the *Companies Act* 1915 and of *Tayler* v. *Great Indian Peninsula Railway Co.* (1) (and see *Lindley on Companies*, 6th ed., vol. I., p. 655). Shares cannot be treated as negotiable securities in this way. But the judgment proceeds:—"Directly sales began to be made and the *scrip to be used indiscriminately* the register ceased to have any relation to the real interests of the persons concerned. It therefore became necessary for the" taxpayer "to make up his mind from time to time on whose behalf he was selling, whether on behalf of his family or himself or Orton or Scarborough. This he determined and noted for his own guidance and for the information of Orton and Scarborough merely by making memoranda on the brokers' sold notes as they came into his hands." I thoroughly accept this clear statement; but it shows that the taxpayer determined the destiny of the proceeds not at the alleged giving of the shares but when the shares had been sold. The sales occurred from time to time, and at different prices; and each specific shareowner should be in a position to say "that is my share, I want the proceeds" (not the proceeds of the shares of others). So there was no gift of shares, as recognized by law, whatever the benevolent intentions of the taxpayer towards his family may have been.

It is true that certain shares in both the Badak and the Bux companies were registered in the names of members of the family; but, as the Judge says:—The "distribution was quite arbitrary and seems to have been made by the secretary when making a record of the total shares *which were in Clarke's hands.* As between members of the family it meant nothing and was merely *pro forma.* The" taxpayer "continued to realize for the benefit of himself and family, *distributing the proceeds among the latter on what he considered an equitable basis.*" As the taxpayer says: "I claimed

(1) (1859) 4 DeG. & J. 559.

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the right that having given them I should distribute them as I thought fit." Such a right to distribute is absolutely inconsistent with distinctive rights to distinctive shares given. Moreover, the shares which were actually put in the names of beneficiaries in the register were not put there in completion of the promises or alleged gifts made to the beneficiaries.

But there is a concise statement in the judgment which, to my mind, is perfectly correct, and which also relieves me from a more detailed exposition of the facts :—" In no case can the sum received " (by members of the family) " be connected with the sale of a share or shares of which the person receiving the money was at the time of sale the registered holder. In the case of the Bux as in the case of the Badak Company the state of the register was regarded as of no importance." But it is of the very essence of property that the subject of the property should be indentified or identifiable. Even if what is claimed be merely an undivided interest in a mass of assets, the mass of assets must be identified or identifiable; the boundary of that in which the interest is alleged has to be defined. It is admitted in the judgment that specific shares were not appropriated to specific children :—" To have made a specific gift of specific shares to each child would have defeated his whole purpose of conferring equal benefits since the shares would have to be realized gradually at different prices. The scrip for these shares was in his hands for disposal along with a quantity of other scrip also for disposal in other interests." I may add on my own account that the same absence of specific appropriation of shares is evident also as between the family and the " other interests."

As to the wife and family in relation to the proceeds of the Bux enterprise, the taxpayer says that a syndicate was formed in 16 shares, and he paid for 4 : " I told the wife I would give her one, and that the others in the family " (the six) " could have an interest with her." There was no scrip issued in the syndicate. But when the company was formed, and each syndicate share was to carry 108 shares in the company, he told the wife and family; and they said " All right." Later on, says Mrs. Clarke, " he said he would sell them on our behalf, and he did sell them," and he gave the proceeds—cheque for £5,085 and bonds for £4,000—to

Mrs. Clarke alone; and she spent these proceeds for her personal use, not for the benefit of herself and family. The gift, to the wife and family, therefore, was not completed—the 108 shares were not put in the names of the wife and family; and the whole of the proceeds were given to the wife. The taxpayer did as he chose with the proceeds; he did not give the shares to his wife and children as promised. The promised gift of shares was not completed.

The position with regard to the sons, A. S. and L. V. Clarke is much more difficult. First, as to Badak shares. The taxpayer, having four certificates for shares (the Badak Syndicate No Liability was registered May 1918), said to these two sons who were employed in the brewery business: "Here you are, boys. I got these for you, you can have one each." A. S. Clarke put the certificate in the safe; they were in the name of Murchie, the legal manager in trust, with a blank transfer signed by Murchie. There were other shares in a new issue, and A. S. Clarke was registered in all for 4, 2 for himself and 2 for L. V. Clarke. According to the judgment:—"In November 1919 two Badak Syndicate shares were sold upon the authority of A. S. and L. V. Clarke, and the proceeds were paid to them or credited in account. *The scrip handed to the broker to complete this sale was not scrip for the shares actually standing in A. S. Clarke's name in the register.*" According to A. S. Clarke:—"In November of 1919 I instructed my father to sell *a* share for me, and that was sold for £148 10s. Father brought the cheque home for me, and I paid it into my State Savings Bank account." According to L. V. Clarke the father received the broker's cheque "on my behalf." "I was paid really in the end. It was credited to me in the business. £148 10s. was credited to me." Taking these statements at their face value, the registration of the shares in the name of A. S. and L. V. Clarke would seem at first sight to be a completion of the gift intended by the father for these two sons. But the point as to identity is serious, in view of the finding that the scrip handed to the broker to complete the sale was not scrip for the shares actually standing in A. S. Clarke's name in the register. For the shares of which the sons got the proceeds were shares which did not belong to them; and they may have fetched prices which the shares registered in the name of A. S. Clarke did

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not fetch. The judgment deals with this difficulty as follows:— "Great importance has been attached in argument to the fact that the scrip delivered to complete the sale was not in fact the scrip for the actual shares in respect of which the sons were, or rather A. S. Clarke was, registered. To my mind this circumstance is not material when once the bona fides of the transaction has been clearly established. Upon a strict analysis, the technical result of exchanging scrip I should suppose was an exchange of equities, and the sons sold on the market the equity to 2 shares resulting from the exchange. From the point of view of the father and sons, the number of shares sold for each account was the only question."

I regret that I am unable to take this view: for surely the point of view of Orton and of Scarborough and the others has also to be considered. Suppose Orton came back and claimed his certificates —the certificates held in trust for him by Murchie; suppose he is told: "Oh, that certificate has been sold for £500 as for A. S. Clarke, who has got the money; but you can have another certificate —take this." The market having fallen, Orton objects, and wants to follow his own certificate and its proceeds. I can find no evidence of "exchanging scrip" on the part of the owners of the certificates. An exchange implies mutual consent of the owners, and there was none here. "The fruit follows the tree and goes the same way"; and the proceeds of the sale of a share, the certificate for which was put in the safe for Orton, ought to go to Orton. Under the circumstances, I cannot say that the Commissioner was wrong in refusing to treat these proceeds of these 2 shares as being the proceeds of shares that had been given to A. S. and L. V. Clarke. The taxpayer has not satisfied the burden of proof which is on him.

Secondly, as to the proceeds of the Bux shares of A. S. and L. V. Clarke; the position seems to me to be ultimately the same as that of the Badak shares. I do not think it necessary to examine critically the history of the acquisition of these shares; for I am going to assume that they came to the two sons by purchase for valuable consideration. It is true that the father speaks, in these proceedings, most hesitatingly as to these sons repaying him by contra account; and no books or documents have been produced in confirmation. The books which contained the sons' accounts

were destroyed when the brewery business was abandoned; and the broker's sale notes have been destroyed. Perhaps, as the father merely "thinks" that he was repaid, we are merely bound by the finding of the learned Judge as to the father's veracity to believe that he did *think* so; we are not bound by any such finding as to the veracity of the sons. But I propose to give the taxpayer the benefit of the doubt, as the learned Judge has found that the two original shares of these sons in Bux belonged to the sons by purchase. These 2 shares were each "floated" (that is the expression) into 54 shares paid up and 54 contributing shares—216 in all. Trembath, the broker, sold 162 shares in Bux, as for A. S. Clarke and L. V. Clarke, and other brokers sold other shares, and the proceeds went into the account of L. V. Clarke, for himself and A. S. Clarke, under the instructions of the taxpayer, and were, as to part, invested in war bonds which were deposited in the same all-embracing safe. But there is still the missing link—it is not proved that the shares sold were the shares for which A. S. and L. V. Clarke were registered. If they were not, the taxpayer has no ground for saying that the proceeds of the shares sold were proceeds of the shares which these sons owned; and the Commissioner's assessment must be accepted as correct on this subject also.

Perhaps I ought to express my view with regard to an objection which is based on the second proviso to sec. 2 of the *Income Tax Assessment Act* 1922-1925. This provides that "no alteration or addition shall be made in or to any assessment made under any such Act" (*inter alia*, the Act 1915-1918, repealed) "after the expiration of three years from the date when the tax payable on the assessment was originally due and payable, *unless* the Commissioner has reason to believe that there has been an avoidance of tax owing to fraud or attempted evasion." The tax to be paid was originally due and payable under the first assessment (if that is the assessment referred to) in February or March 1921; but the assessment with which we have to deal is dated 16th April 1926, more than five years after. But whether the section means that the Commissioner *believes with reason*, or simply that he has a reason which would justify belief (a point which it is unnecessary here to decide), I am of opinion that the reassessment of 16th April 1926 comes within the exception.

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It is unnecessary to state all the facts which justify such a belief; for my present purpose it is sufficient to refer to the glaring omission of all stock-jobbing profits from the original return, the conversations of the taxpayers with the Commissioner's officers, the acquiescence of the taxpayer in the reassessment of 11th May 1923, the evidence which the taxpayer gave before *Starke* J. as to the assessment of A. S. Clarke, and the statements made in the cases for opinion submitted to counsel for the taxpayer. But it is for Parliament to consider whether the Commissioner ought not to be required, in making reassessment after three years, to state definitely that he has reason to believe that there has been an avoidance of the tax owing to fraud or attempted evasion.

In my opinion this appeal ought to be allowed.

RICH J. This appeal relates to the liability of the respondent for income tax upon a large sum of money which arose from the sale of a number of shares in the Badak Company and the Bux Syndicate. The shares in question had multiplied from a few original shares in a small Badak company and in a Bux syndicate. These original shares were at the time when they were taken up of small value. The shares which grew from them were sold on the share market at extraordinary prices. The respondent incurred the odium which always attaches to those who take part in the successful sale of mining shares on an excited market which afterwards collapses. The sudden accession of himself and his family to comparative wealth excited sufficient public prejudice to give rise to a prosecution of himself and two promoters of these concerns for conspiracy. They were, however, acquitted.

The learned primary Judge, in consequence, approached the examination of the respondent's evidence and the facts of the case with all due suspicion and criticism. His Honor says:—"The hearing of this appeal has necessarily involved a prolonged investigation of facts which occurred in 1919 and 1920. It has occupied a long time, and so far as I can judge every source of information has been explored with great thoroughness. In the result I can feel no doubt upon any important question of fact, the only difficulties in the case being, in my opinion, questions of law, to which I shall

refer later. The question of the appellant's bona fides has necessarily been in the forefront throughout and I could not but approach this question with a very critical mind, having regard to the dubious nature of the undertaking of the two companies and the appellant's close association with their promotion and management. Nevertheless I am satisfied of the substantial truth of the appellant's story as regards his dealings with his family. Prolonged observation of the appellant in the witness-box has chiefly led me to that conclusion, and wherever confirmation might reasonably be hoped for so many years after the event it has, in my opinion, been forthcoming. The deficiencies in the evidence on matters of fact have been no more, in my opinion, than necessarily occur in any inquiry into details of events which occurred seven and eight years ago. The methods pursued by the appellant in 1920 were obviously not devised with an eye to the requirements of legal evidence but were the most natural methods in the circumstances. He had a large family still living with him and unprovided for. He was the natural guardian of the interests of his wife and the younger sons and daughters and was familiar with mining affairs and in close touch with other speculators and brokers. What is more important still, the entire family appear to have lived with the appellant on terms of affection and complete confidence."

We in turn were invited to examine in full once again the credibility of the respondent and his witnesses, whom we had not seen—I was a reluctant party to a meticulous and exhaustive investigation of every fact and document which could conceivably be used to throw light on the circumstances in which the material facts occurred eight years ago. In addition we thoroughly examined the books and contract notes of many stockbrokers for the keeping of which the respondent was not responsible. This evidence, both admissible and inadmissible, so far from displacing the learned Judge's conclusion completely confirmed his findings. Matters which, when divorced from the context and considered apart from other material, might seem to found an argument to the contrary could not survive a reasonable understanding of the evidence as a whole. This is well illustrated by the observation of the learned primary Judge in relation to the supposed inconsistency and

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discrepancy upon which Sir *Edward Mitchell* mainly relied:—"As regards what were believed to be the incorrect and inconsistent statements by the appellant and his son in April 1926 and prior thereto upon the question as to whether the appellant was or was not repaid his outlay on the sons' behalf, these were relied upon before me mainly as affecting the credit of the witnesses concerned. It was not, I think, contended that the fact of repayment would have any importance one way or the other upon the question of the taxability of the appellant. As going to credit I have been satisfied that there have always been and still are to some extent uncertainty and difference of opinion on the part of the appellant and his sons upon this question of fact. In the numerous transactions resulting in such large benefactions to the appellant's wife and family, occurring as they did within a short space of time and contemporaneously with numerous other transactions whereby very large profits accrued to the appellant himself, it does not seem to me surprising that the question whether the appellant ever received payment or credit for his original comparatively small outlay should be a difficult one to answer after the lapse of years unless there has been some contemporary record—and the more so because at the time, considering the large sums of money flowing in, none of the parties would have been likely to regard the adjustment of such a sum as of any moment. It has now been proved that much the greater part of the father's outlay on behalf of his sons, namely £540, was repaid to him, but there remain conflicting beliefs as to the balance—a point upon which I have already stated my findings." With this view I thoroughly concur.

Compelled as I was to embark upon this independent and adventurous voyage of discovery without the advantage of the mariner's compass possessed alone by the learned Judge who saw and heard the witnesses, I have arrived at exactly the same conclusion as his Honor. I am, of course, at liberty and, indeed, am bound to draw my own inference from the facts (*Mersey Docks and Harbour Board* v. *Procter* (1); *Montgomerie & Co.* v. *Wallace-James* (2)). The observations of Lord *Robson*, in delivering the opinion of the Privy Council in *Khoo Sit Hoh* v. *Lim Thean Tong* (3), precisely

(1) (1923) A.C., at p. 259. (2) (1904) A.C. 73, at p. 75.
(3) (1912) A.C., at p. 325.

describe the position in this case:—"Their Lordships' Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial Judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present, where those Courts have only his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the Judge's satisfaction at the trial, either by his own questions or by the explanations of counsel given in presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony." Upon the view which in common with the learned primary Judge I accept, the determining facts are very short and the decision of the case depends entirely upon questions of law. The respondent, Alfred Clarke, in 1919 carried on a business of a cordial manufacturer under the name of the Bux Brewing Company, but consistently allowed himself to be seduced by the temptation of putting small sums, derived by the sale of cordials, at hazard on the Stock Exchange. Until 1919 he appears to have met with little but disaster. In 1918 some persons of a like tendency whom he appears to have known associated themselves in an adventure the purpose of which was to win tin in the far distant Malay Peninsula. They registered a company under the no-liability provisions of Part II. of the Victorian *Companies Act* 1915, which is

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devoted to mining companies, and called the company the Badak Mining Syndicate No Liability. The respondent took up 2 fully paid up shares in this company the capital of which was divided into 100 shares of £10 each. Two persons, one named Williamson and one named Scarborough, appear to have received or become possessed of promoters' shares. Shortly after these shares were allotted they gave 2 of them to the respondent. They did so by handing him the scrip for each such share, which presumably was, like most other scrip in mining companies, endorsed in blank by the person to whom it was issued. It was treated by Williamson, Scarborough and the respondent, as it universally always is, as passing by delivery. At this juncture, of the numerous family of the respondent, which consisted of eight children and a wife, the three eldest sons were working with their father in his cordial factory, which seems to have been situated near his house. On the respondent's return home with the two gift shares, being desirous of giving them to his sons, one each to A. S. Clarke and L. V. Clarke (the two sons in whom his confidence seems to have been greatest), he put the shares on his desk and said "Here you are, boys; I got these free, you can have one each." They accepted them of course. The scrip was put in the office safe, one key of which was held by the father and one key by one of the sons. A. S. Clarke was subsequently registered in the register of the company as holder of 2 shares by reason of this gift. A point was made that it was not clearly established by the respondent that the registration was in respect of the 2 shares the scrip for which was physically given in the manner stated. These shares in respect of which A. S. Clarke was registered are numbered 77 and 78 and, as a matter of conjecture, it seems probable that they were the same. The sufficient answer is that after the lapse of eight years he can hardly be expected to prove with precision the indentity of the shares with the scrip. Moreover, in a community where mining shares in a company are treated as bearer securities the failure on the part of A. S. and L. V. Clarke to insist when it came to registration upon the identity of their own shares, when all shares were of equal value and only differed in the identifying number on the face of the scrip, could scarcely deprive them of the interest which the

father sought to bestow on the sons. In my opinion the delivery of the scrip amounted to a gift. Before registration the sons were entitled both at law and in equity to procure by legal remedies, if necessary, the registration of the shares. As *Isaacs* J. in *Anning* v. *Anning* (1) says:—"The intention of the donor must have been perfectly effectuated so far as the nature of his property admits. . . . On the other hand, if the donor has carried out his intention so far as the nature of the property will allow, equity will then exercise its jurisdiction to assist the donee in getting in the property. As was said by *Chitty* J. in *In re Earl of Lucan*; *Hardinge* v. *Cobden* (2): 'It is unnecessary to say in the case of a gift, the gift must be complete, and equity will not assist in completing an imperfect gift, though it is equally plain that equity will protect a donee who by a valid gift has obtained the title to the enjoyment of the thing that has been given.'" The sons had no need to resort to legal remedies but procured registration, although for some reason L. V. Clarke preferred to have his share registered in the name of A. S. Clarke. At this stage it is undeniable that these shares belonged to the sons A. S. and L. V. Clarke. At a later date the company increased its capital and each shareholder became entitled to one more. Accordingly A. S. Clarke was registered for 2 more shares making 4 in all. This entailed a payment of £10 to the company, which the father paid on behalf of the sons. At a later stage the company again doubled its capital so that those sons became entitled to four additional shares. The father had been desirous of benefiting his wife and the remaining members of his family, and had already taken some steps to bestow Badak shares upon them. The father asked A. S. and L. V. Clarke if they would stand back in favour of the other members of the family and allow these 4 shares to be given to them. This they agreed to. This seems to have taken place in January or February 1919. In April 1919 another project which had for its object mining in the Malay Peninsula was started. A promoter of the Badak Company named Orton was in the Malay Peninsula and wrote to the Badak Company stating that there was a claim adjoining the Badak property which was good land and suggesting it should be acquired. He also wrote to Williamson

(1) (1907) 4 C.L.R., at p. 1063.

(2) (1890) 45 Ch. D., at p. 474.

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and Scarborough to the same effect. The company had not the money or would not take up the land, and these letters were shown to the respondent. He suggested that Scarborough should be sent to see if Orton had the kind of property he said he had. He then spoke to A. S. and L. V. Clarke about the matter:—"I had a conversation with my sons about it; that night I went home and spoke to A. S. and Leslie V. The conversation was about the letter that had been received from Orton stating that there was some good ground adjoining the Badak, and that it would be worth while sending someone across to take it up. They agreed to help to finance me to send Scarborough across at our own expense—just the three of us, I and my two sons—to acquire further territory, principally to see if he had the property he said he had. We had a conversation with Scarborough to see whether he would go over and make arrangements." What then occurs is clearly shown in the following passage from A. S. Clarke's evidence:—"Q. Was there anything else said while Scarborough was there? A. Only that he should get ready and get away. The next step was that just a few days after father came home and suggested a syndicate being formed, and he told me that he met Mr. Rogers, I think in Queen Street, and Dad told Mr. Rogers what he was doing and Mr. Rogers said 'Oh, well! I would like to stand in with you.' Father said 'I cannot do anything, I will have to ask the boys.' Father came home and told me that he saw Mr. Trembath, and Mr. Trembath wanted to form a syndicate and send Scarborough across. I was a bit peeved at the time, I said 'Why do they want to come in now? We decided to send him across and now they want to come in.' Father suggested that we should let them come in and form a syndicate, and Leslie and I both agreed that a syndicate should be formed and it was formed. Q. Whilst it was being formed, did your father and you have discussions as to what interest you should take? A. I said I wanted a share right off. He told me it was being put into a syndicate of sixteen shares, and I said 'I want one,' and L. V. said he wanted one. That was agreed to. Nothing was said at that time about paying for it, but within a month I wanted to fix up for that share, but father said 'No, leave it go and see how it gets along.' I did make a suggestion to

pay for that within a few days." This makes it plain that, the father and sons having tentatively agreed upon a joint adventure the profits or losses of which they were to share equally, the father and the sons afterwards agreed to become members of a wider syndicate in which each son was to have an interest expressed as one share. The syndicate was formed as a common law partnership or unincorporated company, with its subscribed capital divided into 16 shares of £30 each of which £25 each was immediately paid up. The father and sons agreed that the father should stand in relation to the other syndicators as a shareholder for 3 shares but as between the sons and himself he was to subscribe in respect of one share for each of them. In point of fact he at the same time told his wife and the other members of the family that he would take one share for them. He took up 4 shares but, owing to some misunderstanding, felt himself obliged to part with his own to two persons named Rees and Taylor. He was thus left holding 3 shares, 2 of which he had taken up under a definite arrangement with his sons A. S. and L. V. Clarke and on their behalf and 1 of which he at least believed he held for his wife and the other members of his family. The Commissioner contends that it was never intended that the sons should pay the father the amounts paid or payable upon their shares and much time was expended in discussing whether they ever did so. There is no doubt that the father and the sons entered into the transaction as a business venture on a business basis. It appears from a book of account, which happened to survive the subsequent discontinuance of his brewing business and the vicissitudes of the exhaustive inquiries of the Commissioner and the investigation of other authorities, that these sons, like other members of his family, had definite business relations with the father as the result of which they sometimes stood as his creditors and sometimes as his debtors in relation to the business. I have no doubt that the father and his sons A. S. and L. V. Clarke regarded themselves as in definite business or legal relations under which the father was bound to treat himself as holding 2 shares in the syndicate 1 for each of them. But, as would be not unusual where father and sons had a running account between them, the father waived aside actual payment, as the learned primary Judge points

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out in the passage already quoted from his judgment. In the numerous subsequent transactions, in what must have become to them very high finance, it does not seem at all improbable that both father and sons had a very misty idea of precisely when and precisely how the small sum of £25 (with an additional call of £5) was debited to each son in their transactions with the father. The varying strength of their beliefs and misgivings in the numerous statements they have had to make rather betokens candour than a concerted story. The learned primary Judge's view on this transaction seems to be very sensible and right and to display no unwonted credulity on his part, but merely a knowledge of human beings and their ways. The legal result of this transaction seems clearly to be that the father held what contractual right he possessed in the syndicate as a fiduciary in relation to 2 shares for his two sons. The syndicate at all material times was possessed of paid up capital, and the suggestion that the father had no proprietary or legal right which he could hold for the sons seems to lack foundation. It is true that the syndicate had no mine in the Malay States but merely a claim for one or what might be called a *spes accessionis* in relation thereto, but it was a definite partnership adventure, and why an interest in such an adventure cannot be the subject of equitable relations I am unable to understand. As a result of the transaction thus discussed, the sons were, in my opinion, entitled to 4 Badak shares and to a beneficial interest in 2 shares in the Bux Syndicate.

In the year ending 30th June 1920 the sons sold 2 Badak shares for £297. During the same period the Bux Syndicate interests and prospects were conceived to be so valuable that a no-liability company was floated to take them over and in respect of each syndicate share in question 54 fully paid shares in the new company were issued free and 54 contributory shares upon a payment of £5 per share. Each son thus became entitled to 108 shares in the new company on payment of £270. All the shares in the company were issued in the name of a nominee and the scrip was endorsed by him. The father paid the £540 required for and on behalf of his two sons. The company was registered on 17th February 1920, but there was some delay in the issue of the scrip. According to the father, the two sons and Trembath, a sharebroker, the

last-named sought to buy on behalf of his clients some of the Bux shares about to be issued. The father told him that perhaps his sons would sell, and they in fact instructed him to sell a number. 162 shares were sold by this broker between 17th February and 18th March 1920 for a gross sum of £14,937 10s.; 23 more were sold by a broker named Archer for £2,159. These sums for the 2 Badak shares, 162 Bux and the 23 Bux were all actually received by the two sons either in cheques from the brokers or in *Commonwealth War Bonds* purchased by the brokers. The cheques were paid into the bank account of L. V. Clarke, who drew a cheque on 23rd March for £540 by which he paid his father the two sums of £270 which the father had paid for him and his brother respectively for the 54 contributory shares. The balance he divided later with his brother A. S. Clarke. The reason for L. V. Clarke handling the money seems to be found in the fact that A. S. Clarke had had the misfortune on 17th February to kill a man in a motor accident and was to be tried for manslaughter. The total sum thus received by the sons from the proceeds of shares sold during the period in question was thus £17,393 10s. Whether these profits were income or not, they were the profits of the sons derived by their own dealings with their own property. The Commissioner, after the fullest possible investigation, took this view and assessed A. S. and L. V. Clarke in May 1923 for income tax upon their respective shares in this amount less proper deductions. The sons seem to have been advised that the profits were not income, and appealed against this assessment. The question upon the appeal was whether the admitted profit, admittedly derived by them, was in its character income or not. The facts relating to the question whether the profits were theirs or their father's were unnecessarily imperfectly gone into. Upon the slight materials before the learned Judge who heard the appeal of A. S. Clarke he seems to have got the impression that the sons might have been put forward as taxpayers in order to prevent the amount so derived being treated as the father's income, whether to avoid aggregation or tax altogether is not clear. The Commissioner was encouraged by the expression of the learned Judge's views or suspicions to depart from the view which he had formed on much fuller and, indeed, very complete material, and to

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amend the father's assessment to include the whole of this sum together with a further sum of £23,379 3s. 2d., less proper deductions, which he had before attributed to the mother and other members of the family. He accordingly cancelled the assessments of the two sons which were under appeal. The sum of £23,379 3s. 2d. which he had so attributed to the mother and various members of the family consisted of £11,936 4s., proceeds of 9 shares in the Badak No Liability Company; of £2,433 4s. 2d., proceeds of 5,000 shares in a larger Badak company into which the former Badak company was reconstructed at a later date, representing 3 shares in the original company with 500 shares in the new company added or thrown in; and of £9,009 15s., the proceeds of 100 shares in the Bux No Liability Company into which the Bux Syndicate was floated. The whole of these sums, with the exception of £1,064, were actually received by the wife and the various members of the family either in the form of brokers' cheques or war bonds. It is clear that the respondent never enjoyed any part of this money at any time. It is true that some part of the money which was invested in war bonds passed through his bank account. It is true that for some time the war bonds remained in the office safe together with the bonds belonging to A. S. and L. V. Clarke and, for all that appears, together with securities belonging to the father. But it is also true that each member of the family ultimately placed war bonds of the face value of £2,000 in his or her bank for safe-keeping and the mother placed war bonds of the face value of £4,000 in her bank, and that in the interim each member received the interest upon the war bonds, and there cannot be any reasonable doubt that from the time the war bonds were purchased they belonged to and were enjoyed by the mother or child, as the case may be, who afterwards placed them in her or his bank. The proceeds of the 100 Bux Company shares represented the selling price of 100 out of 108 shares in that company which were taken up in respect of the 1 share in the original Bux Syndicate which the father had avowedly acquired in that syndicate for the benefit of his wife and his family. He told his wife he took it for her and the family when he acquired it. He told Trembath, the broker, who was secretary of the syndicate, and Murchie, the secretary of the company. He avowedly took up 108

shares for his wife and family, and he told them at the time that he was about to do so. The scrip for the 108 shares was intended to be issued in the name of Murchie as a nominee and endorsed by him to bearer. The father did not acquire any legal interest in respect of the 108 shares of his own as a shareholder on the register of the company. When he took up the shares in the original syndicate he intended to stand in relation to the other syndicate as a syndicator, but he declared that the beneficial interest was in his wife and family. It is true that he did not intend them to give any consideration, although it is probable he intended to deduct the £25 paid, and any further payments, from the price the share realized when it was sold. But, as he intended to hold the legal right himself but intended that the beneficial right should be in others and declared this intention, he seems to me to have constituted himself a trustee for his wife and family. He said he intended to reserve for himself a power or right of apportioning the profits derived from the share among the wife and the children; and, although this was done without objection, he did not communicate this intention at the beginning, and in strictness he constituted himself a trustee for the wife and family in equal shares. Be this as it may, he does not appear to me to have been entitled to the profits derived from the sale of the 100 Bux Company's shares. He was free neither according to the principles of honesty nor the strict rules of equity to appropriate the proceeds to his own use. The proceeds of the 12 Badak shares, 9 of which were sold in their original form and 3 in the form of property into which they were converted, namely, 4,500 in the reconstructed Badak Company, were, in my opinion, in the same position. These 12 shares belonged to the father neither in law nor in equity. In 1918 he informed his wife that he had acquired 2 Badak shares for her. He narrates the circumstances in which he acquired them, and it would appear that the scrip which represented them was bearer scrip at the time, the registered shareholder being a stranger. In May 1919, 2 shares were accordingly registered in the name of Mrs. Clarke. These shares had been doubled when the capital was doubled, and she was entitled therefore to 4. 2 were, however, registered in the name of her son Edgar and when the capital was again doubled Edgar and she together became entitled to 4 more, 8 in all.

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A. S. and L. V. Clarke agreed to stand back in respect of the 4 to which they became entitled, but 2 of these were registered in A. S. Clarke's name, the remaining 2 were registered in the name of some nominee. In the meantime the father did make it clear that he did not intend his wife to have the sole interest in these shares but that they were held for the family other than A. S. and L. V. Clarke, and accordingly 4 were registered in Edgar's name and 2 remained in A. S. Clarke's name. In these circumstances the respondent clearly did not have the legal interest, and in my opinion he did not have the equitable interest in these 12 shares and the proceeds of them formed no part of his property and could not be his income. From the proceeds of the Badak and Bux shares sold for the wife and family he in fact deducted £1,064 or thereabouts, of which £800 represented what he had expended in acquiring these interests, and the remaining sum of £200 odd seems to have been unaccounted for in the division amongst the children because, apparently, the division was accomplished by giving brokers' cheques or bonds.

It was contended on behalf of the Commissioner that the activities carried on by the father with the help of the sons in the realization of the shares amounted to the carrying on of a business so that the net proceeds of the shares were income or, in that or some other way, the activities were so frequent and repeated as to render the proceeds income. It was said that activities carried on systematically and on an organized scale, although directed to realization of stock and shares, constituted a business or avocation or pursuit the profits derived from which were income. But the expressions "systematic" and "organized" are somewhat elastic and, unless it was quite kept in view that they meant something more than repetition, frequency or habit, they were misleading. The difference was well brought out in the judgment of *Rowlatt* J. in *Graham* v. *Green* (1) by the illustration of the bookmaker and his client. It was nothing to the point that the bookmaker attended at the racecourse with equal frequency as the client. The bookmaker had his system organized in a way that made his business consist not in the multiplicity but in the mutual relation of his bets and in the continuous effort to maintain a profitable

(1) (1925) 2 K.B. 37.

return therefrom. The speculations of men who dabble in stocks and shares, however often repeated, depend upon no such continuous effort. The continuous optimism of the respondent for very many years led him to hazard small sums of money in speculation often enough to justify him in calling it a hobby. Every speculation was isolated from the others. There was no co-ordination or system. The speculations in Badak and in Bux in their inception resembled these, although their result was so different as to justify the optimism which the respondent continued to show over so many years in the others. Moreover, there seems to be much reason in the suggestion of *Mann* J. that, if Clarke thought he had given the shares from which profits proceeded to his sons and family, he could scarcely be considered as carrying on an organized business for his own profit in selling them. Except for the extraordinary amount of profits derived from these ventures, the position of Clarke and his family is not dissimilar from that of the ordinary speculator who becomes a member of a syndicate and takes part in the conversion of the syndicate into a company or otherwise speculates on the Stock Exchange. Both in New South Wales and Victoria such persons have not been considered as liable to be taxed on their profits or entitled to deduct their losses under the Income Tax Acts (*Foreman* v. *Commissioners of Taxation* (1); *In re The Income Tax Acts* (*No.* 4) (2)). For these reasons the profits in question were not derived by the respondent Clarke nor were they income.

This appeal was from an amendment of an assessment made in 1921. This amendment was made pursuant to sec. 2 of the Act 1922-1925, which keeps alive the repealed Acts 1915-1921 for certain purposes. They were kept alive subject, however, to the proviso that "no alteration or addition shall be made in or to any assessment made under any such Act after the expiration of three years from the date when the tax payable on the assessment was originally due and payable, unless the Commissioner has reason to believe that there has been an avoidance of tax owing to fraud or attempted evasion." This proviso was inserted by Act No. 28 of 1925 and is evidently based upon the proviso to sec. 37 (1) of the 1922-1925 Act which is, however,

(1) (1898) 19 N.S.W.L.R. (L.), at p. 200.

(2) (1899) 25 V.L.R. 679; 22 A.L.T. 39.

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confined to assessments made for the financial year commencing 1st July 1922 and for the succeeding financial years (sec. 32 (2)). The question therefore arises whether the Commissioner had "reason to believe that there had been an avoidance of tax owing to fraud or attempted evasion." The Commissioner attempted to establish that he had reason to believe that the amended assessment, made 11th May 1923, by which he assessed the father in respect only of £7,499, was induced by fraud or attempted evasion. It may be doubted whether on the true construction of the second proviso to sec. 2 and also of the second proviso to sec. 37 (1) the fraud or attempted evasion there referred to must not be in connection with the assessment itself and not subject to additions or alterations thereto. The scheme of the legislation appears to be to allow the Commissioner as much time to make the assessment as he desires but, when he has made it, to give him a period of three years to rectify mistakes he has made in it "to insure its completeness and accuracy," unless those mistakes, namely, its lack of "completeness and accuracy," are attributable to the fraud or attempted evasion of the taxpayer. Where the proviso says "unless the Commissioner has reason to believe that there has been an avoidance of tax owing to fraud or attempted evasion," some period is referred to by the words "has been," and the fraud or attempted evasion must have been in relation to some act or assessment of the Commissioner, and the structure of the sentence strongly suggests that the process of assessment is the act referred to and the words "has been" relate to the time when that takes place. However this may be, the Commissioner directed his case to showing that the fraud or attempted evasion which he had reason to believe existed took place at a much later date. It was not suggested that he had reason to believe that in 1921 there was fraud or attempted evasion. It may be that the Legislature intended the Commissioner to express to the taxpayer in the assessment or in connection with it his belief in the fraud or attempted evasion, but this step the Commissioner did not take. The notice of amended assessment bears no trace of any such belief. After the taxpayer had lodged objections, including the objection that the period of three years from the original assessment had expired, the Commissioner on 30th November 1926 wrote to the

taxpayer claiming double tax on the ground of fraud or attempted evasion, and narrated that he had formed the belief in May 1923, and he says: "I have now ascertained that the said representation was not true and that the whole of the said profits were profits made by you, and, having reconsidered the matter, I have determined that I have reason to believe that there has been an avoidance of tax on your part owing to fraud or attempted evasion within the meaning of section 2 of the *Income Tax Assessment Act* 1921-1925."

The Commissioner was called as a witness and described the formation of his belief, which he attributed to the time when the amendment appealed from was made in April 1926. An appeal of the son A. S. Clarke had been heard before a Justice of the High Court, and the son and father had given some account of their mutual relations as to which my brother *Starke* had during the progress of the case expressed some incredulity. The Commissioner did not profess to be influenced by these expressions but quite properly directed his own mind, as he says, to the question. He looked at two cases for opinion which had been submitted to counsel upon the question whether the profits in respect of which he had separately assessed the father, sons and members of the family bore the character of income. He found in them statements which he considered inconsistent with the evidence given by them before *Starke* J., and he appears to have recalled that according to the reports of his officers some statements had been made to him which he thought were not borne out by the evidence. He overlooked the fact that the cases for opinion had been submitted to counsel and afterwards handed to him after the amended assessment had been made in May 1923, and if these cases did contain misstatements they neither were designed nor operated to induce him to do what he had already done. The reports of his officers were put in evidence, but it is not clear from the Commissioner's evidence whether he studied them or relied upon his memory or some other account of them. A scrutiny of these reports and a comparison of the evidence do not afford ground for thinking that any fraud or attempted evasion had been practised; nor does the Commissioner say that, had it not been for the cases for opinion which he thought preceded the

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amendment to the assessment, he would have arrived at the conclusion that there was fraud or attempted evasion.

In these circumstances the question is: Did the Commissioner have "reason to believe"? The answer seems to depend upon the meaning and effect of that expression. In *Moreau* v. *Federal Commissioner of Taxation* (1) my brother *Isaacs* discussed it and has given a very wide meaning to it. *Mann* J. considered himself bound by that decision, and, applying it, was constrained to hold that the Commissioner had reason to believe. It seems plain from his judgment that if he had been free to express his own view he would have held otherwise. The expression "reason to believe" is one frequently used in the English language. In the *Oxford Dictionary* "reason" is defined as "a fact or circumstance forming or alleged as forming a ground or motive leading, or sufficient to lead, a person to adopt or reject some course of action or procedure, belief, &c." And *Mill's Logic* I. iii., sec. 7, is cited: "Should we not have as much reason to believe that it still existed as we now have." Applying this standard, the materials do not of themselves suggest to my mind any reason to believe, and the Commissioner's reason to believe consists merely of an irrational error due to forgetfulness or a failure to advert to the real sequence and significance of those materials. The process of calling the Commissioner as a witness as to his secret beliefs and reasons unexpressed and not communicated to the taxpayer seems a curious proceeding; and I cannot help thinking that the Legislature intended that the assessment itself should state what reason the Commissioner had for his belief, leaving the taxpayer to attack its sufficiency if he thought he could do so.

It was suggested that, if the Court were to hold that the gifts and trusts were established, it should under sec. 51A (5) amend the assessment in some fashion so as to make the tax exigible in respect of the gifts and trusts. Such a course is not warranted by the Act. The assessment made by the Commissioner was directed against the respondent in his individual capacity. The donees and the cestuis que trust were not parties to the assessment and could not lodge an objection to it (sec. 50) and were not parties to or heard on the

(1) (1926) 39 C.L.R. 65.

appeal (sec. 51A). Moreover, the Act makes special provision for the case of trustees (sec. 31). In an ordinary case these gifts and trusts would not escape taxation but would be assessed in the manner prescribed by the Act. Whether the vagaries indulged in by the Department in the course of this somewhat tortuous series of assessments now prevent this being done, I refrain from saying. It is another story. That matter and the proper parties to it are not before us.

Before parting with this case I must deal with an argument insisted upon by counsel for the Commissioner, lest it be thought it was overlooked. It was urged that the Court would not lend its aid to the respondent because it was alleged he had been guilty of fraud or illegality in connection with the Badak and Bux shares (*Scott* v. *Brown, Doering, McNab & Co.* (1)). "No man," said Lord *Mansfield*, "shall set up his own iniquity as a defence, any more than as a cause of action" (*Montefiori* v. *Montefiori* (2)). But this argument appears to me to involve some confusion of thought. The fraud or illegality, if there was any, was concerned with the acquisition of the interests in the two companies mentioned. The constitution or validity of the gifts and trusts in favour of the respondent's family—the only matter in issue in this case—was surely an innocent and meritorious transaction. The *facta probanda* relied upon to establish the gifts and trusts in question are unconnected with the alleged fraud or illegality and the well-known principle has no application.

In my opinion the appeal should be dismissed with costs.

Appeal allowed with costs. Order of Supreme Court of Victoria discharged, and appeal from Commissioner of Taxation dismissed with costs.

Solicitor for the appellant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Dunlop & Dunstan.*

E. F. H.

(1) (1892) 2 Q.B., at p. 728.

(2) (1762) 1 W. Bl. 363.