HIGH COURT OF JUSTICE (CHANCERY DIVISION)—28TH AND 29TH JULY 1969

COURT OF APPEAL—17TH AND 18TH NOVEMBER AND 18TH DECEMBER 1969

HOUSE OF LORDS—17TH, 18TH AND 19TH MAY AND 20TH JULY 1971

Greenberg *v.* Commissioners of Inland Revenue[1]

Commissioners of Inland Revenue *v.* Tunnicliffe[1]

Surtax—Tax advantage—Counteraction—Contracts made before 5th April 1960 *for forward dividend-strip—Purchase money released to vendor after that date as and when dividends paid—Whether tax advantage obtained from transactions in securities carried out before 5th April* 1960*—Finance Act* 1960 (8 *&* 9 *Eliz.* 2, *c.* 44), *ss.* 28(1) *and* 43.

The Appellant in the first case and the Respondent in the second case each entered before 5th April 1960 *into a contract with share-dealers for the sale of shares in a company on terms constituting a forward dividend-stripping operation. In the first case the purchase price was paid by instalments as and when dividends were paid on the shares by the company to be stripped, the greater part being paid after 4th April* 1960. *In the second case the purchase price was paid forthwith, but the vendor was required to deposit an equal amount with a bank, which was released to him by instalments depending on the payment of dividends by the company to be stripped; all the relevant dividends were paid after 4th April* 1960.

On appeal against notices under s. 28(3), *Finance Act* 1960, *specifying adjustments requisite to counteract the tax advantages obtained or obtainable by the foregoing transactions, it was contended for the Appellant in the first case and for the Respondent in the second case that the transaction or transactions from which the tax advantages were obtained were carried out before 5th April* 1960. *In the first case the Special Commissioners held that the transactions in consequence of which the tax advantages were obtained included the receipts of money by the Appellant. In the second case the Special Commissioners held that the Respondent obtained the tax advantage when he received a banker's draft for the purchase price of the shares.*

Held, (1) *in both cases, that the relevant transactions in securities had not been carried out, within the meaning of the proviso to s.* 28(1), *Finance Act* 1960, *before 5th April* 1960 *because* (a) (*Lord Reid dissenting*) *the agreement for the sale of the shares was the relevant transaction and it had not been implemented before that date or, alternatively,* (b) (*by Lords Reid, Morris of Borth-y-Gest and Simon of Glaisdale*) *each payment of dividend and of the corresponding instalment of the purchase price was a separate transaction relating to securities;* (2) *in the second case, that the vendor in no real sense received payment before 5th April* 1960.

[1] Reported (Ch. D.) [1971] Ch. 286; [1969] 3 W.L.R. 883; 113 S.J. 876; [1969] 3 All E.R. 1445; (C.A.) [1971] Ch. 286; [1970] 2 W.L.R. 362; 114 S.J. 169; [1970] 1 All E.R. 526; (H.L.) [1972] A.C. 109; [1971] 3 W.L.R. 386; 115 S.J. 643; [1971] 3 All E.R. 136.

CASES

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

CASE

Stated under the Income Tax Management Act 1964, s. 12(5), the Income Tax Act 1952, s. 64, and the Finance Act 1960, s. 28(8), by the Commissioners B for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 23rd and 24th October 1967, Mr. Henry Greenberg (hereinafter called " the Appellant ") appealed against a notice given to him by the Commissioners of Inland Revenue pursuant to s. 28(3) of the Finance C Act 1960. A copy of the notice is set out in Sch. I of this Case.

2. (*a*) The following documents were admitted or proved; such of the documents listed as are not attached hereto as exhibits are available for inspection by the Court if required:

(1) A special resolution of L. Greenberg Ltd. passed on 30th December 1958, creating preferred shares (exhibit A[1]).

D (2) A letter of allotment dated 30th December 1958 in respect of twelve of such shares (exhibit B[1]).

(3) An agreement dated 30th December 1958 between David Greenberg and the Appellant of the one part and Finsbury Securities Ltd. of the other part (hereinafter called " the sale agreement ") (exhibit C[1]).

(4) A share certificate dated 30th December 1958.

E (5) Accounts of L. Greenberg Ltd. for the years ended 31st December 1959 to 1963.

(6) Copies of various minutes of meetings of L. Greenberg Ltd.

(7) Copy of an account entitled " Martins Bank Ltd.: re D. & H. Greenberg " (exhibit D[1]).

(8) Copy of an account entitled " Finsbury Securities Ltd." (exhibit E[1]).

F (9) Statutory declaration made by the Appellant pursuant to s. 28(4) of the Finance Act 1960.

(10) Counter-statement of the Commissioners of Inland Revenue pursuant to s. 28(5) of the Finance Act 1960.

(11) Notice under s. 29 of the Finance Act 1960 and correspondence.

(*b*) In addition, entries in the Appellant's private bank account were read G out and treated as agreed facts and the Appellant gave evidence before us.

3. L. Greenberg Ltd. (hereinafter called " the company ") at all material times carried on the business of millinery manufacturer. Prior to 30th December 1958 its issued capital was £504 in 504 £1 shares held as to 63 shares by the Appellant and as to 441 by David Greenberg. The Appellant and David

[1] Not included in the present print.

Greenberg, his father, were its only directors, and where they are referred to together in this Case they are referred to as " the Greenbergs ". The company's accounts were made up to 31st December each year. It was accepted by the Appellant that at all material times the company was a company to which s. 28(2)(*d*) of the Finance Act 1960 applied.

4. Towards the end of 1958 the Greenbergs decided, in association with Finsbury Securities Ltd. (hereinafter called " Finsbury "), which was a dealer in shares, to carry out a forward dividend-stripping operation. In broad outline, this was to take the following form. The company (which was expected to earn, over the following five years, profits amounting to £20,000 or more after tax) would create new shares carrying the right to all the net profits for five years, up to £20,000 net after tax. These shares would be sold by the Greenbergs to Finsbury for £20,100 plus the right to receive half of whatever amount Finsbury might be able to obtain by repayment of, or relief from, income tax in respect of tax deducted from the dividends it would receive on such shares. Finsbury was expected to obtain such repayment or relief by reason of the fact that it would show a loss of £20,000 on its dealing account, because at the close of the five-year period the shares (for which it would have paid £20,100) would have a value of only about £100. In this manner the Greenbergs would receive £20,000 free of income tax and surtax for parting with £20,000 of taxed dividends, and would also receive a further sum dependent upon Finsbury's tax adjustment. As events turned out Finsbury did not obtain any repayment of or relief from tax as expected, and no such further sum became due.

5. It was not disputed that the Appellant obtained tax advantages within the meaning of s. 28 of the Finance Act 1960 in that he avoided possible assessments to surtax, such avoidance being effected by receipts accruing in a non-taxable way, the receipts being sums which but for the operation would have accrued to him in a taxable way. Nor was it disputed that he obtained them in consequence of a transaction in securities, or the combined effect of two or more such transactions as there described; it was however claimed (*a*) that the transaction or transactions in consequence of which he obtained them were carried out before 5th April 1960 and (*b*) that they were not obtained in the circumstances mentioned in s. 28(2).

6. On 30th December 1958 the company passed a special resolution (exhibit A[1]) increasing the capital by the creation of 100 preferred shares of £1 each, carrying (*a*) a fixed cumulative preferential dividend at the rate of 6 per cent. per annum, and (*b*) further dividend rights which (shortly stated) entitled the holders, *pro rata*, to receive, in respect of each of the five years 1959 to 1963 inclusive, net dividends of such amounts as, after deduction of income tax, should be equal (in the aggregate) to either the profits of the company arising in each such year or the accumulated profits of the company available for dividend, whichever should be the less. This was subject to a proviso that the total amounts of such further dividends should not exceed £20,000 after deduction of income tax.

7. On the same day (30th December 1958) the company resolved to capitalise £100 of its reserves and apply that sum in paying up the said preferred shares, which were to be distributed to the company's existing shareholders *pro rata*. Accordingly renounceable letters of allotment were issued to David Greenberg (88 preferred shares) and the Appellant (12 preferred shares). The Appellant's letter of allotment is exhibit B[1].

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[1] Not included in the present print.

A 8. On the same day (30th December 1958) the Greenbergs entered into the sale agreement (exhibit C[1]), whereby they agreed to sell the preferred shares to Finsbury for £20,100, subject to adjustment as therein provided. Clauses 2 and 3 of the agreement read:

"2. (*a*) The said sale and purchase shall be completed forthwith when the Vendors shall hand to the Purchasers duly renounced letters
B of allotment in respect of the said Shares and the Purchasers shall pay to the Vendors or such persons as the Vendors may nominate the sum of £10,100 on account of the said purchase price.

(*b*) The balance of £10,000 of the said £20,100 shall be paid by the Purchasers to the Vendors or such persons as the Vendors may nominate not later than 31st December 1960.

C 3. The said purchase price shall be subsequently adjusted:

(*a*) in the event of the aggregate dividends (other than cumulative dividends) paid on the said Shares on or before 31st December 1964 (after deduction of tax) amounting to less than £20,000 by the deduction from the said purchase price of a sum equal to the difference between the amount of the said aggregate dividends and £20,000 and

D (*b*) by the addition to the said purchase price of 50 per cent. of the amount (if any) which the Purchasers shall by reason of losses suffered by them on their purchase holding and sale or other dealing in the said Shares become entitled to claim and of which they shall receive repayment (or relief against the income tax otherwise payable on other profits) in respect of any part of the income tax deducted from any such dividends
E (other than cumulative dividends).

Any adjustment of the purchase price pursuant to paragraph (*a*) of this Clause shall take place not later than 31st December 1964 when the Vendors shall pay to the Purchasers the amount involved in the adjustment. Any adjustment to be made under paragraph (*b*) of this Clause shall be made not later than 31st December 1966 when the
F Purchasers shall pay to the Vendors or to such persons as the Vendors may nominate the amount involved in such adjustment. The parties shall give to each other such information and evidence as may reasonably be required for the purpose of settling any adjustment to be made under this Clause."

9. The Greenbergs renounced the letters of allotment of the preferred shares
G in favour of Finsbury, which was duly registered as holder of the preferred shares on 30th December 1958.

10. Clause 2 of the sale agreement was not implemented according to its terms, but was varied. We had no evidence as to when, why or how the variation was arranged; the evidence before us related to what in fact took place.

As regards clause 2(*a*) no sum of £10,100 was paid on handing over the
H renounced letters of allotment; Finsbury paid £100 on 22nd January 1959 (of which £12 was paid to the Appellant), and as regards £10,000 an arrangement was made which is described in para. 11 below.

As regards clause 2(*b*) the balance of £10,000 was not paid by 31st December 1960 but various amounts were paid at different dates as and when Finsbury received dividends from the company.

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(1) Not included in the present print.

11. The arrangement as regards the first sum of £10,000 referred to in para. 10 above involved Martins Bank Ltd., Tottenham Court Road. Mr. David Greenberg, who was the director responsible for making the arrangements in 1958 referred to above, has since died, and accordingly no direct evidence was led as to precisely what the arrangement was, or as to when, why or how it was made; but two accounts were produced to us (*vide* paras. 12 and 13 below) and we found that broadly the arrangement was that the bank advanced £10,000 to Finsbury, and that £10,000 was credited to another account in the books of the bank, the Greenbergs being able to call on the money standing to the credit of such account to the extent that money (from the dividends on the preferred shares) was paid into Finsbury's account. One of the questions for our decision was whether this £10,000 belonged to the Greenbergs on 11th February 1959.

12. Exhibit E(1) is a copy of an account opened by Finsbury with Martins Bank (hereinafter called " the Finsbury account ").

It opens with a debit on 11th February 1959 of £10,000. Apart from debits for interest and charges, the other entries are:

(*a*) three credits on 26th March 1959, 15th March 1960 and 24th March 1961, which were dividends received by Finsbury on the preferred shares in the company;

(*b*) an amount of £9,807 15*s*. 2*d*. paid in by Finsbury on 25th June 1962, following the receipt by Finsbury in April 1962 of a dividend on the preferred shares of £9,677;

(*c*) a debit on 25th June of £6,923 15*s*., which was transferred to the credit of the special account referred to in para. 13 below;

(*d*) a final payment in by Finsbury of £7 3*s*. in July 1962 to close the account.

13. Exhibit D(1) is a copy of an account (hereinafter called " the special account ") opened in the books of Martins Bank, entitled " Martins Bank Ltd. Re D. & H. Greenberg ". It opens with a credit of £10,000 on 11th February 1959, and there is a further credit of £6,923 15*s*. on 25th June 1962 (*vide* 12(*c*) above). The three debits are amounts transferred to the respective private accounts of the Greenbergs, as follows:

22nd March 1960 ..	£4,000	of which the Appellant received £480
4th May 1961	£3,246 5*s*.	of which the Appellant received £389 11*s*.
25th June 1962 ..	£9,677 10*s*.	of which the Appellant received £1,161 6*s*.

Because of Mr. David Greenberg's death we had no evidence as to whether he asked for these transfers to be made, or whether the bank was directed to make them by Finsbury or made them of its own initiative.

(1) Not included in the present print.

A 14. (*a*) Finsbury received from the company net dividends (in addition to the fixed 6 per cent. dividend) on the preferred shares as follows:

	£	
23rd March 1959 ..	1,725	This was credited to the Finsbury account.
15th March 1960 ..	2,328	This was credited to the Finsbury account.
B Sub total	4,053	On 22nd March 1960 £4,000 was transferred from the special account to the respective private accounts of the Greenbergs, of which the Appellant received £480 on that date.
24th March 1961 ..	3,246	C Credited to the Finsbury account. On 4th May 1961 £3,246 was transferred from the special account to the respective private accounts of the Greenbergs, of which the Appellant received £389 11*s.* on that date.
13th April 1962 ..	9,677	D This was banked separately by Finsbury. On 25th June 1962 Finsbury paid into the Finsbury account £9,807, and £6,923 was transferred from the Finsbury account to the special account. On the same day £9,677 was transferred from the special account to the respective private accounts of the Greenbergs of which the Appellant received £1,161 6*s.* on that date. E
11th October 1963 ..	3,024	On 18th October 1963 Finsbury paid £3,024 direct to the Greenbergs, of which the Appellant received £362 17*s.* on that date. F
Total	20,000	

It was not disputed that on the occasion of the receipt of each dividend Finsbury received " an abnormal amount by way of dividend ", within s. 28(2).

(*b*) The Appellant's share of the £20,000 purchase money was £2,400 G (i.e. $\frac{12}{100}$). In addition to the sums received by him as detailed above (totalling £2,393 14*s.*) he received £23 19*s.* from Finsbury on 5th May 1961, making £2,417 13*s.* in all.

15. The transactions referred to in paras. 12, 13 and 14 above are set out in tabular form in the statement following:

H Date	Dividend (net) Amount	Finsbury account Credit	Finsbury account Debit	Special account Credit	Special account Debit	Received by Greenbergs Total	Received by Greenbergs Appellant's Share
(Opening Entries 11.2.59)	£	£	(£10,000)	(£10,000)	£	£	£ *s.*
23.3.59 ..	1,725	1,725					
I 15.3.60 ..	2,328*	2,330*			4,000	4,000	480 0
24.3.61 ..	3,246	3,246			3,246	3,246	389 11
1.5.61 ..						not known	23 19
13.4.62 ..	9,677	9,807	6,923	6,923	9,677	9,677	1,161 6
11.10.63 ..	3,024					3,024	362 17
	20,000						2,417 13

* There was no explanation of the discrepancy of £2.

16. Following the receipt of a notification under s. 28(4) the Appellant made a statutory declaration pursuant thereto, and the Commissioners of Inland Revenue duly made a counter-statement pursuant to subs. (5). These documents are not annexed hereto, but are referred to because certain arguments were directed to the terms thereof.

17. It was contended on behalf of the Appellant:

(1) that the tax advantage obtained by the Appellant was obtained in consequence of the transactions listed as 1 to 5 of the notice, all of which were carried out before 5th April 1960;

(2) that the receipts of instalments of the purchase price of the shares were not " transactions in securities " as defined for the purposes of s. 28, and in any event the tax advantage was not obtained in consequence of such receipts;

(3) that if such receipts were " transactions in securities " having any bearing upon the tax advantage obtained, the Greenbergs received £10,000 on 11th February 1959;

(4) that the tax advantage was not obtained in the circumstances mentioned in subs. (2)(*c*) or (2)(*d*) of s. 28;

(5) that the notice should be cancelled.

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

(1) (so far as concerns amounts transferred from the special account) that such receipts accrued to the Greenbergs at the dates when such transfers were made and not on 11th February 1959;

(2) that the tax advantage was obtained in consequence of either:

all of the transactions specified in the notice taken together, in which case it was contended that all the transactions taken together were not carried out before 5th April 1960, or

the sale agreement, in which case it was contended that such agreement was not carried out before 5th April 1960, inasmuch as at that date part of the price was still outstanding and its full amount had not been ascertained, or

the receipts of money by the Appellant, which were not all effected before 5th April 1960, or

the sale of shares, i.e. the sale agreement and the things done under it, that is to say transactions numbered 4, 5 and 6 in the notice, in which case it was contended that the sale was not carried out before 5th April 1960;

(3) that the tax advantage was obtained in the circumstances mentioned in s. 28(2)(*c*), or (alternatively) in the circumstances mentioned in subs. (2)(*d*);

(4) that, subject to certain alterations to the figures, the adjustments specified in the notice were appropriate;

(5) that the notice should be upheld in principle.

19. We were referred (*inter alia*) to the following authorities: *May & Butcher Ltd.* v. *Rex* [1934] 2 K.B. 17; *Commissioners of Inland Revenue* v. *Parker* 43 T.C. 396; [1966] A.C. 141; *Commissioners of Inland Revenue* v. *Cleary* 44 T.C. 399; [1968] A.C. 766; *Beswick* v. *Beswick* [1968] A.C. 58.

20. We, the Commissioners who heard the appeal, gave our decision in writing as under:

(1) It was not disputed that the Appellant obtained tax advantages; these consisted in the avoidance or reduction of assessments to surtax or the avoidance of possible assessments thereto effected by receipts accruing in such a way that the Appellant would not bear surtax thereon.

(2) We were told that clause 2 of the agreement of 30th December 1958 was varied, but no evidence was adduced concerning the variation agreement. We infer that the parties agreed that what in fact happened should happen, i.e. that the Greenbergs should receive £100 in February 1959 and should receive further sums making up the balance of the purchase price at the times and to the extent that dividends should be received by Finsbury. As regards part of such balance, an arrangement was made with Martins Bank as a result of which £10,000 is shown at 11th February 1959 as an entry in an account entitled " Martins Bank Ltd. Re D. and H. Greenberg ". We find that the £10,000 did not belong to the Greenbergs in February 1959, but that sums of £4,000, £3,246 5*s.* and £9,677 10*s.* first belonged to them at the dates when the respective entries were made in the account by the bank; these coincided with the dates when money was actually received by the Appellant.

(3) We hold that the said tax advantages were obtained in such circumstances as are mentioned in s. 28(2)(*c*). Each time the Appellant received money (whether from Finsbury or from Martins Bank) he received a consideration, and he received it in consequence of a transaction whereby Finsbury had received an abnormal amount by way of dividend. That consideration represented the value of assets which (apart from the company's declaration of a dividend) would have been available for distribution by the company. Subsection (2)(*c*) uses the words " which are (or apart from anything done by the company in question would have been) available for distribution ", and in our opinion this embraces the situation we have here.

(4) In our opinion the tax advantages were obtained in consequence of the combined effect of all the transactions specified in the notice, including the receipts of money by the Appellant. To our minds it would not be realistic to say that they were obtained in consequence of the transactions listed as 1 to 5 and that the later receipts of money were merely the automatic fruition of something obtained previously; nor were the receipts merely the automatic consequence of the earlier transactions. We cannot regard the receipts as we might ordinarily regard the payment of a debt arising from some earlier transaction; it was a part of the arrangement that both the time and the amount of the receipts should be geared to dividends expected to be paid by the company to Finsbury; the timing of the receipts was not fortuitous, but was a significant part of the arrangement. It was contended that the case presented exactly the sort of situation which the proviso to subs. (1) was designed to rescue; we do not agree, because we see the situation in the present case as a series of transactions with a single purpose (i.e. the obtaining of tax advantages) spread out over a period of nearly five years, which period straddled the critical date of 5th April 1960.

(5) In our opinion the receipts were " transactions in securities ", being receipts of part of the purchase price of securities received against receipts of dividends from those same securities.

(6) We hold that (subject to any variation which may be agreed) the adjustments specified by the notice are requisite and appropriate for counteracting the tax advantages. We uphold the notice and adjustments in principle and leave the figures to be agreed.

The parties having notified us of their agreement of figures pursuant to our decision, we accordingly varied the notice on 14th February 1968 to the extent that the amounts to be included in the computation of liability to surtax should be as follows:

1960–61	nil
1961–62	£675 (gross)
1962–63	£1,896 (gross)
1963–64	£592 (gross).

21. Immediately after our determination of the appeal on 14th February 1968 the Appellant declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court, which Case we have stated and do sign accordingly.

22. The questions of law for the opinion of the Court are:

(1) whether the tax advantages obtained by the Appellant were obtained in consequence of a transaction in securities, or of the combined effect of two or more such transactions, which was or all of which were carried out before 5th April 1960;

(2) whether the said tax advantages were obtained in the circumstances mentioned in subs. (2)(*c*) or subs. (2)(*d*) of s. 28 of the Finance Act 1960;

(3) whether it was open to us to find that the several sums of £4,000, £3,246 5*s*. and £9,677 10*s*. were considerations received by the Greenbergs within the meaning of s. 28(2) at the dates when the respective entries were made in the special account, and that the said sums were receipts accruing at the said dates within the meaning of s. 43(4)(*g*) of the Finance Act 1960.

R. A. Furtado } Commissioners for the Special
H. G. Watson } Purposes of the Income Tax Acts

Turnstile House,
94-99 High Holborn,
London W.C.1
30th October 1968

Schedule I

To: Henry Greenberg, Esq.,
21 Meadowside,
Cambridge Park,
Twickenham, Middlesex.

Section 28, Finance Act 1960

Whereas on 5th December 1966 the Commissioners of Inland Revenue issued a notification to you, in accordance with subsection (4) of Section 28 of the Finance Act, 1960, that they had reason to believe that the said Section 28 (which relates to the cancellation of tax advantages from certain transactions in securities) might apply to you in respect of the transactions described in the attached schedule:

And whereas on 15th March 1967 the Tribunal constituted under the said Section 28, having taken into consideration the statutory declaration made by you under subsection (4) of that Section and the certificate and counter-statement of the Commissioners of Inland Revenue under subsection (5) thereof, determined that there was a prima facie case for proceeding in this matter:

Now therefore the Commissioners of Inland Revenue, being of opinion that Section 28 of the Finance Act, 1960, applies to you in respect of the aforesaid transactions hereby give notice, in accordance with subsection (3) of that Section, that the adjustments described overleaf are requisite for counteracting the tax advantage thereby obtained or obtainable.

Dated this 21st day of March 1967

.....

The adjustments referred to:

the computation or recomputation of your liability to surtax for the years of assessment 1960–61, 1961–62, 1962–63 and 1963–64 on the basis that the sums shown below should be taken into account as if they were the net amounts received in respect of dividends payable at the dates of receipt thereof from which deduction of tax was authorised by subsection (1) of Section 184 of the Income Tax Act, 1952, and any assessments or further assessments to surtax which may be requisite to give effect to such computation or recomputation.

Surtax 1960–61	
Payments received by you on 24th March 1961	£389 10 5
Add for income tax at 7*s.* 9*d.* in the £	246 8 7
Gross equivalent thereof	£635 19 0
Surtax 1961–62	
Payment received by you on 1st May 1961	£23 19 0
Add for income tax at 7*s.* 9*d.* in the £	15 3 0
Gross equivalent thereof	£39 2 0
Surtax 1962–63	
Payment received by you on 13th April 1962	£324 2 5
Payment received by you on 14th July 1962	830 17 0
	£1,154 19 5
Add for income tax at 7*s.* 9*d.* in the £	730 14 0
Gross equivalent thereof	£1,885 13 5
Surtax 1963–64	
Payment received by you on 16th October 1963 ..	£362 17 0
Add for income tax at 7*s.* 9*d.* in the £	229 11 2
Gross equivalent thereof	£592 8 2

The schedule referred to in the accompanying notice under the provisions of Section 28(3), Finance Act 1960

The transactions referred to:

1. the special resolution of L. Greenberg Ltd. (hereinafter called " the Company ") on 30th December 1958, increasing the capital of the Company to £2,100 by the creation of 100 6 per cent. Preferred Shares of £1 each conferring on the holders thereof special rights and subjecting them to restrictions of which the more relevant ones are set out below.

Rights and Restrictions of the 6 per cent. Preferred Shares as to dividend

(i) the right as from 1st January 1959 to be paid out of the profits of the Company available for dividend a fixed cumulative preferential dividend in respect of each financial year of the Company at the rate of 6 per cent. per annum on the capital for the time being paid up or credited as paid up thereon in priority to any payment to the holders of any other class of shares in the capital of the Company, and

(ii) the right, pro rata to their respective holdings, to the payment in respect of each of the financial years of the Company ending on 31st December in the years 1959 to 1963 both inclusive of a net dividend (after deduction of income tax) of such an aggregate amount as is equal to the profits of the Company arising in such financial year (to be determined in the manner set out in paragraphs 4 and 5 of the Third Schedule to the Finance (No. 2) Act 1955) or the accumulated profits of the Company available for dividend (whichever shall be the less) after deduction of the net amount of the said fixed cumulative preferential dividend in respect of such financial year

Provided Always:

(*a*) that the total amounts paid by way of dividends under the provisions of paragraph (ii) above in respect of the said five financial years shall not exceed £20,000 after deduction of income tax, and

(*b*) that no dividends shall be declared or paid on any other class of shares in the capital of the Company until 1st January 1965 or until the date on which the total amount paid by way of dividends under the provisions of paragraph (ii) above reaches £20,000 after deduction of income tax, whichever shall be the earlier

Except when the Directors shall consider that the financial position of the Company shall not justify such course, the said fixed cumulative preferential dividend shall be paid half-yearly on 30th June and 31st December in each year. Each dividend payable under the provisions of paragraph (ii) above shall be paid within one month after the date upon which the Company in general meeting approves the accounts for the financial year in question. The Directors may however from time to time pay interim dividends on the said Preferred Shares which shall be deemed to be payments on account of those payable under the provisions of paragraph (ii) above;

2. the ordinary resolution of the Company on 30th December 1958 capitalising the sum of £100, being part of the reserves of the Company, and applying such sum in paying up in full 100 6 per cent. Preferred Shares of £1 each in the capital of the Company, such shares to be allotted and distributed, credited as fully paid up, among the ordinary stockholders of the Company;

3. the allotment on 30th December 1958 pursuant to the said ordinary resolution, to you of 12 of the said Preferred Shares credited as fully paid up as aforesaid;

4. the agreement dated 30th December 1958 whereby you and David Greenberg sold the said 100 Preferred Shares to Finsbury Securities Ltd. at the price of £20,100, such price being subject to adjustment as provided in the said agreement;

5. the transfer or renunciation of the said 100 Preferred Shares to Finsbury Securities Ltd. in pursuance of the said agreement and the registration of Finsbury Securities Ltd. as the registered holder of the said shares;

6. the receipts by you from Finsbury Securities Ltd. of the following amounts in payment of the said purchase price on or about the dates stated:

22nd January 1959	£12 0 0
23rd March 1959	£207 0 0
15th March 1960	£279 7 2
24th March 1961	£389 10 5
1st May 1961	£23 19 0
13th April 1962	£324 2 5
14th July 1962	£830 17 0
16th October 1963	£362 17 0

the last seven of which receipts except for that on 1st May 1961 were consequent upon the receipts by Finsbury Securities Ltd. of dividends declared by the Company on the said 100 Preferred Shares as follows:

Date of declaration and payment	*Gross dividend*	*Net dividend*
23rd March 1959	£3,000	£1,725
15th March 1960	£3,800	£2,328
24th March 1961	£5,300	£3,246
13th April 1962	£15,800	£9,677
11th October 1963	£4,937	£3,024

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(2) *Commissioners of Inland Revenue* v. *Tunnicliffe*

CASE

Stated under the Income Tax Management Act 1964, s. 12(5), the Income Tax Act 1952, s. 64 and the Finance Act 1960, s. 28(8), by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 17th and 18th June 1968, Walter Arthur Tunnicliffe (hereinafter called " Mr. Tunnicliffe ") appealed against a notice dated 22nd March 1967, issued to him under s. 28, Finance Act 1960 (hereinafter called " the notice ").

2. Shortly stated, the question for our decision was whether the said s. 28 should not apply to Mr. Tunnicliffe under the terms of the proviso to subs. (1) of that section.

3. The following facts were admitted between the parties:

(1) The company, Arthur Tunnicliffe & Son Ltd., was formed in January 1941 to carry on the business of lace making. On 29th October 1959 the authorised and issued share capital of the company was £5,000, made up and held as follows:

	£1 ordinary shares	£1 7½ per cent. participating preference shares
Mr. Tunnicliffe	3,998	
G. C. Salisbury	1	
R. S. Salisbury	1	
Cavendish Mercantile Co. Ltd.		1,000
	4,000	1,000

Apart from the issue of the second preference shares referred to below these shareholdings continued at all material times. The 7½ per cent. participating preference shares (hereinafter called " the first preference shares ") had originally attached to them certain rights (similar to those set out below) to participate in profits, but those rights had been exhausted, leaving only the right to receive a fixed cumulative preference dividend of 7½ per cent.

(2) On 29th October 1959 special resolutions were passed at an extraordinary general meeting of the company as follows:

(*a*) that the authorised capital of the company be increased to £5,500 by the creation of 500 5 per cent. second participating preference shares of £1 each (hereinafter called "the second preference shares");

(*b*) that, subject only to the fixed 7½ per cent. cumulative preference dividend payable on the first preference shares, the second preference shares should have (*inter alia*) the following rights: (i) to receive a fixed cumulative preference dividend of 5 per cent.; (ii) to receive in each financial year of the company a participating dividend of 10 per cent. of the profits of the company for that financial year; (iii) at the discretion of the directors of the company, to receive in each financial year of the company an additional participating dividend not exceeding 80 per cent. of the profits of the company for that financial year; but so that rights (ii) and (iii) were to terminate when the aggregate participating dividends amounted to £30 per share (before deduction of tax), until which time no dividends were payable by the company on any other class of shares except for the 7½ per cent. preference dividend.

(3) On the same day a resolution was passed capitalising the sum of £500, being part of the reserves of the company, and applying that sum in paying up the second preference shares, which were to be allotted to the holders of ordinary shares in the company.

(4) Renounceable letters of allotment in respect of the second preference shares were accordingly issued to the holders of ordinary shares, in particular to Mr. Tunnicliffe.

(5) These allottees (hereinafter called "the vendors") had on or before 29th October 1959 orally agreed to sell all the second preference shares to Cavendish Mercantile Co. Ltd. (hereinafter called "Cavendish"). By this oral agreement (which was not reduced to writing) the price was stated as £11,000, but as part of the same agreement this was made subject to the arrangements referred to below.

(6) In pursuance of the said agreement the vendors renounced the said letters of allotment to Cavendish, and on 30th October 1959 the solicitors acting for the vendors received from the solicitors acting for Cavendish a banker's draft for £11,000 and handed over the receipt, a copy of which is annexed hereto (1).

(7) This £11,000 had been borrowed by Cavendish from bankers named Robinson Frere & Co. Ltd. (hereinafter called "the bank"), and appears as the opening entry of a loan account between the bank and Cavendish.

(8) On the same day, 30th October 1959, Mr. Tunnicliffe, one of the vendors and the beneficial owner of all the second preference shares, deposited this same £11,000 with the bank. This deposit was made in accordance with clause 8 of a guarantee given by Mr. Tunnicliffe to the bank, which related to the said loan which the bank had made to Cavendish.

(1) Not included in the present print.

(9) It had been agreed between the vendors and Cavendish, as part of the agreement for sale of the shares, that Cavendish would obtain a loan of £11,000 from the bank, that a draft for this amount would be handed over to the vendors under that agreement and that at the same time Mr. Tunnicliffe would guarantee repayment to the bank (on the bank's usual form of guarantee) of the overdraft to be created by that loan, depositing back with the bank the £11,000 which would be released by the bank to Mr. Tunnicliffe as and when Cavendish reduced its overdraft.

It had also been so agreed that Cavendish would pay into its loan account (*a*) £500 (the amount paid upon the second preference shares); (*b*) as and when Cavendish received dividends on those shares, sums of money being on each occasion at least equal to the net amount of each such dividend; (*c*) if Cavendish obtained some further benefit from the agreement whether by repayment or set-off of tax then Cavendish would pay the balance required to bring the total up to £11,000, with a proportionate reduction if the total gross amounts of the dividends did not at any such time reach £15,000.

(10) Dividends were paid on the above-mentioned second preference shares on the following dates:

Date of payment	Gross dividend	Net dividend
	£	£
16th May 1960	1,500	919
29th November 1960	3,000	1,838
16th May 1961	2,500	1,531
26th October 1961	6,000	3,675
16th February 1962	2,000	1,225
	15,000	9,188

All these dividends were paid out of profits within the charge to income tax, and were paid to Cavendish as the registered holder of the second preference shares. It was accepted on behalf of Mr. Tunnicliffe that the dividends were abnormal in amount.

(11) Payments were made by Cavendish into its loan account, and releases were made by the bank to Mr. Tunnicliffe, as set out in the copy accounts annexed hereto (1).

(12) In all relevant years of assessment Mr. Tunnicliffe's total income was such that he was assessable to surtax.

(13) The directors of the company were at all material times Mr. Tunnicliffe, G. C. Salisbury and R. S. Salisbury, and also, from 1st April 1961, J. Hallam.

4. The following documents were agreed and are annexed hereto, and form part of this Case:

(i) Notice under s. 28(3), Finance Act 1960, served upon Mr. W. A. Tunnicliffe on 22nd March 1967.

(ii) Copy of resolution passed by Arthur Tunnicliffe & Son Ltd. dated 29th October 1959 (1).

(iii) Guarantee dated 30th October 1959 (1).

(iv) Copy of loan account between Robinson Frere & Co. Ltd. and Cavendish Mercantile Co. Ltd. (1).

(1) Not included in the present print.

(v) Copy of deposit account in respect of moneys deposited by Mr. W. A. Tunnicliffe with Robinson Frere & Co. Ltd. (1). A

(vi) Receipt dated 30th October 1959 (1).

(vii) Accounts of the company for the calendar years 1958 to 1962 inclusive (1).

5. It was contended on behalf of Mr. Tunnicliffe that:

(1) the only transaction or transactions in securities in consequence of which Mr. Tunnicliffe had obtained a tax advantage in any such circumstances as are mentioned in s. 28(2) were carried out and the said tax advantage was obtained before 5th April 1960; B

(2) if, contrary to the previous contention, the tax advantage was obtained on or after 5th April 1960, it was obtained in consequence of a transaction or transactions in securities which was or were carried out before that date; C

(3) such of the transactions set out in the notice as took place on or after 5th April 1960 were not transactions in securities; or, alternatively, they were not transactions in consequence of which Mr. Tunnicliffe had obtained a tax advantage; or, in the further alternative, they were not transactions in consequence of which Mr. Tunnicliffe had obtained a tax advantage in any such circumstances as are mentioned in s. 28(2); D

(4) it was not open to the Commissioners of Inland Revenue to argue before us that the transactions numbered (1) to (8) in the notice, or some of those transactions, together constituted one transaction in securities which was not carried out before 5th April 1960;

(5) in any event, the said transactions or any combination of some of them did not in law together constitute one transaction in securities; E

(6) the notice should be discharged;

(7) the adjustments directed to be made in the notice were inappropriate in so far as the sums directed to be taken into account as dividends included £500 received for the amount paid up on the second preference shares and also the excess over the net dividends from the company received by Cavendish.

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

(1) Mr. Tunnicliffe did not effectively receive the purchase price of the second preference shares prior to 5th April 1960;

(2) the receipt by or release to Mr. Tunnicliffe of various amounts as set out in para. (8) of the notice constituted instalments of the purchase price, and Mr. Tunnicliffe obtained tax advantages in the avoidance or reduction of assessments or possible assessments to surtax by those receipts accruing in such a way that G he did not pay or bear tax on them as income;

(3) each of the transactions specified in paras. (1) to (8) of the notice was a transaction in securities;

(4) all the said transactions were interrelated as part of an entire scheme worked out prior to any of the transactions being entered into, and all together constituted one transaction in securities; H

(1) Not included in the present print.

(5) the tax advantages obtained by Mr. Tunnicliffe (in any such circumstances as are mentioned in s. 28(2)) were obtained in consequence of all the transactions in securities set out in paras. (1) to (8) of the notice or of a transaction in securities comprised of all those transactions taken together or in consequence of a combination of any of them so taken; or, alternatively, in consequence of the agreement for sale of the second preference shares on 30th October 1959;

(6) in any event the transaction or transactions in securities in consequence of which Mr. Tunnicliffe obtained a tax advantage was or were not carried out before 5th April 1960;

(7) the tax advantages were obtained in the circumstances set out in s. 28(2)(*c*) and also in the circumstances set out in s. 28(2)(*d*);

(8) the notice should be confirmed;

(9) the adjustments specified in the notice were not inappropriate.

7. We, the Commissioners who heard the appeal, took time to consider our decision, and gave it in writing on 6th August 1968 as follows:

(1) Mr. Tunnicliffe appealed against a notice dated 22nd March 1967 issued to him under s. 28, Finance Act 1960.

He admitted that in such circumstances as are mentioned in subs. (2)(*c*) or (*d*) of s. 28 and in consequence of a transaction in securities, namely, the sale of 500 second preference shares in Arthur Tunnicliffe & Son Ltd. (" the company ") to Cavendish Mercantile Co. Ltd. (" Cavendish "), he had obtained a tax advantage within the meaning of s. 28. He claimed, however, that that section should not apply to him because in the terms of the proviso to subs. (1) of the section the transaction in securities was carried out before 5th April 1960.

(2) Having reviewed the agreed facts and the arguments presented to us, we have come to the conclusion that Mr. Tunnicliffe's claim is well founded.

(3) In our view the transaction or transactions in securities as a consequence of which Mr. Tunnicliffe obtained a tax advantage in such circumstances as are mentioned in s. 28(2) were carried out by 30th October 1959. On or before 29th October 1959, Mr. Tunnicliffe had agreed to sell the 500 second preference shares to Cavendish. On 30th October 1959 his solicitors received from the solicitors to Cavendish a bankers' draft for £11,000, being the agreed price for the shares, and handed over a receipt for that amount. At that point Mr. Tunnicliffe obtained what came to be described as a tax advantage in circumstances that he received, in consequence of a sale of shares in the company whereby Cavendish would subsequently receive an abnormal amount by way of dividend from the company, a consideration of £11,000 which was received in respect of the future receipts of the company. Although by the terms of the oral agreement with Cavendish Mr. Tunnicliffe had undertaken to deal with the proceeds of his sale of the 500 second preference shares in a particular way, we are unable to regard the transactions relating to the deposit of the £11,000 and the piecemeal release of that deposit as transactions in securities or, certainly, as transactions in securities in consequence of which Mr. Tunnicliffe obtained a tax advantage. Nor are we able to hold that all the transactions specified in the notice dated 22nd March 1967 may be regarded as one transaction in securities which was not carried out before 5th April 1960, or that certain of those transactions may be grouped in such a way as to constitute one such transaction which was not carried out before 5th April 1960. In our view the

sale of the 500 second preference shares for £11,000 was carried out before 5th April 1960, and it was only as a consequence of that sale of shares that Mr. Tunnicliffe obtained a tax advantage in such circumstances as are mentioned in s. 28(2).

(4) We accordingly discharge the notice appealed against.

8. The representative of the Commissioners of Inland Revenue immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law, and on 30th August 1968 required us to state a Case for the opinion of the High Court pursuant to the Income Tax Management Act 1964, s. 12(5), the Income Tax Act 1952, s. 64, and the Finance Act 1960, s. 28(8), which Case we have stated and do sign accordingly.

The question of law for the opinion of the Court is whether on the facts agreed between the parties as set out in this Case Mr. Tunnicliffe had properly claimed that the provisions of s. 28, Finance Act 1960, do not apply to him in respect of the transaction or transactions in question.

W. E. Bradley
B. James
} Commissioners for the Special Purposes of the Income Tax Acts

Turnstile House,
94–99 High Holborn,
London W.C.1
8th May 1969

Notice referred to in para. 4(i) of the Case

To: Walter A. Tunnicliffe, Esq.,
Whiteholm,
Ashby Road,
Kegworth,
Derby.

Section 28, Finance Act, 1960

The Commissioners of Inland Revenue being of opinion that Section 28 of the Finance Act, 1960 (which relates to the cancellation of tax advantages from certain transactions in securities) applies to you in respect of the transactions shown in the attached schedule hereby give notice, in accordance with subsection (3) of that Section, that the adjustments described overleaf are requisite for counteracting the tax advantage thereby obtained or obtainable.

Dated this 22nd day of March 1967

. . . . .

The adjustments referred to:

the computation or recomputation of your liability to surtax for the years of assessment 1960–61, 1961–62 and 1962–63 on the basis that the sums shown below should be taken into account as if they were the net amounts received in respect of dividends payable at the dates of receipt thereof from which deduction of tax was authorised by subsection (1) of Section 184 of the Income Tax Act 1952, and any assessments or further assessments to surtax which may be requisite to give effect to such computation or recomputation.

Surtax 1960–61		
Sum released to you on or about 20th May 1960 ..	£1,000	0 0
Sum released to you on or about 8th December 1960	2,000	0 0
	£3,000	0 0
Add for income tax at 7*s.* 9*d.* in £	1,897	19 2
Gross equivalent thereof	£4,897	19 2
Surtax 1961–62		
Sum released to you on or about 23rd May 1961 ..	£1,500	0 0
Sum released to you on or about 6th November 1961	3,675	0 0
Sum released to you on or about 10th November 1961	25	0 0
Sum released to you on or about 27th February 1962	1,250	0 0
	£6,450	0 0
Add for income tax at 7*s.* 9*d.* in £	4,080	12 3
Gross equivalent thereof	£10,530	12 3
Surtax 1962–63		
Sum released to you on or about 28th June 1962 ..	£550	0 0
Add for income tax at 7*s.* 9*d.* in £	347	19 2
Gross equivalent thereof	£897	19 2

The schedule referred to in the accompanying notice under the provision of Section 28(3), Finance Act 1960.

The transactions referred to:

(1) the Special Resolution of Arthur Tunnicliffe & Son Ltd. (hereinafter called "the Company") on 29th October 1959 increasing the capital of the Company to £5,500 by the creation of 500 5% Second Participating Preference shares of £1 each conferring on the holders thereof special rights and privileges and subjecting them to restrictions of which the more relevant ones are set out below.

Rights and Restrictions of the 5% Second Participating Preference shares as to dividend

(i) The right to be paid out of the profits of the Company available for dividend after payment has been made to the holders of the 7½% Participating Preference Shares in the capital of the Company of the fixed Cumulative Preferential Dividend payable on such 7½% Participating Preference Shares of a fixed cumulative preferential dividend in respect of each financial year of the Company at the rate of 5% per annum on the capital for the time being paid up thereon in priority subject as aforesaid to any payment to the holders of any other class of shares in the capital of the Company.

(ii) The right to the payment in each financial year of the Company pro rata to the holders of each such share of a participating dividend of such an aggregate amount as is before deduction of income tax equal to 10% of the profits of the Company for that year such dividend payable not later than six months after the

end of the relevant financial year or one month after the approval and adoption by the Company in general meeting of the accounts for that year (whichever shall first occur). A

(iii) The right to the payment pro rata to the holders of each such share of all such sums as the directors may from time to time declare by way of additional participating dividend but so that the aggregate amount so paid on all such shares of such additional participating dividend shall not exceed 80% of the profits of the Company for that year and the final payment in respect of each financial year shall be made not later than one month after the approval and adoption by the Company in general meeting of the accounts for that financial year. B

The said 5% Second Participating Preference Shares shall rank for dividend as from and including the 1st day of November 1959 and the Board shall pay the fixed cumulative preferential dividend half yearly on the 30th day of June and the 31st day of December in each year whenever the financial position of the Company in the opinion of the directors justifies that course. The directors may also from time to time pay to the members such interim participating dividends as appear to the directors to be justified by the financial position of the Company. C

The right to the payment of dividends under (ii) and (iii) aforesaid shall terminate on the aggregate amount paid on each share under (ii) and (iii) aforesaid amounting to £30 per share before deduction of tax the holders of the 5% Second Participating Preference Shares being after such aggregate amount has been paid entitled only to the fixed cumulative preferential dividend aforesaid and to no further participation in profits. Provided always that no dividend on any class of shares other than the 5% Second Participating Preference Shares (except the fixed cumulative preferential dividend on the 7½% Participating Preference Shares) shall be paid until such participating dividends aggregating £30 before deduction of tax have been paid; D E

(2) the resolution of the Company on 29th October 1959, capitalising the sum of £500, being part of the reserves of the Company, and applying such sum in paying up in full the said 500 5% Second Participating Preference shares of £1 each, such shares to be allotted and distributed, credited as fully paid up, to the holders of Ordinary shares in the capital of the Company; F

(3) the allotment on 29th October 1959 pursuant to the last mentioned resolution of the said 500 Second Participating Preference shares credited as fully paid up as aforesaid;

(4) the verbal agreement whereby you agreed to sell the said 500 Second Participating Preference shares to Cavendish Mercantile Co. Ltd. (hereinafter called "the Purchaser"); G

(5) the receipt by you of a bankers draft for a sum of £11,000 from Cavendish Mercantile Co. Ltd. on 30th October 1959 in connection with the purchase price of the said 500 Second Participating Preference shares and the deposit by you on the same day of the said sum of £11,000 with Robinson Frere and Company Ltd.; H

(6) the instrument of Guarantee executed by you on the 30th October 1959 in pursuance whereof you made the said deposit of £11,000 with Robinson Frere and Company Ltd. on condition that the said sum of £11,000 would be repaid to you from time to time by instalments on the terms set out therein;

(7) the renunciation of letters of allotment in favour of the Purchaser and the registration in the books of the Company of the Purchaser as owner of the said Second Participating Preference shares; I

(8) the receipt by or release to you of various amounts in and towards payment of the said sum of £11,000.

Note. The Commissioners of Inland Revenue believe that the said amounts and the dates of payment were as follows:

On or about 20th May 1960	£1,000
On or about 8th December 1960	£2,000
On or about 23rd May 1961	£1,500
On or about 6th November 1961	£3,675
On or about 10th November 1961	£25
On or about 27th February 1962	£1,250
On or about 28th June 1962	£550

and that some or all of these amounts were released or paid consequent upon the receipt by the Purchaser of dividends declared by the Company on the said Second Participating Preference shares as follows:

Date of payment	*Gross dividend*	*Net dividend*
16th May 1960	£1,500	£918 15 0
29th November 1960	£3,000	£1,837 10 0
16th May 1961	£2,500	£1,531 5 0
26th October 1961	£6,000	£3,675 0 0
16th February 1962	£2,000	£1,225 0 0

The cases came before Buckley J. in the Chancery Division on 28th and 29th July 1969, when judgment was given against the Crown, with costs.

H. H. Monroe Q.C. and *J. E. Holroyd Pearce* for both taxpayers.

W. A. Bagnall Q.C. and *Patrick Medd* for the Crown.

The following cases were cited in argument:—*Finsbury Securities Ltd.* v. *Bishop* 43 T.C. 591; [1966] 1 W.L.R. 1402; *Commissioners of Inland Revenue* v. *Parker* 43 T.C. 396; [1966] A.C. 141; *Barclays Bank Ltd.* v. *Quistclose Investments Ltd.* [1970] A.C. 567; *Patel* v. *Premabhai* [1954] A.C. 35; *Commissioners of Inland Revenue* v. *Brebner* 43 T.C. 705; [1967] 2 A.C. 18.

Buckley J.—These are two appeals which raise the same, or very much the same, point on the interpretation proper to be placed upon s. 28 of the Finance Act 1960, and in particular upon the proviso in subs. (1) of that section. The section in question provides that, where in circumstances mentioned in subs. (2) and in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage, then—leaving out some words in parenthesis—s. 28 is to apply to him in respect of that transaction or those transactions. Then follows the vital proviso:

> " Provided that this section shall not apply to him if—(i) the transaction or transactions in securities were carried out, and (ii) any change in the nature of any activities carried on by a person, being a change necessary in order that the tax advantage should be obtainable, was effected, before the fifth day of April, nineteen hundred and sixty."

Then subs. (2) sets out a number of classes of circumstance in which the section is to apply; and it is common ground that if the two appeals before me are not excluded from the operation of the section by the proviso to subs. (1) they fall within the section as satisfying the circumstances described in subs. (2)(*c*), which are that

(Buckley J.)

" the person in question receives, in consequence of a transaction whereby any other person (i) subsequently receives, or has received, an abnormal amount by way of dividend; "—that is the accepted position here; I need not read para. (ii)—" a consideration which either is, or represents the value of, assets which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend, or is received in respect of future receipts of the company or is, or represents the value of, trading stock of the company, and the said person so receives the consideration that he does not pay or bear tax on it as income. . . ."

To discover what is meant by a tax advantage one must go to s. 43, which defines that expression as meaning

" a relief or increased relief from, or repayment or increased repayment of, income tax, or the avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains "; and the expression " transaction in securities " is defined as including " transactions, of whatever description, relating to securities, and in particular—(i) the purchase, sale or exchange of securities, (ii) the issuing or securing the issue of, or applying or subscribing for, new securities, (iii) the altering, or securing the alteration of, the rights attached to securities."

That is a very wide definition. The word " includes " must, I think, here be read as equivalent to " means ", for one cannot imagine a wider meaning to be attributed to the expression " transaction in securities " than the meaning " transactions, of whatever description, relating to securities ".

In the case of *Greenberg*, Mr. Greenberg was a shareholder in a company, L. Greenberg Ltd., which carried on a business of millinery manufacturers, and his father was, I think, the only other shareholder in the company. Towards the end of 1958 they decided, in conjunction with a company known as Finsbury Securities Ltd., which was a dealer in shares, to carry out what is described as a forward dividend-stripping operation, broadly on the following lines. The company, which was expected to earn over the following five years profits amounting to £20,000 or more after tax, was to create new shares carrying the right to all the net profits for five years up to £20,000 net after tax. These shares would be sold by the Greenbergs to Finsbury Securities Ltd. for £20,100 plus the right to receive half of whatever amount Finsbury might be able to obtain by repayment of, or relief from, income tax in respect of tax deducted from the dividends it would receive on such shares. Finsbury was expected to obtain relief on the basis that it would suffer a loss in its business as a dealer in shares in consequence of a fall in the value of the shares, in consequence of the distribution of the profits of the company, but that expectation was defeated(1).

On 30th December 1958 the company accordingly increased its capital by creating a new class of 100 preferred shares, carrying a fixed cumulative preferential dividend at 6 per cent. and further dividend rights entitling the holders *pro rata* to receive in respect of each of the five years 1959 to 1963 inclusive net dividends of such amounts as after deduction of income tax should be equal in the aggregate to either the profits of the company arising in each such year or the accumulated profits of the company available for dividend,

(1) *See* Finsbury Securities Ltd. *v.* Bishop 43 T.C. 591; [1966] 1 W.L.R. 1402.

A whichever should be the less, subject to a proviso that the total amounts of such further dividends sholud not exceed £20,000 after deduction of income tax. £100 of the company's reserves were capitalised by way of paying up of these shares, which were allotted to the existing shareholders, the two Mr. Greenbergs, *pro rata* to their shareholdings, and on the same day, 30th December 1958, the Greenbergs entered into a sale agreement whereby B they agreed to sell the 100 shares to Finsbury Securities Ltd. for £20,100 subject to adjustment as provided in the agreement. By the terms of the agreement it was provided that the sale and purchase should be completed forthwith, when the vendors—that is, the Greenbergs—should hand to the purchasers, Finsbury Securities Ltd., renounced letters of allotment in respect of the 100 shares, and when the purchasers should pay to the vendors or their nominees C £10,100 on account of the purchase price. The balance of £10,000, to make up the full price of £20,100, was to be paid by the purchasers to the vendors not later than 31st December 1960. Then provision was made for an adjustment of the purchase price in the event of the dividends distributed during the five years to the holders of the 100 shares amounting to less than £20,000, and for the price being increased to the extent of one-half of any tax remission D which Finsbury Securities Ltd. might obtain as a result of the transaction. The allotments of the shares were duly renounced in favour of Finsbury Securities Ltd., and Finsbury Securities Ltd. were registered as holders of the shares on 30th December 1958.

In fact the agreement was not carried out in accordance with its terms but was varied. The £10,100 was not paid in accordance with the terms of the E contract. Finsbury Securities Ltd. paid £100 on 22nd January 1959 to the vendors, and as regards the balance of £10,000 of that part of the purchase price an arrangement was arrived at, of which the Special Commissioners had no very satisfactory evidence, by reason of the fact that Mr. David Greenberg, who had been responsible for making the arrangement, died before the matter was considered by the Special Commissioners, and accordingly they had no F direct evidence as to precisely what the arrangement was. What happened was that Martins Bank made an advance of £10,000 to Finsbury Securities Ltd., and that amount of £10,000 was debited against Finsbury Securities Ltd. in their account with Martins Bank. The same amount was credited to an account opened in the books of the bank and headed " Martins Bank Ltd. Re D. & H. Greenberg in account with Martins Bank Ltd." That account was opened G with this credit of £10,000, and by arrangement between Mr. David Greenberg and Martins Bank, or it may be between all parties concerned, including Finsbury Securities Ltd., Martins Bank was not to be called upon to make any payments to the Greenbergs out of that credit of £10,000 except to the extent that money was paid from dividends on the preferred shares into Finsbury Securities Ltd.'s account with the bank. That was the way in which in fact H that position was worked out.

On 23rd March 1959 the company declared a dividend of £1,725 net on the preferred shares, which was credited to Finsbury Securities Ltd.'s account with the bank. On 15th March 1960 the company declared a further dividend of £2,328 net on the preferred shares, which was again credited to Finsbury Securities Ltd.'s account with the bank, and on 23rd March 1960 £4,000, I approximately the sum of those two dividends, was transferred from the special account, Martins Bank Ltd. re D. & H. Greenberg, to the Greenbergs' own accounts. On 24th March 1961 a further dividend of £3,246 net was declared by the company on the preferred shares and was credited to the account of Finsbury Securities Ltd. with the bank, and on 4th May of that year the same amount, £3,246, was transferred out of the special account, re D. & H.

(Buckley J.)

Greenberg, to the two Messrs. Greenbergs'. On 13th April 1962 a further dividend of £9,677 was declared and credited to the account of Finsbury Securities Ltd. with the bank and a sum of £9,677 was transferred out of the special account to the Messrs. Greenbergs'. Finally, a dividend of £3,024 was declared on 11th October 1963, and that amount seems to have been paid direct, without going through the other two accounts, to the two Messrs. Greenberg. Those dividends amount to the total of £20,000, and the amounts which found their way as I have described into the pockets of the two Messrs. Greenberg come to £19,967. The discrepancy is no doubt explicable by some accounting process, but I do not know precisely what the explanation is. It will be seen, therefore, that some part of this scheme was carried into effect before 5th April 1960 and some part of it after 5th April 1960, the crucial date under s. 28 of the Act.

It was contended for the Appellant, Henry Greenberg, before the Special Commissioners that the tax advantage which he obtained was obtained in consequence of transactions all of which took place before the crucial date, and in particular the sale agreement of 30th December 1958 and the transfer or renunciation of the shares in favour of Finsbury Securities Ltd., and that the receipts of what one might call instalments of the purchase price—that is to say, sums transferred out of the special account to the two Messrs. Greenberg —were not transactions in securities within the meaning of s. 28, and in any event tax advantages, it was said, were not obtained in consequence of such receipts. It was further contended that on the true view of the facts the Greenbergs in fact received £10,000 on 11th February 1959, the date when the special account was opened, and that that was when they received the price for the shares.

It was contended for the Crown that the various instalments of purchase price were received by the Greenbergs only at the dates when the transfers were made to them out of the special account. In other words, it was said that they did not receive the purchase price in February 1959 but received it only by four separate instalments on the dates I have mentioned, when transfers were made out of the special account. It was further contended that the tax advantage was obtained in consequence either of all the transactions, including the various transfers of moneys out of the special account, taken together, so that it followed that these transactions as a whole were not carried out before 5th April 1960, or that the sale agreement, if that was the relevant transaction, was not carried out within the meaning of s. 28(1) before 5th April 1960, in as much as at that date part of the price was still outstanding and the full amount of it had not yet been ascertained because of the provisions in the contract for adjustment.

The Special Commissioners found, amongst other things, that the £10,000 did not belong to the Greenbergs in February 1959. In other words they held, as I understand their decision, that the Greenbergs did not receive the purchase price for the shares on 11th February 1959 and then, by arrangement with the bank, allow the bank to hold it on terms that instalments would be released to them from time to time as dividends were declared. The Special Commissioners held that the various sums released out of the special account first belonged to them at the dates when those releases were effected. They came to the conclusion that the tax advantages obtained by the Messrs. Greenberg were obtained in consequence of the combined effect of all the transactions, including the various receipts of money consequent on the transfers out of the special account, and not only in consequence of transactions which took place before 5th April 1960. The method of dealing with the purchase

price was, they held, part of the arrangement: that is to say, that the time and the amount of the receipts should be geared to the dividends expected to be paid by the company to Finsbury Securities Ltd. Accordingly they came to the conclusion that the Appellant, Mr. Henry Greenberg, was taxable in respect of the years 1961–62, 1962–63 and 1963–64 in appropriate sums having regard to that proportion of the amounts released out of the special account to the shareholders in the company which was attributable to him, grossed up. That is the story as regards Mr. Greenberg and his appeal.

The other appeal relates to Mr. Walter Tunnicliffe. He was substantially the only shareholder in Arthur Tunnicliffe & Son Ltd., apart from a holding of participating preference shares which were held by a company called Cavendish Mercantile Co. Ltd. On 29th October 1959 the capital of that company was increased by the creation of a special class of 500 5 per cent. second participating preference shares of £1, each carrying a fixed cumulative preferential dividend of 5 per cent. and the right to receive in each financial year a participating dividend of 10 per cent. for that year and, at the discretion of the directors of the company, the right to receive in each financial year an additional participating dividend not exceeding 80 per cent. of the profits of the company for that year, but so that the right to receive amounts by way of the participating dividend and the additional participating dividend should terminate when the aggregate participating dividends amounted to £30 per share before deduction of tax, until which time no dividend was to be paid on any other class of share except the 7½ per cent. preference shares. £500 was capitalised in paying up that new class of share. The ordinary shareholders, which substantially means Mr. Tunnicliffe himself, had on or before 29th October 1959 orally agreed to sell all the new class of shares to Cavendish Mercantile Co. Ltd. at a price of £11,000, but subject to certain special arrangements. In pursuance of that agreement, Mr. Tunnicliffe renounced his new shares in the company resulting from the capitalisation in favour of Cavendish, as I will call the Cavendish Mercantile Co. Ltd., and on that day the solicitors acting for Mr. Tunnicliffe—I ignore for present purposes the other two ordinary shareholders, who held only one share each—received from the solicitors acting for Cavendish a banker's draft for £11,000, and in respect of that a receipt was given in these terms: " Received of Messrs. Warrens the sum of £11,000 in payment for 500 5 per cent. participating second preference shares of £1 each in Arthur Tunnicliffe & Son Limited." That was signed by Messrs. Slaughter & May, the solicitors acting for the other party. This £11,000 had been borrowed by Cavendish from a company called Robinson Frere & Co. Ltd., which for present purposes I will call " the bank ", and was the opening entry of a loan account between the bank and Cavendish.

On the same day, 30th October 1959, Mr. Tunnicliffe deposited the £11,000 with the bank. That deposit was made in pursuance of a guarantee which he had given for repayment of the loan made to Cavendish. It had been agreed between Mr. Tunnicliffe on the one hand and Cavendish, as part of the agreement for the sale of the shares, that Cavendish should obtain a loan from the bank, that a draft for the amount of £11,000 would be handed over to the vendors under the agreement and that at the same time Mr. Tunnicliffe would guarantee repayment of the loan to the bank, in the bank's usual form, depositing back with the bank the £11,000, which would be released by the bank to Mr. Tunnicliffe as and when Cavendish reduced its overdraft. It was also agreed that Cavendish would pay into its loan account with the bank £500 and, as and when Cavendish received dividends on the new shares, sums of money at least equal to the net amount of each such dividend, and the matter was carried out in that way.

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The contentions here were of a similar nature to those in the *Greenberg* case, but in this case the Special Commissioners, who were in fact different Commissioners from those who decided the *Greenberg* appeal, came to an opposite conclusion. They came to the conclusion that the transaction or transactions in securities as a consequence of which Mr. Tunnicliffe obtained a tax advantage were carried out by 30th October 1959. He had then agreed to sell the 500 second preference shares to Cavendish. On 30th October 1959 his solicitors received the purchase price of £11,000, and at that point, in the view of the Special Commissioners, Mr. Tunnicliffe obtained what resulted in a tax advantage in that he received in consequence of a sale of shares in the company £11,000, which was a price fixed having regard to the future prospects of dividends being declared by the company. Those are not the precise words used by the Special Commissioners, but I think that is an accurate précis of their view. They said they were unable to regard the transactions relating to the deposit of the £11,000 and the piecemeal release of that deposit as transactions in securities. On those grounds they came to the conclusion that the sale of the shares for £11,000 was carried out before 5th April 1960 and so the whole scheme escaped from the effect of s. 28.

The point, when one comes to consider it closely, is, I think, a very narrow point of construction of the section. The section is expressed in terms which, but for the proviso, would give it unlimited retroactive effect, for subs. (1) provides that where, in suitable circumstances and in consequence of a transaction in securities, a person has obtained a tax advantage, the section shall apply to him, and purely as a matter of grammar the operation of that section is not confined to the future or to any limit in the past. One does not expect taxing Acts to have retroactive effect unless that intention is made plain, but the extent to which this section is not to have retroactive effect is expressly laid down in the proviso to subs. (1), and it is the interpretation of that proviso which gives rise to the difficulty in the case. What is meant by the transaction or transactions in securities being " carried out " before 5th April 1960? As I have pointed out, the definition of " transaction in securities " is of very great width, and therefore perhaps the use of some non-technical expression such as " carried out " in relation to such a transaction is not surprising in this context. But it is an expression which I think is rather imprecise in its significance, and it is not easy to see precisely what the Legislature here intended. It is conceded that, but for the proviso and save in so far as the proviso applies, both of these cases are cases which fall within the terms of the section and are such that the provisions of the section would apply to them.

Mr. Monroe, appearing for the Appellant in the *Greenberg* case and for the Respondent in the *Tunnicliffe* case, has submitted that the relevant transaction at which one must look for the purpose of the proviso was in each case the contract for the sale of the shares. Everything else, he says, flows from that transaction as a consequence, and that transaction is the event which committed the parties to all that followed from it and is crucial in deciding whether or not the section applies. He says that it is the making of that contract which is the transaction to be looked at, and that that was " carried out " when in each case the contract was entered into. On the other hand, Mr. Bagnall, appearing for the Crown in these two cases, says that the sale and purchase of the shares was truly the occasion which attracts the section, but that in neither case was the sale and purchase of the shares wholly carried out before 5th April 1960, because in neither case did the taxpayer receive the whole of the purchase price before that date; nor did he receive the tax benefit until he received the various instalments of purchase price payable under the arrangements with the bank. He has drawn attention to a difference in the language used in ss. 21 and 25

A of the Act and the language used in the relevant part of s. 28. Section 21 relates to a case where shares in a company are sold after 5th April 1960; s.25 relates to a case where, after 5th April 1960 and otherwise than in pursuance of an agreement made on or before that date, a company acquires shares from an associated company, and so forth, in circumstances detailed in the section. The language in those two sections, Mr. Bagnall says, is very different from the B language used in s. 28. He agrees that the language of s. 28(1), if read unqualified by the proviso, would involve unlimited retroaction, but he says that the limit placed upon that effect of the subsection is to be found in the proviso. In practice the Revenue would not claim tax in respect of tax advantages which accrued in years before 5th April 1960, but that for purposes of construction I think, and I believe that Mr. Bagnall agrees with me, is irrelevant. He also C draws attention to the fact that in s. 28(10), which is a subsection under which a taxpayer may get a clearance from the Commissioners of Inland Revenue in respect of a proposed transaction before he embarks on it, reference is made to particulars of a transaction or transactions " effected or to be effected "—not " carried out or to be carried out "—and he contends that one must look at each of these schemes as a whole and see whether at the crucial date the D scheme had or had not yet been carried out, which on his contention means completed. He says that clearly the schemes had not been carried out, because some part of the purchase price had yet to be received by the vendors from the banks.

Now it seems to me that a useful approach to the problem is to consider at what date it could be said that either of these taxpayers became in a position E to obtain a tax advantage—not, be it observed, the date at which he obtained the tax advantage, but the date at which he was in a position to obtain the tax advantage—for if one finds that, as a result of a relevant transaction in securities, he was before 5th April 1960 in a position to obtain a tax advantage, and if thereafter there was no subsequent transaction which one could call a transaction in securities, then it would appear that the section could not apply.

F Taking the case of Mr. Greenberg, when he and his fellow shareholder in L. Greenberg Ltd. entered into the agreement to sell the 100 new shares to Finsbury Securities Ltd., he had achieved a state of affairs in which he had become entitled to a certain purchase price for his shares—a capital receipt which, as the law then stood, would not attract income tax—instead of the possibility of extracting from the company, by way of dividend, income which G would of course have attracted income tax. By doing so it seems to me that in a natural sense of language he obtained, or at any rate put himself in a position to obtain, a tax advantage. It may be that he should not be regarded as actually obtaining a tax advantage until he received the cash representing the purchase price for his shares, but he became in a position to obtain that advantage as soon as the contract was entered into.

H Now it is not easy in the *Greenberg* case to decide precisely what the position was about the £10,000 fund which was put into the special account. Mr. Bagnall says that that was not money that belonged to the Greenbergs, but that it was money which, under a tripartite agreement between the Greenbergs, Finsbury Securities Ltd. and Martins Bank, was held by Martins Bank on terms that the bank would make payments thereunder to the I Greenbergs as the loan account of Finsbury Securities Ltd. was reduced. So be it. I am prepared to accept for purposes of this judgment that that was the effect of the arrangement, although it is not clear, I think, from the Case Stated, and it was probably not clear to the Special Commissioners, by reason of the inadequate evidence available to them, whether that was really the

(Buckley J.)

nature of the transaction. But suppose that that was so, and suppose that on the true view of the facts the Greenbergs received no payment for their shares except by the various amounts released and paid to them as I have detailed earlier in this judgment. That circumstance does not seem to me to affect the fact that as soon as they entered into the contract for the sale of the shares with Finsbury Securities Ltd. they had either obtained, or were in a position to obtain, tax advantages, advantages which, may be, could not be quantified at that time but which they were in a position to obtain to an extent and by such instalments as subsequent events should produce.

This approach to the problem is, I think, helpful because it indicates, in my view, that an appropriate method of construing the proviso is to look at the transaction—given, of course, that it is a transaction which answers to the definition of a transaction in securities contained in the Act—from which the tax advantages flow. It seems to me that in the case of both these appeals it is true to say that tax advantages flow from the initial contracts of sale entered into by the taxpayers. I see, of course, the attraction of Mr. Bagnall's argument that these were sales and purchases of shares, and that a sale or purchase of shares is not carried out until all its terms have been completed; but that, I think, fails to distinguish between the transaction which is involved in entering into the contract and the transaction of the sale and purchase of the shares pursuant to the contract. Both of those things appear to me to be transactions. They are both transactions relating to securities, and the transaction which in each case put the taxpayer here in a position to obtain tax benefits was, in my judgment, the contract for the sale of the shares, which, in each case, was of an earlier date than the crucial date under the proviso to s. 28(1). The fact that thereafter various steps followed does not seem to me to affect the matter. The payment of an instalment of the purchase price of shares pursuant to a contract for the sale of the shares seems to me much less apt to answer the description of a transaction in securities than does the initial contract for the sale of the shares. I do not think that in either of these cases there is any step or transaction which took place after 5th April 1960 which can be said itself to constitute a transaction in securities within the meaning of the Act and so, so to speak, to raise a new ground for invoking the section. Those events which occurred and the steps which were taken after 5th April 1960 were steps which were consequential upon the crucial transaction, which was in each case the contract for the sale of the shares.

For these reasons, in my judgment, Mr. Greenberg succeeds in his appeal and the Crown fails in the *Tunnicliffe* case.

Bagnall Q.C.—Your Lordship's Order will simply be in the *Greenberg* case to allow the appeal with costs and in the *Tunnicliffe* case to dismiss the appeal with costs?

Buckley J.—Yes. Do I have to give any further directions with regard to Mr. Greenberg?

Bagnall Q.C.—I think not, no. The notice should be discharged.

Buckley J.—I will discharge the notice given under the section.

The Crown having appealed against the above decision, the cases came before the Court of Appeal (Lord Diplock and Russell and Cross L.JJ.) on 17th and 18th November 1969, when judgment was reserved. On 18th December 1969 judgment was given unanimously in favour of the Crown, with costs.

A *W. A. Bagnall Q.C.* and *Patrick Medd* for the Crown.

H. H. Monroe Q.C. and *J. E. Holroyd Pearce* (*D. de M. Carey* with them) for both taxpayers.

The following cases were cited in argument:—*Barclays Bank Ltd.* v. *Quistclose Investments Ltd.* [1970] A.C. 567; *Commissioners of Inland Revenue* v. *Marbob Ltd.* 22 T.C. 580; [1939] 2 K.B. 872; *Commissioners of Inland Revenue* B v. *Parker* 43 T.C. 396; [1966] A.C. 141; *Commissioners of Inland Revenue* v. *Brebner* 43 T.C. 705; [1967] 2 A.C. 18; *Commissioners of Inland Revenue* v. *Horrocks* 44 T.C. 645; [1968] 1 W.L.R. 1809; *Patel* v. *Premabhai* [1954] A.C. 35.

Russell L.J.—The judgment I am about to read is the judgment of the Court.

C Both these cases concern forward dividend-stripping operations and the impact of the proviso to s. 28(1) of the Finance Act 1960 on the facts. Had all the facts in point of time occurred after 5th April 1960 it is quite clear that s. 28 would have operated to counteract the tax advantages otherwise accruing to the taxpayers by the receipt in capital non-taxable form of the equivalent of profits of companies in which they were shareholders which would otherwise D have reached them in the form of dividends as part of their income for tax purposes. The question is whether these are cases, as Buckley J. has held, to which s. 28 has no application as being cases in which the transaction or transactions in securities were " carried out " before 5th April 1960, which was the Budget day on which the s. 28 proposals were announced. The facts in the cases are set out in the report in the Court below, [1969] 3 W.L.R. 883, E and therefore we need not burden this judgment with them.

Before considering the meaning of the proviso now in question, or the application of that meaning to the facts of these cases, it is desirable to consider the operation of s. 28 as a whole. Subsection (1) applies the section to a person in respect of a transaction or transactions in securities where that person " is in a position to obtain, or has obtained, a tax advantage " in particular stated F circumstances and in consequence of a transaction in securities (or of the combined effect of two or more such transactions). Subsection (2) states the relevant circumstances that must obtain: para. (*c*) fits the present cases, since it deals with a case in which the relevant person receives, in consequence of a transaction whereby another person receives an abnormal amount by way of dividend or becomes entitled to a relevant deduction in computing profits, a G consideration which either is related to the value of assets available for distribution as dividend or is received in respect of future receipts of the company: and, moreover, so receives the consideration that he does not suffer tax on it as income. " Tax advantage " is defined by s. 43(4) (*g*) as follows:

> " ' tax advantage ' means a relief or increased relief from, or repayment or increased repayment of, income tax, or the avoidance or reduction of H an assessment to income tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains ". Under the same subsection, para. (*i*): " ' transaction in securities ' includes transactions, of whatever description, relating to securities, and in particular—(i) the I purchase, sale or exchange of securities, (ii) the issuing or securing the issue of, or applying or subscribing for, new securities, (iii) the altering, or securing the alteration of, the rights attached to securities."

(Russell L.J.)

The operative part of s. 28 is subs. (3): thereunder, where the section applies to a person in respect of any transaction, the tax advantage " obtained or obtainable " by him in consequence thereof is counteracted by assessment or additional assessment, or the nullifying of a right to repayment of tax, or requiring the return of tax already repaid, or by recomputation: in effect, by any method requisite to counteract the tax advantage so obtained or obtainable. A

It is of the first importance to observe that this section is concerned, so far as applicable to transactions of the character found in the present cases, with receipts by the relevant person. Subsection (3) in providing for counteraction involves a quantification, and so, when speaking of a tax advantage " obtainable " or " obtained " in consequence of a relevant transaction, it is not speaking, on the one hand, of a tax advantage potential involved in a relevant transaction at the time it is entered into and, on the other hand, of a tax advantage obtained on a receipt. " Obtainable " relates to the case of a receipt which entitles a person to claim tax relief or repayment of tax thereon: " obtained " refers to a case in which the person has actually received repayment of tax from the unsuspecting Revenue, or to a case in which, the receipt being of a capital nature as a result of the transaction, no more is required to secure the tax advantage. Similarly, in subs. (2) the circumstances stated involve the receipt by the relevant person of consideration. B C D

Against that background we construe the words in subs. (1), " is in a position to obtain, or has obtained, a tax advantage ", in the same sense. Buckley J. appears to have been led to his decision on the question whether in these cases the relevant transactions were " carried out " before 5th April 1960 by his view that when the agreements were entered into the taxpayers were thereby and thereupon placed " in a position to obtain " the tax advantage that (apart from the impact of s. 28) would flow from the agreements in due course. With this view, for the reasons we have given, we respectfully disagree. In fact, in neither of these cases were the words " in a position to obtain " or " obtainable " relevant, since the tax advantage arrived at was one that arose in point of time only at the receipt of consideration in capital form— i.e. " receipts accruing in such a way that the recipient does not pay or bear tax on them ". E F

What then is the scope of the proviso to subs. (1)? Do the taxpayers demonstrate that there were here transactions in securities " carried out " before 5th April 1960? In our judgment " carried out ", which is not a technical phrase or term of art, should be construed in the light of the section from which this proviso is an escape clause. The section strikes at the occasion of a receipt in cases such as these: or the accrual of a loss in other cases, or a claim to repayment of tax deducted in yet other cases, for example a charity. It bites not so much on the transaction but rather on its tax advantage *outcome*: a saving proviso is to be expected to point therefore to such an outcome. G

There seems to have been a misunderstanding below as to the retroactive operation of the section had the proviso not existed, the Judge understanding the Crown to contend for unlimited retroaction. This is not so. Any tendency in that direction is restricted by the general point that income tax is annual. But if that be so, argued the taxpayers, no effect can be given to the proviso unless it applies to cases such as these, the proviso saving the tax advantages which, though actually arising after 5th April 1960, flow from transactions " carried out ", in the sense of being launched (irrevocably unless otherwise later agreed), before 5th April 1960. This contention is in our view unsound, for there is in fact scope for the proviso on the Crown's view of the section. Examples were given of a relevant acquisition by a charity of shares, the shares H I

being paid for and transferred before 5th April 1960, but the dividend being received by the charity after that date: but for the proviso the claim for repayment of tax on the dividends could be counteracted. Another example involves the fact that losses incurred under a transaction carried out before the date could but for the proviso be the object of counteraction under the section in respect of a later year. In our judgment, therefore, unless in these cases the taxpayers can establish that the transactions were carried out, in the sense that they paid for the shares, before 5th April 1960 and then " obtained " the tax advantage before that date, they are not saved by the proviso. On the facts do they really show this?

In *Greenberg's* case, the agreement dated 30th December 1958 for sale of the preference shares to Finsbury Securities Ltd. provided for registration of Finsbury as holders of those shares forthwith, and for payment forthwith of £10,000 of the (adjustable) purchase price of £20,100 to the Greenbergs or to their nominees, the balance to be paid not later than 31st December 1960. In fact, however, payment was not made in that manner, and the agreed variation is described in para. 11 onwards of the Stated Case. In our judgment it cannot be said that the Greenbergs became entitled to receive any payment otherwise than by virtue of, and in the course of the working out of, the agreement so varied, and to the extent to which payments were outstanding at and made after 5th April 1960 it cannot in our view be said that the transaction was carried out before that date. Accordingly, the tax advantages involved in the receipt in capital form of these later sums are liable to counteraction under s. 28.

The *Tunnicliffe* case contained the special feature that, at the time when the special shares were renounced in favour of Cavendish Mercantile Co. Ltd., a banker's draft for the consideration, £11,000, was handed over to the vendor and a receipt therefor was given. But it is plain from the facts set out in the Stated Case, para. 5 onwards, that in no real sense did the vendor then receive this payment. It was part of the scheme and agreement that the draft should be at once used for the benefit of the purchaser in the manner there set out, and that the vendor should not in fact receive payment for the shares save in the deferred manner provided by the devised machinery. Our view may be underlined by stating that, if the whole transaction from the outset had been dated after 5th April 1960, it would not have been said that the boomerang " payment " of £11,000 gave rise at that time to a tax advantage in respect of that sum: on the contrary, counteraction would have been available only in respect of tax advantages inherent in the sums from time to time released to the vendor under the arrangement or agreement. Similar considerations would apply to the *Greenberg* case.

Consequently, in our judgment, the appeal of the Crown in both these cases should be allowed.

Medd—My Lord, I ask therefore if your Lordship would allow the appeals with costs.

Russell L.J.—Yes.

Medd—I think I have to ask that the notice under s. 28 should be restored in both cases.

Russell L.J.—That is the proper form of Order, is it?

Medd—I think that is right.

Carey (for Holroyd Pearce)—I respectfully agree with that, my Lord; but I am instructed to ask for leave to appeal to the House of Lords in each case.

Russell L.J.—We are at the moment only a Court of two, in the absence of Lord Diplock. Have the parties any objection to this application being decided by the two of us, bearing in mind that if we are of one mind we would in any event be a majority? A

Medd—I have no objection at all.

Russell L.J.—Yes, you may have your leave.

Carey—Thank you, my Lord. B

The taxpayers having appealed against the above decision, the cases came before the House of Lords (Lords Reid, Morris of Borth-y-Gest, Guest, Wilberforce and Simon of Glaisdale) on 17th, 18th and 19th May 1971, when judgment was reserved. On 20th July 1971 judgment was given unanimously in favour of the Crown, with costs. C

H. H. Monroe Q.C. and *J. E. Holroyd Pearce* for both taxpayers.

R. A. MacCrindle Q.C., *Patrick Medd* and *J. P. Warner* for the Crown.

The following cases were cited in argument in addition to those referred to in the speeches:—*Hague* v. *Commissioners of Inland Revenue* 44 T.C. 619; [1969] 1 Ch. 393; *Commissioners of Inland Revenue* v. *Cleary* 44 T.C. 399; [1968] A.C. 766; *Commissioners of Inland Revenue* v. *Toll Property Co. Ltd.* 34 T.C. 13; 1952 S.C. 387. D

Lord Reid—My Lords, the two cases now before your Lordships exhibit slight variations of a simple scheme for tax avoidance by forward dividend stripping. Farther use of the scheme was stopped by the Finance Act 1960. The question in this case is whether or to what extent the provisions of that Act apply to schemes which had been initiated but not completed before the critical date, 5th April 1960. E

The typical method of forward dividend stripping required the co-operation of a taxpayer who controlled a trading company and a finance company which dealt in shares. The taxpayer wished to escape from paying tax on the profits of his company for say the next five years. He caused his company to create a novel kind of shares—say 100 of them—which were to receive all dividends declared by his company for the next five years and thereafter to receive only an ordinary preference dividend. Suppose he expected his company to declare dividends of £20,000 during that period: he sold these shares to the finance company for £20,100; this price was to be paid to him by instalments, the instalments being the dividends which the finance company received from his company; so in this way he received his company's profits as capital—the price of the shares which he had sold to the finance company. This kind of scheme was only profitable because it has been held that finance companies which trade in shares are entitled to treat participating in schemes for tax avoidance as trading operations. So in these cases the finance company could treat the difference between the price which it paid for these strange shares and the nominal value of the shares at the end of the five-year period as a trading loss and so diminish the amount of tax which it had to pay. In the case which I have supposed the finance company paid £20,100 for the shares: the shares at the end of that five-year period were worth £100. So the finance company F G H

A could claim that it had suffered a trading loss of £20,000 during the five-year period, deduct that sum from the true profits which it had earned, and thereby keep £20,000 of its true profits free of tax.

Parliament attempted to prevent this and other methods of tax evasion by provisions in the Finance Act 1960. We are concerned with s. 28. I need not set out its provisions in full because admittedly it would counteract any B new scheme of this character begun after 5th April 1960. This case turns on the meaning of proviso (i) to subs. (1). That subsection is as follows:

> " 28.—(1) Where—(*a*) in any such circumstances as are mentioned in the next following subsection, and (*b*) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage, then C unless he shows that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained, this section shall apply to him in respect of that transaction or those transactions: Provided that this section shall not apply to him if— D (i) the transaction or transactions in securities were carried out, and (ii) any change in the nature of any activities carried on by a person, being a change necessary in order that the tax advantage should be obtainable, was effected, before the fifth day of April, nineteen hundred and sixty."

In *Greenberg's* case all the initial arrangements for carrying out the scheme were completed by 30th December 1958. The special shares in the taxpayer's E company had been created. They had been sold by the taxpayer to the finance company. The finance company had been registered as shareholders. What remained to be done was that in each of the next five years the taxpayer's company would declare a dividend, that dividend would be paid to the finance company, the finance company would then pay to the taxpayer the sum which it received as dividend, and the taxpayer would receive that sum as an instalment F of the price of the shares which he had sold to the finance company. Admittedly the tax evasion involved succeeds if proviso (i) applies: it fails if and in so far as the " transaction or transactions in securities " were not " carried out " before 5th April 1960.

So the first question must be what is meant by a " transaction in securities ". This expression is defined in s. 43(4)(*i*):

G

> " (*i*) ' transaction in securities ' includes transactions, of whatever description, relating to securities, and in particular—(i) the purchase, sale or exchange of securities, (ii) the issuing or securing the issue of, or applying or subscribing for, new securities, (iii) the altering, or securing the alteration of, the rights attached to securities."

The word " transaction " is normally used to denote some bilateral activity, H but it can be used to denote an activity in which only a single person is engaged. It would not be wrong to say of a person doing office work that he is transacting business. This definition shows that no bilateral element is necessary, for it includes applying or subscribing for new securities which are single acts done by one person alone. Then the definition includes not only transactions in securities but transactions relating to securities. A previous definition states, I as one would expect, that " securities " includes shares. So on the face of it any single act done by one person alone is a transaction in securities if it is one " relating to securities ". This is a vague phrase, but I do not see how to stop short of giving to it a very wide meaning. Taking acts done in carrying out

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these schemes I think that declaration of a dividend and payment of dividends by the taxpayer's company to the finance company were acts relating to shares. Certainly declaration of a dividend is an act done relating to the company's shares, and if that is so I do not see how to draw a line and say that the actual payment of dividends is not also an act relating to the shares. Then what about a sale of shares? Clearly the sale is a transaction in securities. Can it then be said that payments at later dates of instalments of the price are not acts relating to the sale? And if they are acts relating to the sale why are they not " transactions " relating to the sale and therefore transactions relating to the shares? I must confess that I do not like being forced step by step to a conclusion of this kind. At first sight to call each payment of one instalment of the price of a share a separate transaction relating to securities seems far-fetched. We seem to have travelled a long way from the general and salutary rule that the subject is not to be taxed except by plain words. But I must recognise that plain words are seldom adequate to anticipate and forestall the multiplicity of ingenious schemes which are constantly being devised to evade taxation. Parliament is very properly determined to prevent this kind of tax evasion, and if the Courts find it impossible to give very wide meanings to general phrases the only alternative may be for Parliament to do as some other countries have done and introduce legislation of a more sweeping character, which will put the ordinary well-intentioned person at much greater risk than is created by a wide interpretation of such provisions as those which we are now considering.

Section 28 was considered by this House in *Commissioners of Inland Revenue* v. *Parker*(1) [1966] A.C. 141. A company had capitalised accumulated profits as debentures in 1953 and had redeemed them in 1961. This clearly conferred a tax advantage, and the question was when the taxpayers received it. It was held that the unilateral act of the company in redeeming the debentures was a " transaction in securities ". So as that was after 1960 the section applied. I do not think that that decision is directly relevant here, but at least I can find nothing which prevents me from holding that a payment of an instalment of the price of a share is a " transaction in securities ". The taxpayer argued that payment of the price could not be regarded as a separate transaction but that it was merely a consequence of the only transaction in which the finance company was involved, viz. the sale of the shares to that company by the taxpayer. This argument does get some support from the earlier part of s. 28(1), which excludes the operation of the section if the taxpayer " shows that the transaction or transactions were carried out for bona fide commercial reasons or in the ordinary course of making or managing investments ". That appears to contemplate only transactions which the taxpayer or other person was free to enter into or not as he chose. It cannot appropriately be applied to payment of a debt which a person is legally bound to pay, and if one tries to apply it to such payment that person could reasonably say that he did make the payment for bona fide commercial reasons, for if he refused to pay he would lose his commercial reputation for honest dealing, and payment of the price of shares acquired must surely be in the ordinary course of making investments. Farther, he could go on to say that fulfilling a legal obligation cannot have as a main object the obtaining of a tax advantage.

The phraseology of this protection against the operation of the section also comes into the argument in another way. The Crown argue that, even if the only transaction was the sale of the shares in 1958, that transaction had not

(1) 43 T.C. 396.

A been " carried out " before 5th April 1960, because part of the price was still unpaid at that date. Taking the ordinary use of language I would think that a contract had not been carried out until both parties had performed their obligations under it. But the taxpayer argues that " carried out " can mean the making of the contract and not its fulfilment, and that the earlier phraseology shows that there it has that meaning. What the taxpayer has to show is that
B the transaction was carried out for bona fide commercial reasons: there the words " carried out " must mean entered into and not performed. I am inclined to think that the real explanation of these verbal difficulties may be that, in legislation of such extreme complexity as we have here, it is not humanly possible for a draftsman to preserve that consistency in the use of language which we generally look for. Indeed, I sometimes suspect that our normal
C meticulous methods of statutory construction tend to lead us astray by concentrating too much on verbal niceties and paying too little attention to the provisions read as a whole. So I might be inclined to hold that " carried out " in the proviso means completed or fulfilled but for one important matter. If " carried out " means completed or fulfilled what is the position when there has been partial fulfilment before 5th April 1960? If the draftsman had intended
D " carried out " to mean performed or fulfilled or completed, I find it difficult to suppose that he would not have envisaged cases where the transaction had been carried out in part only: and if he had thought of that I find it equally difficult to suppose that he would not have provided for that event. The complexity of the whole section shows that he was setting out to provide for every possibility he could think of. In *Greenberg's* case the contract was made
E in 1958. So what is the position with regard to the instalment of the price paid in 1959? If the proviso only applies so as to exclude those transactions which have been completed before 5th April 1960, and Greenberg's transaction had not then been completed because part of the price had still to be paid, then the proviso has no application to Greenberg's transaction or any part of it. So on the face of it the section applies to the whole of the tax advantage which it
F brought to Greenberg.

Section 28(3) provides that, where the section applies in respect of any transaction, the tax advantage obtained in consequence of it " shall be counteracted " in various ways. There is nothing in the section to exclude counteraction of such part of the tax advantage as was obtained or harvested before 5th April 1960. The Crown admit that the section ought not to be applied so as to
G counteract the tax advantage which was obtained when the 1959 instalment of the price was paid. They say that the general presumption against retrospective legislation is sufficient to prevent this. Certainly where a Finance Act imposes a tax on income it does not in the absence of clear indication to the contrary impose that tax on any income which was received before the beginning of the financial year during and in respect of which the Act was passed. But here
H there is no imposition of a tax. The section appears to treat each transaction as a whole, and I am by no means convinced that the general presumption would by itself entitle or require one to read into s. 28(3) some qualification to the effect that there shall be no counteracting of such part of the tax advantage from a transaction to which the section applies as was obtained before the beginning of the financial year 1960–61. It might well be said that Parliament
I defined in the proviso the limits of the retrospective application of the section so that if the transaction had been carried out before 5th April 1960 none of the tax advantage flowing from it was to be counteracted, but that if it had not been carried out before that date then the whole tax advantage was to be counteracted. I regard the difficulty of excluding from the application of the section the instalment paid in 1959, if the sale and subsequent payments of

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instalments of the price of the shares must be regarded as one single transaction, as a strong argument against this interpretation of the word " transaction " in the proviso. I am not prepared to accept the Crown's alternative argument. A

I would dismiss these appeals on the ground that each payment of an instalment of the price of these shares was a separate transaction and that therefore the section applies to all instalments paid after 5th April 1960.

Lord Morris of Borth-y-Gest—My Lords, the facts concerning the forward dividend stripping operations which have given rise to these two appeals are carefully set out in the Cases Stated by the Special Commissioners, and I only find it necessary to refer to them in outline. The decision in each appeal depends upon the interpretation, in relation to the facts, of s. 28 of the Finance Act 1960. Though the facts of the two cases differ the important issues of interpretation are common to the two. B C

The Appellant Greenberg and his father were the sole shareholders in a company, L. Greenberg Ltd. They decided to embark upon what was known as—and acknowledged as—a " dividend-stripping " scheme. Though it was somewhat elaborate, and though its operation would extend over a period of years, its avowed and only purpose was the avoidance of taxation. If receipts that might have come as income could be so processed that they would come as capital then the tiresome payment of surtax could be avoided. So what was done in 1958 was to create 100 new 6 per cent. preferred shares of £1 each which carried special rights. Shortly stated, in addition to the preferential dividend there were to be payments in each of the years 1959 to 1963 (both inclusive) of net dividends (after deduction of tax) equal to the profits of the company arising in the year or the accumulated profits of the company available for dividend, whichever should be the less. But the total to be paid in respect of the five years was not to exceed £20,000 after deduction of income tax. That was the amount of the profits which, after tax, it was expected that the company would earn during the five years. The shares were then sold to a finance company. The nominal price was £20,100. But that sum was subject to adjustment and there were terms as to payment. If the aggregate net dividends received by the finance company amounted to less than the £20,000 the price would come down. On the other hand, if the finance company obtained tax repayments or reliefs the Greenbergs were to have half of their amount. So the Greenbergs would receive the price of the new specially created shares as capital free of surtax, whereas if the profits of the company had been distributed by way of dividend to them there would have been a liability to surtax. They would receive £20,000 free of income tax and surtax for parting with £20,000 of taxed dividends: and if the finance company had obtained a hoped-for repayment of or relief from tax there would have been a further receipt. That adjustment was to be made not later than the end of the year 1966. As events turned out, and by reason of a decision of your Lordships' House(1), the finance company did not obtain any repayment of or relief from tax as had been hoped for and expected. So no further sum became due. D E F G H

The special resolution which increased the capital of the company by the creation of the new preferred shares was on 30th December 1958. On the same day there was an ordinary resolution capitalising £100 of reserves and applying such sum in paying up the new shares, which were to be allotted (credited as fully paid up) among the shareholders. The Appellant and his father received their allotments the same day. The sale agreement was also on the same day. There were terms as to the payment of the price. Those terms I

(1) *See* Finsbury Securities Ltd. *v.* Bishop 43 T.C. 591; [1966] 1 W.L.R. 1402.

A were, however, varied. The Special Commissioners inferred that what the parties agreed was that the Greenbergs should receive £100 in February 1959 and should receive further sums making up the balance of the purchase price at the times and to the extent that dividends should be received by the finance company. The Special Commissioners concluded that it was part of the arrangement that both the time and the amounts of the receipts of the Greenbergs
B should be geared to dividends expected to be paid by the company to the finance company. Payment for the shares was therefore to be made by a series of instalments over a period of years. Various payments were made after 5th April 1960.

In considering the applicability of s. 28 of the Finance Act 1960, it is to be noted that it has not been disputed that the Appellant obtained tax advantages.
C The Special Commissioners recorded that these consisted in the avoidance or reduction of assessments to surtax or the avoidance of possible assessments thereto effected by receipts accruing in such a way that the Appellant would not bear surtax on them: see the definition of " tax advantage " in s. 43(4)(*g*). In my view, the Appellant Greenberg " obtained a tax advantage " each time that he received an instalment of the purchase price of the shares that he sold.
D The opening words of s. 28(1) are:

> " Where—(*a*) in any such circumstances as are mentioned in the next following subsection, and (*b*) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage . . ."

Before the Special Commissioners it had been submitted on behalf of the
E Appellant Greenberg that the tax advantages which the scheme yielded to him had not been obtained in any of the circumstances mentioned in subs. (2). That submission having failed, it was not repeated either in the High Court or in the Court of Appeal. So s. 28(1)(*a*) is satisfied. As to s. 28(1)(*b*), it is not disputed that there was a transaction in securities or that there were transactions in securities. Nor, as I have stated, is it disputed that in consequence
F of some transaction in securities the Appellant obtained a tax advantage. The first important question, therefore, is to decide what was the relevant transaction or what were the relevant transactions.

If a transaction in securities to which the opening words of s. 28(1) applied was " carried out ", then the person concerned might assert in two ways that the section nevertheless did not apply to him in respect of the transaction. In
G the first place, he could show " that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained ". Even before a transaction is " carried out " there will be no difficulty in deciding (if it is for any reason necessary to decide) whether when it is carried out it will
H have been carried out for bona fide commercial reasons or in the ordinary course of making or managing investments and without any main object of obtaining tax advantages. In the second place, a person could assert, in reliance on the first proviso to s. 28(1), that " the transaction or transactions in securities were carried out . . . before the fifth day of April, nineteen hundred and sixty." The main contention of the Appellant is that the transaction in
I securities in consequence of which he received sums of money was the contract for the sale of the shares or, alternatively, the sale or transfer of the shares pursuant to the contract, and that either transaction was " carried out " before 5th April 1960. The Appellant does not (and, indeed, could not) contend that

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any one of the " transactions in securities ", whenever " carried out ", was carried out for bona fide commercial reasons or in the ordinary course of making or managing investments or that there was no main object of enabling tax advantages to be obtained.

The words " carried out " are, in my view, words of ready comprehension and should be given their ordinary meaning. To say that a contract has been made or entered into is very different from saying that it has been carried out. Parties may make an agreement one day in the expectation that it will be carried out another day. It is contended on behalf of the Appellant that the making of an agreement or contract for sale is " carried out " when the agreement is made or the contract recorded. I cannot accept that contention. If an agreement is made pursuant to which vendors are to sell shares and purchasers are to pay for them, and if the agreement provides that the shares are to be transferred forthwith and that payment for them is to be by future instalments, it would be contrary to fact and to reality to assert that the agreement is carried out when it is made or when the vendors transfer the shares. An essential part of the agreement from the vendors' point of view would be the payment by the purchaser of the sums that he had promised to pay. The vendors would be surprised if they were told that the contract had been carried out before they received their money. The inherent features of performance or fulfilment are involved in the carrying out of a transaction. To suggest that where there is an agreement to sell the payment of the price is only a consequence of the agreement or transaction is to mask or obscure the fact that payment is an important and vital part of the transaction. It is of equal importance to a vendor to get his payment as it is for a purchaser to get what he is buying and paying for. The contrast is to be noted between the words " the transaction or transactions in securities were carried out ", as in s. 28(1), and the words " a transaction or transactions effected or to be effected by him ", as in s. 28(10). The former words essentially and necessarily convey the conception of completion, whereas the latter words do not essentially and necessarily convey that conception.

I turn, then, to consider what was the relevant " transaction in securities " or what were the relevant transactions. The definition of the phrase (see s. 43(4)(*i*)) is of great width. The phrase includes transactions of whatever description relating to securities, a word which in turn includes shares. Examples of transactions in securities are the purchase, sale or exchange of securities and the issuing or securing the issue of or applying or subscribing for new securities. So the allotment to the Greenbergs of the new shares was a transaction in securities. Though the creation of the new shares and their allotment only came about because of and as a necessary preliminary to the tax-avoiding scheme which was devised, the consequence that the Greenbergs could anticipate or hope to secure tax advantages only followed from the next steps, which were the sale agreement of 30th December 1958 followed by the transfer (by way of renunciation) of the shares to the purchasing finance company. The sale agreement was clearly a " transaction in securities ". It was at least one of the relevant transactions. I consider it first because it was earlier in date than the various receipts. Was that transaction in securities " carried out " before 5th April 1960? For the reasons which I have given I consider that it was not. Certain obligations were fulfilled. Others were not. They could not have been fulfilled by 5th April 1960. The price of the shares was not ascertained. The stated figure was adjustable up or down. If the company did not make profits no instalment of the price would be payable. The instalments were payable at various dates. Some were not due until after

A 5th April 1960. Until a receipt of a payment (which being in capital form would be within the words " receipts accruing in such a way that the recipient does not pay or bear tax on them ") there would be no tax advantage. A tax advantage would only be obtained when and if a payment was made.

If, therefore, the sale agreement of 30th December 1958 is identified as the relevant transaction in securities (or as one of the relevant transactions) it was
B not a transaction that was carried out before 5th April 1960. The purchasers had discharged some only of the obligations under the agreement by that date: other obligations remained. The question is then raised whether, if s. 28 applies in respect of that transaction, there could be counteraction under subs. (3) in respect of any tax advantage obtained before the commencement of the financial year 1960–61. In fact the Crown made no such claim. But that is a
C circumstance which by itself is of no relevance. Very clear words are, however, necessary to overturn the presumption against the retroactive operation of a taxing provision. The result, if counteracting adjustments were made under s. 28(3), would be that additional tax would be payable by the Appellant in respect of the current and future years of assessment. There would be a computation or recomputation of liability to surtax, always assuming that there
D were payments, on the basis of taking certain sums into account. Those sums would be the gross equivalents resulting from treating the payments received by the Appellant as though they had been net amounts received in respect of dividends payable at the dates the payments were received. The provision in s. 28(12) to the effect that nothing in the section authorised the making of an assessment later than six years after the year to which the tax advantage relates
E does not, in my view, involve that counteractions involving assessments for years earlier than 1960–61 could be made. A provision designed to have retroactive operation would have to be enacted in clear and positive terms. If it is said that on this approach the proviso would lack operative effect unless it covered such a case as the present, it suffices to point out, as did Russell L.J. in delivering the judgment of the Court of Appeal, that scope for the proviso
F could be shown. As an example Russell L.J. referred to an acquisition of shares by a charity where the shares were transferred to the charity and paid for by the charity before 5th April 1960 and where the charity received a dividend after that date: on a claim for repayment of tax on the dividend the charity would be protected by the proviso from counteraction under subs. (3) in respect of tax advantage obtainable.

G The present case may also be approached and examined in an alternative way. The sale agreement with its somewhat special terms may be regarded not only as being itself a " transaction in securities " but as a transaction which resulted in and required a sequence of later transactions. There were to be successive payments of instalments of purchase price. Those payments were contingent upon the receipt by the purchasers (the finance company) of dividends.
H It was a part of the transaction that the payments should not only be so contingent but that they should be made when the purchasers received dividends and to the extent that they received dividends. The payments were, however, still to be made, and they were part payments in respect of the shares which were bought. In these circumstances each act of payment (with its corollary act of receipt) was a transaction and it was a transaction relating to securities.
I Upon receipt of an instalment the Appellant obtained a tax advantage. He avoided an assessment to tax because the receipt accrued to him in such a way that he did not pay tax on it. Until the receipt of the instalment he was not " in a position to obtain " that tax advantage. On receipt of an instalment he obtained the advantage. If, however, the transaction of paying and receiving

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an instalment of the purchase price was carried out before 5th April 1960 then the proviso would preclude the application of the section to the recipient in respect of that transaction.

The facts in regard to the *Tunnicliffe* case are fully set out in the Case Stated and are summarised in the judgments under review. There was the special feature in regard to the "banker's draft" for £11,000 which was described as being in payment for the shares. I agree with the Court of Appeal that in no real sense did the vendor receive that payment at the date when a receipt for it was given. As Russell L.J. expressed it[1]:

> "It was part of the scheme and agreement that the draft should be at once used for the benefit of the purchaser in the manner there set out, and that the vendor should not in fact receive payment for the shares save in the deferred manner provided by the devised machinery."

Counsel's reflection that the transaction had the features of a "pantomime" was not uncharitable.

I would dismiss the appeals.

Lord Guest—My Lords, this appeal is concerned with the proper interpretation of s. 28 of the Finance Act 1960, the section designed to counteract avoidance of income tax by means *inter alia* of the device known as "dividend-stripping". The facts in the *Greenberg* case, which may be taken as typical, are fully set out in the Case Stated and also referred to in the judgment of Buckley J. The learned Judge sustained an appeal by the taxpayer from a decision of the Special Commissioners. The Court of Appeal reversed the learned Judge's decision.

The question may be stated thus. Where an operation of dividend-stripping is conducted by means of an agreement to sell shares pregnant with dividend to a finance company and the agreement which is the initial stage of the operation is effected prior to 5th April 1960, whether if the purchase price being payment of the dividends is paid after 5th April 1960 the operation is caught by s. 28 of the Act or is saved by the proviso to subs. (1) of that section. Section 28(1) provides as follows:

> "28.—(1) Where—(*a*) in any such circumstances as are mentioned in the next following subsection, and (*b*) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage, then unless he shows that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained, this section shall apply to him in respect of that transaction or those transactions: Provided that this section shall not apply to him if—(i) the transaction or transactions in securities were carried out, and (ii) any change in the nature of any activities carried on by a person, being a change necessary in order that the tax advantage should be obtainable, was effected, before the fifth day of April, nineteen hundred and sixty."

There is no question that apart from the proviso the operation comes within the terms of the section and that the Commissioners of Inland Revenue would be entitled to counteract under subs. (3) the tax advantage which was undoubtedly obtained by the Appellant.

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[1] *See* page 269 *ante*.

A By s. 43(4)(*i*) " transaction in securities " is defined thus:

> " (*i*) ' transaction in securities ' includes transactions, of whatever description, relating to securities, and in particular—(i) the purchase, sale or exchange of securities, (ii) the issuing or securing the issue of, or applying or subscribing for, new securities, (iii) the altering, or securing the alteration of, the rights attached to securities."

B To succeed the Appellant must show that none of the " transactions in securities " within the meaning of s. 43 was " carried out ", within the meaning of the proviso, after 5th April 1960. There was a dispute between the parties as to whether " carried out " in the proviso meant " effected " or " implemented ". If these words have the first meaning then I cannot escape from the conclusion that each payment of dividends and each consequential payment C of an instalment of the purchase price was a transaction in securities. It certainly related to securities, and *Commissioners of Inland Revenue* v. *Parker*(1) [1966] A.C. 141 is authority for the view that the unilateral payment of money may be a " transaction in securities ". If this view be right then it would not matter whether " carried out " meant " effected " or " implemented " because all the dividends which are in question in this appeal were paid after 5th D April 1960. The proviso would then be excluded. This would be sufficient for the decision of the appeal.

The construction of the words " carried out " as meaning " effected " was supported by a reference to the same words in the body of s. 28 (1), which speaks of the transactions being " carried out for bona fide . . . purposes ". The meaning of " carried out " in the body of this subsection must be " effected " E because the purpose of a transaction, bona fide or otherwise, could only be ascertained at its inception and could not await the conclusion of the transaction. But notwithstanding the force of these contentions I do not take the view that the meaning of " carried out " can be restricted to mean " effected ". The ordinary and natural meaning of " carried out " is " implemented ". Moreover, the interpretation of " carried out " must be considered in the context of the F whole of s. 28. The operation of " dividend-stripping " necessarily consists of a number of transactions, all leading to achieve the result of tax avoidance. This is shown by the reference to " the combined effect of two or more transactions " in the body of s. 28(1). In these circumstances I am driven to the conclusion that the words " carried out " have a different meaning in the body of s. 28(1) from that in the proviso. This, of course, is an unhappy conclusion G to reach, but draftsmen, like Homer, sometimes " nod ", and perhaps in the unnecessary complexity of s. 28 this is not surprising. It appears to me that " carried out " in the proviso must have the wider meaning of " implemented ". It is thus contrasted with " effected " in s. 28(10). If it did not have this wider meaning the purpose of the section would be very largely defeated. A transaction which had only entered its initial stage of an agreement prior to H 5th April 1960 would be protected by the proviso although the tax advantage might not be obtained until some time after 5th April 1960. This would not, in my view, be in consonance with the tenor and purpose of the section.

A further objection to the wide construction of " carried out " in the proviso was that a transaction which was implemented before 5th April 1960 would not in any event be caught by s. 28 in view of the general principle that a I Finance Act has no retrospective effect unless there are clear words to that effect. If the proviso had no content, that would certainly be a strong argument for adopting a different construction. Parliament is not in the habit of saving

(1) 43 T.C. 396.

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a position which requires no saving clause. I was, however, satisfied by the examples given by the Crown in which the provision might be applicable that the proviso has a content. I refer particularly to cases of relief for losses.

I would dismiss the appeal.

In *Tunnicliffe's* case I refer to my opinion in the *Greenberg* case, and for the same reasons would dismiss this appeal.

Lord Wilberforce—My Lords, there is no doubt that if the transactions in question in these cases had taken place wholly after 5th April 1960 they would have been caught by s. 28 of the Finance Act of that year. The only question is whether the taxpayers can avail themselves of the proviso (i) to subs. (1). In order to do this they must show that the transaction(s) in securities which attract the section was (were) carried out before 5th April 1960. After preparing my opinion on this matter I have been able to read those of your Lordships, which, in agreement with the Court of Appeal, unanimously reject this contention on the ground that " carried out " means " fulfilled ", and I see no advantage in stating my own reasons for reaching this conclusion. I would only add that I do not think it necessary, or opportune, to decide whether the payment of a dividend, or the consequent payment to the taxpayer, was itself, separately, a transaction in securities. In my opinion, nothing in *Commissioners of Inland Revenue* v. *Parker*(1) [1966] A.C. 141 compels or involves this conclusion, and I would reserve my opinion upon it.

I would dismiss both appeals.

Lord Simon of Glaisdale—My Lords, both these cases concern the operation of a form of tax avoidance known as " forward dividend-stripping ". It requires the co-operation of a trading company and a finance company dealing in shares. Its aim is to ensure that the profits of the trading company are not received by those who control it in the form of dividends, on which income tax and surtax would have to be paid. Accordingly, the profits of the trading company are paid to the finance company, which pays them back to those in control of the trading company in the form of capital, on which no income tax or surtax is payable. On the other hand, such repayment involves the finance company in an artificial loss, which can be set off against any receipt on which income tax would otherwise be payable by the finance company.

For the actual working of such a scheme I shall describe *Greenberg's* case. The trading company was called L. Greenberg Ltd. (which I shall call " the company "). Before 30th December 1958 its issued capital was 504 £1 shares, held by the Appellant taxpayer and his father (whom I shall call " the Greenbergs "). The finance company dealing in shares was Finsbury Securities Ltd. (which I shall call " Finsbury "). Towards the end of 1958 the Greenbergs arranged with Finsbury that the company should create new shares carrying the right to all the net profits of the next five years up to £20,000 net after tax (which was the minimum that the company was expected to earn by way of profits over the following five years); these shares were to be sold to Finsbury by the Greenbergs for the sum of £20,100 plus the right to receive half of whatever amount Finsbury might be able to obtain in the way of tax relief relating to the shares. Finsbury was expected to obtain such tax relief by reason of the fact that at the end of the five-year period the shares which they had bought for £20,100 would be worth only £100, since they were a wasting asset dependent in value on the right to receive dividends; Finsbury would thus

(1) 43 T.C. 396.

A be able to show a loss of £20,000 on its dealing account; and the dividends it received on the shares would not be shown on the other side of the account: *F.S. Securities Ltd.* v. *Commissioners of Inland Revenue*(1) [1965] A.C. 631. On the other hand, the Greenbergs would receive £20,100 in the form of capital payment for the shares (and thus free of income tax and surtax) for parting with the right which would otherwise be theirs, as the ordinary shareholders (or as the B holders of the newly created shares), to receive £20,000 of taxed dividends; and they would also receive a further capital sum dependent upon Finsbury's tax relief. (In the event Finsbury did not obtain such tax relief as had been expected, in view of the decision of your Lordships' House in *Finsbury Securities Ltd.* v. *Bishop*(2) [1966] 1 W.L.R. 1402, so that no such further capital sum became due to the Greenbergs.)

C In pursuance of this arrangement, on 30th December 1958 the following events took place. (1) The company passed a special resolution increasing its capital by the creation of 100 preferred shares of £1 each carrying: (*a*) a fixed cumulative preferential dividend at the rate of 6 per cent. per annum and (*b*) further dividend rights which (shortly stated) entitled the holders, *pro rata*, to receive in respect of each of the five years 1959 to 1963 inclusive net dividends D of such amounts as, after deduction of income tax, should be equal (in the aggregate) to either (i) the profits of the company arising in each such year or (ii) the accumulated profits of the company available for dividend, whichever should be the less. (This was subject to a proviso that the total amounts of such further dividends should not exceed £20,000 after deduction of income tax.) (2) The company resolved to capitalise £100 of its reserves and apply that sum E in paying up the preferred shares, which were to be distributed to the company's existing shareholders (i.e., the Greenbergs) *pro rata*. (3) Renounceable letters of allotment of the preferred shares were issued to the Greenbergs. (4) A sale agreement was entered into, whereby the Greenbergs agreed to sell the preferred shares to Finsbury for £20,100, subject to adjustment. £10,100 was to be paid forthwith; the balance of £10,000 not later than 31st December 1960. The F adjustments to the purchase price were to be by way of deduction if the aggregate dividends paid on the preferred shares amounted to less than £20,000 before 31st December 1964; and by way of addition of 50 per cent. of Finsbury's tax relief relating to the preferred shares: any such adjustment was to take place not later than 31st December 1964. (5) The Greenbergs renounced the letters of allotment of the preferred shares in favour of Finsbury, which was G duly registered as holder of the preferred shares. The provisions of the sale agreement as to payment were subsequently varied. According to the findings of the Special Commissioners, which were not challenged before your Lordships, the new arrangement was as follows. The initial sum of £10,100 was not paid on the handing over of the renounced letters of allotment: instead, early in 1959 Finsbury paid £100 only. Arrangements were made with a bank (which H I shall call "the bank"), whereby the bank advanced £10,000 to Finsbury, which was credited to a special account in the books of the bank, on which the Greenbergs drew as and when money from the dividends on the preferred shares was paid into Finsbury's account with the bank. A subsidiary point in this appeal was whether this £10,000 belonged to the Greenbergs on 11th February 1959, the date on which it was credited to the special account. The I balance of £10,000 of the purchase price was not paid by 31st December 1960, as was contemplated under the original sale agreement of 20th December 1958; but instead various amounts were paid (initially into the special account, but finally direct to the Greenbergs) at different dates as and when Finsbury received

(1) 41 T.C. 666. (2) 43 T.C. 591.

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dividends from the company. Between March 1959 and October 1963 net dividends on the preferred shares amounting to £20,000 were paid by the company to Finsbury. As and when they were received such sums were repaid by Finsbury to the Greenbergs (mostly through the accounts at the bank) as instalments of the purchase price of the shares.

The Finance Act 1960 contained a number of provisions designed to obviate tax avoidance schemes. In particular, s. 28 contained provisions designed to obviate tax avoidance by the sort of dividend-stripping operation which I have described. It is not contested by the taxpayer that this scheme falls within the section, subject to the proviso to subs. (1). The relevant words of this proviso are: " Provided that this section shall not apply to him if— (i) the transaction or transactions in securities were carried out . . . before the fifth day of April nineteen hundred and sixty." Subsection (3) provided machinery whereby the Inland Revenue could counteract a tax advantage obtainable by a scheme falling within this section. In the instant case the Inland Revenue claimed to make the necessary adjustments so as to counteract the tax advantage which the taxpayer would have derived by the receipt in the form of capital of sums which represented dividends paid by the company in respect of the financial years 1960–61, 1961–62, 1962–63 and 1963–64. The taxpayer disputed the action of the Inland Revenue, on the ground that he was protected by the proviso. The Special Commissioners held that he was not so protected. They also held that the £10,000 did not belong to the Greenbergs in February 1959, but that moneys in that account first belonged to the Greenbergs on the dates the sums were transferred from the special account to the Greenbergs' private accounts. The taxpayer appealed to the High Court; Buckley J. allowed the appeal, but his decision was reversed by the Court of Appeal ([1971] Ch. 286). The taxpayer now appeals to your Lordships.

The main issue in this appeal is, therefore, whether what took place here was a transaction in securities carried out before 5th April 1960, in consequence of which the Greenbergs were in a position to obtain or had obtained a tax advantage (or whether any such tax advantage was the consequence of the combined effect of two or more such transactions carried out before that date). The taxpayer claims that the relevant transaction or transactions in securities was or were carried out on 30th December 1958 and that everything thereafter was a mere consequence of the transaction or transactions in securities which had been carried out on that date. On this construction " carried out " means " effected ", as (it was argued for the taxpayer) must be its meaning a few lines earlier in the body of s. 28(1)— " unless he shows that the transaction or transactions were carried out either for bona fide commercial reasons ", etc. But the ordinary meaning of " carried out " is " implemented ", not " effected ". Indeed, in this very section it stands in contradistinction to " effected ", since subs. (10) actually speaks of a " transaction or transactions [i.e. in securities] effected or to be effected by him ". " Transaction in securities " is interpreted in s. 43 in terms which could hardly be wider, namely, " ' transaction in securities ' includes transactions, of whatever description, relating to securities, and in particular— (i) the purchase, sale or exchange of securities . . ." " Transaction " itself is not statutorily defined; but its ordinary meaning is " proceeding " or " action ", or, in particular, " business deal ". *Commissioners of Inland Revenue* v. *Parker*(1) [1966] A.C. 141 shows that in this section itself it is an apt word to embrace a payment of money for securities (in that case the redemption after

(1) 43 T.C. 396.

A 5th April 1960 of debentures which had been issued before that date). If " carried out " means " implemented " the transaction(s) in securities with which we are concerned were not " carried out " on 30th December 1958. They were not carried out until the last dividend had been received from the company by Finsbury and until each instalment of the purchase price (which was only ascertainable when the dividend to which it related was paid—quite
B apart from the provisions for the sharing of Finsbury's tax relief) was paid to the Greenbergs. In particular, I do not think that the purchase or sale of the securities can properly be said to have been " carried out " until the whole purchase price had been ascertained and paid. The execution of an executory contract seems to me to be particularly apt for description by the words " carried out ".

C As for the taxpayer's argument that " carried out " in the proviso must bear the same meaning as it does in the passage from the body of s. 28(1) which I have cited (which, on the taxpayer's argument, is " effected "), it was argued for the Crown that " carried out " in this passage too bears its ordinary meaning of " implemented ", the draftsman having in mind a possible change of motivation before the transaction had been completed. With all respect, this
D seems to me to be too far-fetched. I think that " carried out " in the passage I have cited from the body of s. 28(1) must, as the taxpayer claims, mean " effected ". I am therefore left with the choice of, on the one hand, reading " carried out " in the proviso in its ordinary sense of " implemented " and in contradistinction to " effected " in subs. (10), or, on the other, reading " carried out " in the artificially narrow sense of " effected " because I think that this is
E the sense that the word must bear in the body of subs. (1), notwithstanding that " effected " itself is used in subs. (10). I prefer to read the words in their ordinary sense wherever possible. Moreover, the wide-ranging character of this part of the Act dealing with tax avoidance and the width of the definition of " transaction in securities " in s. 43 convince me that Parliament and the draftsmen did not intend " carried out " in the proviso to s. 28(1) to be read in
F any artificially restrictive sense.

But then it is argued for the taxpayer that if the construction of the proviso is that suggested by the Crown the Inland Revenue would have been entitled to have made counteracting tax adjustments in respect of the instalments of the purchase price received by the Greenbergs before 5th April 1960; it is immaterial that the Inland Revenue have not sought to do so. This would offend the
G *prima facie* rule of construction against retroaction of fiscal provisions; which (it is claimed) demonstrates that the construction contended for by the Crown cannot be right. I cannot agree. Even on the Crown's construction, they would not be entitled to make any counteracting adjustment in respect of a tax advantage to the taxpayer obtained before 5th April 1960 in virtue of transactions in securities not " carried out " before that date. This is so, not by
H reason of the words of the proviso, but by reason of the general rule that the provisions of annual Finance Acts (in the absence of a contrary intention appearing) affect only current or future years of assessment. This is plainly the case in respect of the imposition or remission of taxation. In principle the same rule would seem applicable to measures designed to obviate " do-it-yourself " remissions of taxation by tax avoidance. Moreover, there is
I authority that this is the correct line of approach to the construction of a Finance Act. In *Eastwood* v. *Commissioners of Inland Revenue*(1) [1943] K.B. 314 the Court of Appeal was concerned with a provision of the Finance Act 1936, the relevant part of which reads:

(1) 25 T.C. 100.

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> " Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year . . ."

The settlement in question was made before 22nd April 1936. The taxpayer in that case was assessed to tax in respect of certain sums paid under the settlement to his daughter during the financial years ended April 1937 to April 1940. Lord Greene M.R., in a judgment with which Scott and MacKinnon L.JJ. agreed, held that, since the unit of time to which a Finance Act applies is the current financial year, the provision I have cited applied to any income paid under the settlement during the years of assessment, including the fiscal year 1936–37, whether the payment was made before or after the date on which the Act received the Royal Assent. At page 318(1) Lord Greene M.R. said:

> " It invariably happens that the Finance Act for a particular year does not pass into law until the then current financial year has to some extent elapsed, but the time unit with which the Act deals for the purposes of assessment is the financial year, and it deals normally with the taxable income in respect of the then current financial year. That does not mean that it is retrospective. It is merely the unit of time in respect of which taxation is imposed "; and, at page 319(1), ". . . the unit of time being the year of assessment, it is with the receipts during that unit of time that the subsection is dealing."

The point is of importance, since it was considerations relating to retrospection which were largely instrumental in causing Buckley J. to allow the appeal of the taxpayer: see [1971] Ch. 286, at pages 307–8(2).

It is, however, argued for the taxpayer by way of rhetorical question that, if the general revenue law prevents counteraction of a tax advantage obtained or obtainable before 5th April 1960 in respect of transactions in securities not " carried out " (in the ordinary sense, which I favour) by that date, what is the purpose of the proviso at all? Even if it did no more than restate what I understand to be the general rule as to the temporal operation of fiscal provisions, I should assume that it was inserted by way of reassurance, and I would not be persuaded to read " carried out " in the proviso in other than its ordinary meaning of " implemented ". But in fact there are cases to which the proviso applies which are not reached by the general rule. Two were cited in the judgment of the Court of Appeal(3) [1971] Ch., at page 315 F/G. Another, given to your Lordships by Counsel for the Crown, related to the carrying forward of losses under s. 342 of the Income Tax Act 1952 until a year when sufficient profits have accrued for set-off; were it not for the proviso a finance company dealing in shares which had no such sufficient profit before 5th April 1960 would be anomalously at a disadvantage compared with a similar company which had such a profit.

In my view, therefore, your Lordships are concerned with tax advantages consequent on the combined effect of two or more transactions in securities (see s. 28(1)(*b*)) which, not having all been carried out before 5th April 1960, are liable to have their attendant tax advantages counteracted in respect of any year of assessment thereafter.

(1) 25 T.C. 100, at p. 106. (2) *See* page 264 *ante*. (3) *See* pages 268–9 *ante*.

A But there is a further ground on which I think the judgment of the Court of Appeal should be upheld. In my view, the payment of each dividend by the company to Finsbury, and the payment of the corresponding instalment of the purchase price by Finsbury to the Greenbergs, were themselves, being transactions "relating to securities", "transactions in securities" (within the meaning of s. 43) in consequence of which a tax advantage was obtained or B obtainable. I have already referred to *Commissioners of Inland Revenue* v. *Parker*[1], which I think is authority for this view. It was argued for the taxpayer that *Parker's* case is distinguishable: there the redemption of the debentures after 5th April 1960 by which the tax advantage was obtained or obtainable involved a specific act of will on the part of the company (being something in the nature of a *novus actus interveniens*), whereas (it is claimed) C in the instant case the tax advantage was an "automatic fruition" (to use Lord Wilberforce's expression at page 178 C/D[2] of *Parker's* case) of something that has been completed before 5th April 1960. I confess that this seems to me to be an unreal distinction. The declaration and payment of the dividends by the company in the instant case (which might well vary according to the profits of the company) were surely just as much acts of will as, and no less a *novus* D *actus* than, the decision to redeem in *Parker's* case. To attempt to differentiate between these cases would, in my view, be to introduce purely artificial distinctions into the law.

To sum up, in my judgment the proviso cannot avail the taxpayer for three main reasons. (1) If, as he argues, the transaction in securities was the sale agreement of 30th December 1958, it was not "carried out" until the purchase E price was paid. (2) If, as I think, your Lordships are concerned with tax advantages obtained or obtainable in consequence of the combined effect of two or more transactions in securities, such transactions had not been "carried out" before 5th April 1960. (3) The payment of dividends on the preferred shares and the concomitant payments of instalments of the purchase price after 5th April 1960 were themselves transactions in securities in consequence of F which a tax advantage was obtained or obtainable.

There remains the question whether the £10,000 belonged to the Greenbergs on 11th February 1959 (the date on which it was credited to the special account at the bank) so as not to fall as a receipt in any year of assessment to which the section applies. I have already stated the primary facts as found by the Special Commissioners, which were not disputed before your Lordships. Their G conclusion from the primary facts seems to me to be the only reasonable one; namely, that the £10,000 did not belong to the Greenbergs in February 1959 but that the money represented by this entry (and a subsequent one which represented the 1962 dividend) only belonged to the Greenbergs when sums were transferred from the special account to their own accounts at the bank—these transfers only took place when they were covered by dividends paid by H the company to Finsbury in implementation of the dividend-stripping operation.

The appeal in *Tunnicliffe's* case concerns a similar forward dividend-stripping operation, which does not differ in essentials from that in *Greenberg's* case. But a different panel of the Special Commissioners acceded to the claim on behalf of this taxpayer that he was protected by the proviso. Buckley J. dismissed the appeal by the Crown, but the Court of Appeal reversed his I decision. The taxpayer appeals to your Lordships' House, the arguments put forward on his behalf being similar to those advanced in *Greenberg's* case.

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(1) 43 T.C. 396. (2) *Ibid.*, at p. 441.

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The arrangements made with a bank for the initial financing of the scheme were even more artificial than those in the amended Greenberg scheme: in the *Tunnicliffe* case your Lordships are concerned with a bankers' draft for £11,000 which was handed over to the vendors at the time the special shares were renounced by them, the taxpayer (the principal vendor) being himself the source of finance. I have had the advantage of reading the speech prepared by my noble and learned friend Lord Morris of Borth-y-Gest, and I agree with all that he says about this transaction. A B

I would dismiss both appeals.

Questions put (in each case):

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Slaughter & May (for Mr. Greenberg and Mr. Tunnicliffe); Solicitor of Inland Revenue.]