[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF INCOME TAX (QUEENSLAND) . . . . . } APPELLANT;

AND

THE BANK OF NEW SOUTH WALES . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1913.

SYDNEY, *Aug.* 4, 5, 20

Barton A.C.J., Isaacs, Gavan Duffy, Powers and Rich JJ

Income tax—Company—Profits—Premiums on shares—Income Tax Act 1902 (*Qd.*) (2 *Edw. VII., No.* 10), *sec.* 31—*Bank of New South Wales Act* 1850 (*N.S.W.*), *secs.* 2, 8, 16, 23.

Sec. 31 of the *Income Tax Act* 1902 (Qd.), as amended by sec. 11 of the *Income Tax Act Amendment Act* 1904, provides that in the case of foreign companies "if the company carries on in Queensland the business of banking and no other business whatsoever, its income shall be a sum which bears the same proportion to the total profits of the company as the amount of its assets and liabilities in Queensland bears to its total assets and liabilities, not including liabilities to capital or reserves."

Held, that premiums received by such a company on shares issued by it are not "profits" within the meaning of the section.

Decision of the Supreme Court of Queensland : *Commissioner of Income Tax* v. *Bank of New South Wales*, (1913) S.R. (Qd.), 93, affirmed.

APPEAL from the Supreme Court of Queensland.

On the hearing of certain objections taken by the Bank of New South Wales to an assessment for income tax made by the Commissioner of Income Tax, the Court of Review determined the objections in favour of the Commissioner, and stated a case for the opinion of the Supreme Court, which, so far as is material, was as follows :—

1. The Bank of New South Wales is a joint stock banking company constituted under a deed of settlement dated 23rd August 1850, and incorporated in 1850 in the State (then Colony) of New South Wales under an Act entitled "An Act to incorporate the proprietors of a certain banking company called 'The Bank of New South Wales' and for other purposes therein mentioned." The said Act and the said deed of settlement have been amended from time to time.

2. The said bank has its head office in Sydney in the State of New South Wales, and carries on its business in Queensland and elsewhere.

3. The objects of the said bank and the nature of its business are set out in the deed of settlement and Acts of Parliament.

4. At a special general meeting of the proprietors of the said bank held at Sydney in the said State on 31st January 1909 the following resolutions were duly passed:—

"1. That the capital of the bank be increased from £2,500,000 to £3,000,000 by the creation of 25,000 new shares of £20 each.

"2. That the new stock shall be issued to the proprietors at a premium of £5 in the proportion of an even fifth of the number of shares held by each proprietor on 1st March 1910.

"(*a*) That the premium of £5 per share be appropriated in augmentation of the reserve fund.

"3. That allottees of 6 shares and over shall pay in full for each share, viz.: £25, in as nearly equal proportions of the allotment as possible, on 1st April, 1st July, 1st October 1910, and 1st January and 1st April 1911. The first payment to be for not less than one-fifth of the number of shares allotted to each proprietor. Allottees of 5 shares or less shall pay for one share, viz.: £25, on each of the foregoing dates until allotment is completed.

"4. That deposits shall be received in any case when a shareholder may desire it on any of the foregoing dates of the amount still due on the whole or any less number of shares then outstanding. Such deposits to be supplied in payment of the shares allotted on their respective

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due dates, when the shares so paid for will begin to participate in dividends. Interest on such deposits to be allowed meanwhile at the rate of 5 per cent. per annum.

"5. That all shares not accepted, and all shares accepted and not paid for, shall be forfeited.

"6. That all such forfeited shares, and all shares accruing from fractional parts, after division as aforesaid, shall be pooled and sold or otherwise dealt with by the Board in terms of clause 16 of the deed of settlement, and if disposed of at a price exceeding £25, such excess, after deducting all expenses, shall be divided amongst the holders of the old shares from which such shares have been derived in proportion to their interests respectively."

5. Every proprietor of the said bank accepted the new shares so issued under and in accordance with the terms of the said resolutions, and during the years ending 31st December 1910 and 31st December 1911 respectively the said bank received the sums of £56,720 and £68,280 respectively as premiums on the said new shares issued under and in accordance with the terms of the said resolutions.

6. On 31st March 1910 the balance to the credit of the reserve fund of the said bank was £1,750,000; on 30th September 1910 the said balance was £1,850,000; on 31st March 1911 the said balance was £1,950,000; and on 30th September 1911 the said balance was £2,025,000.

7. By the said deed of settlement it is provided (*inter alia*)—

CIII. That whenever and as long as the reserve fund shall amount to a sum equal to the actual paid-up capital for the time being of the corporation, no further addition shall be made thereto out of the net profits or otherwise; nor shall any distribution of any part thereof be made among the proprietors by way of dividend or bonus; provided that if such reserve fund shall at any time be reduced below half of that amount, it shall be the duty of the directors to appropriate towards the augmentation of such fund a sum not less than five pounds per cent. of the net profits of each half-year, if

so much shall be necessary, until the same fund shall again amount to one-half of the actual paid-up capital.

CIV. That all premiums on the sale of new shares, and the proceeds of all forfeited shares, excepting as herein otherwise provided, and all dividends remaining unclaimed for the period of seven years after the same shall be declared, and also all damages which may be recovered from time to time under the covenants, articles, stipulations, and agreements herein contained, or under any laws or regulations which may be hereafter established, shall be carried to the credit of profit and loss.

CV. That the balance of net profit shall be available for the payment of a dividend at such rate as the Board of Directors shall declare at the half-yearly general meeting: And such dividend shall become payable to the proprietors accordingly, at a time to be then fixed by the Board of Directors. And the balance of net profit remaining, if any, after providing for the payment of such dividend, shall be carried forward to the profit and loss account of the ensuing half-year for the purposes of equalizing future dividends.

8. By sec. 16 of the Act mentioned in paragraph 1 hereof it is enacted: That no dividends shall in any case be declared or paid out of the subscribed capital for the time being of the said corporation or otherwise than out of the net gains and profits of the business.

9. Each of the said sums mentioned in paragraph 5 hereof was directly carried in each respective year to the credit of the reserve fund of the said bank and directly applied in augmentation of the said reserve fund, and was not at any time as provided by clause CIV. of the said deed of settlement shown in or carried to the credit of the profit and loss account of the said bank, nor was either of the said sums in any way shown in the books of the said bank as profits of the said bank.

10. On or about 4th March 1912 the Commissioner of Income Tax assessed the income of the said bank for the year 1910 under the provisions of the said Income Tax Acts on a proportion of

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profits which included among the total profits of the bank for the year 1910 the said sum of £56,720, and claimed a further payment of income tax for that year amounting to £259 7s. in respect thereof. On or about 2nd March 1912 the said Commissioner made a similar assessment for the year 1911 in respect of the said sum of £68,280, and claimed a further payment of income tax for the year 1911 amounting to £337 5s. in respect thereof.

11. Objections to the said assessments were duly made and taken by the said bank on the ground that "the Commissioner has included in the income of the taxpayer premiums on certain new shares issued by the taxpayer which premiums have been carried to reserve fund and the taxpayer contends that such premiums are not income or profits subject to income tax," and I sat at a Court of Review on 1st, 8th, 16th and 22nd August 1912 to hear and determine the said objections.

12. It was contended before me on behalf of the said bank that the said amounts so received as aforesaid were not profits arising from the business of the said bank or profits or income within the meaning of the said Income Tax Acts, and that the said bank was not liable to pay income tax on any amount which was arrived at by including in the calculation such amounts or either of them as profits of the bank.

13. It was contended before me on behalf of the said Commissioner that the said amounts should under clause CIV. of the said deed of settlement have been carried to the credit of profit and loss and were as available for the payment of dividends as any other profits of the said bank, and that the said amounts were profits of the bank within the meaning of the said Income Tax Acts, and that the said bank was liable to pay income tax on an amount calculated on the basis that such amounts and each of them were profits of the bank.

14. On 22nd August 1912 I determined the said objections of the said bank and decided that the said amounts and each of them were profits of the bank, and I confirmed the said assessment of the said Commissioner.

15. This special case is stated by me as such Court of Review as aforesaid on certain questions arising at the said review as hereinafter set out on an appeal duly instituted by the said bank.

The questions for the opinion of the Supreme Court are:

1. Are the said sums of £56,720 and £68,280 income arising or accruing from the business of the said bank?

2. Are the said sums of £56,720 and £68,280 to be taken into consideration and to what extent in arriving at the amount of income tax payable by the said bank in Queensland?

3. By whom should the costs of this special case be paid?

The Full Court answered the first two questions in the negative, and, in answer to the third, said that the costs should be paid by the Commissioner: *Commissioner of Income Tax* v. *Bank of New South Wales* (1).

From this decision the Commissioner now appealed to the High Court.

Stumm K.C. and *Wassell*, for the appellant. Irrespective of the deed of settlement, premiums on shares are "profits" within the meaning of sec. 31 of the *Income Tax Act* 1902. They form part of the profits of the business of the bank out of which dividends may be paid notwithstanding sec. 16 of the bank's Act. In respect of each share of the new issue the bank incurred a liability to the shareholders of £20, and in exchange received £25; and, of that £25, £5 is profit. The word "profits" in sec. 31 of the *Income Tax Act* has a wider meaning than "profits of the business" in sec. 16 of the bank's Act. It means the excess of the amount of receipts from all sources over the sum of the amount of expenditure necessary to produce the profits and the amount of the subscribed capital. [They referred to *Palmer's Company Precedents*, 11th ed., vol. I., p. 286; *Buckley on Companies*, 9th ed., p. 652; *Lubbock* v. *British Bank of South America* (2); *In re Spanish Prospecting Co. Ltd.* (3); *Stevens* v. *Hudson's Bay Co.* (4); *Melbourne Trust Ltd.* v. *Commissioner of Taxes (Victoria)* (5); *Commissioner of Income Tax (Qd.)* v. *Brisbane Gas Co.* (6); *Commissioner of Taxes* v. *Australian Mutual Provident Society* (7); *Commissioner of Taxes* v. *Bank of Adelaide* (8); *Equitable Life Assurance Society of the United*

(1) (1913) S.R. (Qd.), 93.
(2) (1892) 2 Ch., 198.
(3) (1911) 1 Ch., 92, at p. 98.
(4) 101 L.T., 96.
(5) 15 C.L.R., 274.
(6) 5 C.L.R., 96.
(7) 20 N.Z.L.R., 255.
(8) S.A., 19th Nov. 1912 (unreported).

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States v. *Bishop* (1); *Mersey Docks* v. *Lucas* (2); *Webb* v. *Australian Deposit and Mortgage Bank Ltd.* (3); *In re Bridgewater Navigation Co.* (4); *Scottish Widows' Fund and Life Assurance Society* v. *Allan* (5); *New York Life Insurance Co.* v. *Styles* (6); *Webb* v. *England* (7); *In re Income Tax Acts* (8).] The deed of settlement of the bank may be looked at to determine whether these premiums were profits, and under clause CIV. they are to be carried to the credit of the profit and loss account, and are thus to be treated as profits.

[RICH J. referred to *Burland* v. *Earle* (9).]

Feez K.C. and *MacGregor*, for the respondents. Even in the ordinary wide acceptation of the word "profits," no profits were made by the bank on their transaction of issuing shares at a profit. It was merely a method by which the shareholders contributed more than the nominal amount of the shares towards the assets of the bank for the purpose of carrying on its business. The new share which each shareholder received, may have been, and on the balance sheets appears to have been, worth much more than £25. The argument for the appellant assumes that each share has a standard value of £20. Premiums on shares are in the nature of an increase of capital: *In re National Bank of Wales Ltd.* (10); *Murray and Carter on Income Tax Practice*, 3rd ed., p. 89; *Stiebel's Company Law*, p. 412.

[ISAACS J. referred to *Bishop* v. *Smyrna and Cassaba Railway Co.* (11).]

Stumm K.C., in reply, referred to *Stiebel's Company Law*, p. 74, note (*z*).

Cur. adv. vult.

The following judgments were read:—

August 20.

BARTON A.C.J. On the facts which he afterwards stated by way of special case under sec. 55 of the Income Tax Acts, *Rut-*

(1) (1900) 1 Q.B., 177.
(2) 8 App. Cas., 891, at pp. 903, 905, 907.
(3) 11 C.L.R., 223, at p. 227.
(4) (1891) 2 Ch., 317, at p. 327.
(5) (1901) W.N., 185; 4 Tax Cas., 369.
(6) 14 App. Cas., 381.
(7) 23 V.L.R., 260; 18 A.L.T., 129; 19 A.L.T., 103.
(8) (1907) V.L.R., 185, at p. 187; 28 A.L.T., 168.
(9) (1902) A.C., 83, at p. 95.
(10) (1899) 2 Ch., 629, at p. 655.
(11) (1895) 2 Ch., 265, at p. 269.

ledge D.C.J., sitting as a Court of Review, determined that two sums of £56,720 and £68,280, being the premiums received by the bank for the allotment among its shareholders of the shares of a new issue of capital stock, were respectively profits of the bank. He therefore confirmed two assessments of the Commissioner which (*inter alia*) involved a claim against the bank of income tax to the amount of £259 5s. for the year 1910 in respect of the first named sum, and a like claim to the amount of £337 5s. for the year 1911 in respect of the sum secondly named. The bank appealed against that determination to the Supreme Court of Queensland, and the Full Court answered in favour of the bank the questions raised by the special case, thus reversing the determination of the Court of Review. The Commissioner now appeals to this Court, and in view of the facts stated in the special case, we are asked to say (1) whether the two sums received as premiums on the new share issue are income arising or accruing from the business of the bank; and (2) whether the two sums so received are to be taken into consideration, and, if so, to what extent, in arriving at the amount of income tax payable by the bank in Queensland.

In the raising of the additional capital as authorized by the shareholders, the total sum received as proceeds of the allotment of the 25,000 new shares at £5 per share premium was £625,000. Of this sum £125,000 was carried directly to the credit of the reserve fund in accordance with the resolutions authorizing the new issue, instead of being carried to the credit of profit and loss as agreed by clause CIV. of the deed of settlement. I am of opinion that, in considering whether the sum was income, the manner in which it was appropriated after receipt is immaterial. To carry it to the reserve fund did not make it capital if it was not so already. To carry it to the credit of profit and loss was not to change it into profit if on its receipt it was not profit. It is the character of the transaction, and not the disposal of the proceeds, that determines the question. This sum was not income unless it was profit. See *Webb* v. *Australian Deposit and Mortgage Bank Ltd.* (1).

In *Hudson's Bay Co.* v. *Stevens* (2), *Kennedy* L.J., speaking

(1) 11 C.L.R., 223, at p. 227.

(2) 5 Tax Cas., 424, at p. 440.

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of the moneys as to which the question there arose, says:—"The fact that they have been used for the payment of dividends is, for the determination of the question as to their taxable character under Schedule D, as immaterial as their devotion, if truly 'profits or gains' of trading, to some other purpose than the payment of dividends would have been." And in *New York Life Insurance Co.* v. *Styles* (1), Lord *Herschell* concurred with the learned Lords who were the majority in *Last* v. *London Assurance Corporation* (2), in repudiating the idea that because moneys which are not in fact profits are erroneously so called they are by reason of that error turned into profits within the meaning of the Income Tax Acts.

Profit ordinarily represents the sum by which receipts exceed expenditure. In the instance of an article sold, it represents the excess of the proceeds of sale over the cost of acquirement or production. If things are acquired or produced for nothing, the vendor profits to the extent of the whole price that he receives. Now, these shares were of no cost whatever to the entity called the bank. Did that entity then profit to the extent of £625,000 upon the sale of them to the shareholders? Of course not. A profit on a sale is a gain made by selling something. But here the bank kept all its property. For how could the rights issued be called assets of the bank? Supposing it to have become insolvent before their issue, what could the creditors have taken in respect of them? This is totally unlike the case which would have arisen if the purchasers of these shares, whether previously shareholders or not, had sold them to third persons at an increase over the price paid. That increase would have been profit, simply because it was the sum by which the price on sale exceeded the cost of acquisition. But here the bank has sold new shares to existing shareholders at £5 beyond something that is only arbitrarily or nominally a value, and there is no difference for the essential purposes of the bank between any one pound and any other pound of the whole price as received—between any portion of the price below £20 and any portion of the price beyond £20. No part of the total price can be singled out as the cost of a share on which the profit is to be reckoned. There is neither law nor reason for the

(1) 14 App. Cas., 381, at p. 409. (2) 10 App. Cas., 438.

position that the arbitrary sum of £20 represents cost. And yet it is difficult to see how the argument for the Commissioner can be sustained unless upon such a fiction. I find it as difficult to say that the "premium" of £5 a share is profit, as to say that the whole sum raised by the allotment of the new shares is profit. It seems to me that the whole sum of £625,000 received must be either profit or capital.

What, then, is the essential character of the transaction? As *Vaughan Williams* L.J. said in *Equitable Life Assurance Society of the United States* v. *Bishop* (1):—"In dealing with the question whether a particular receipt is a profit for the purpose of taxation it does not matter whether or not, for the purposes of distribution or carrying on the business, the machinery of a company is used." All these shares, as soon as they were created, belonged to the co-owners of the bank's capital, namely, the shareholders, whose interest extended to everything possessed by the artificial entity called the bank or company. Each co-owner to whom a share was allotted gave £25 to his co-owners in respect of that share. Every shareholder did this in direct proportion to his pre-existing interest, so that within the limits of the proprietary, everyone gave in the same measure to everyone else. What part of that which each gave to all can be called the profit of all? If any part, why not all? But to conclude that all is profit is palpably absurd. To quote *Vaughan Williams* L.J. again:—"The mere fact that the relationship of the parties interested in this business was worked out by the machinery of an incorporated company does not make any difference whatsoever": *Equitable Life Assurance Society of the United States* v. *Bishop* (1). These words, though applied to a different state of facts, are equally applicable to the present position.

We were not referred to any direct authority upon this question, and there does not appear to be any such; but reference may be made to the dictum of *Romer* L.J. in *In re National Bank of Wales Ltd.* (2). His Lordship said:—"Premiums on the issue of shares are not ordinary trading profits; they are rather of the nature of an increase of capital."

There is yet another consideration which seems to me to show

(1) (1900) 1 Q.B., 177, at p. 189. (2) (1899) 2 Ch., 629, at p. 655.

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that these are not profits. They are not an "appreciation of the assets acquired," nor are they "gained in employing the assets in the trade of the corporation." See *Buckley on Companies*, 8th ed., p. 584. Then, are the shareholders any better off? Apart from any possible construction of sec. 16 of the *Bank of New South Wales Act* the £125,000 could, had the shareholders so chosen, have been distributed amongst them. But what would have been the nature of that transaction? It would have been merely a restoration of £5 out of every £25 they had themselves provided. In that light it is impossible to say that any part of the premium was a distributable profit. I have made no reference to the various clauses of the deed of settlement or the provisions of the bank's Act. The provisions of the deed of settlement most cited to us are clauses CIII., CIV., CV. None of them touch the question of the real nature of the transaction before the Court. They are agreements of the shareholders *inter se* which do not affect the character or quality of these share premiums. Sec. 16 of the incorporating Act affords no help in determining that question, which stands *in limine*. There was full argument as to whether these premiums, if they were profits, were profits "arising from any business" within sec. 20 of the Income Tax Acts, and whether they need arise out of the business in view of sec. 31 of the same Act. But these questions, though interesting, do not arise unless the share premiums are profits, and as in my view they are not so, it is unnecessary to deal with those sections.

For these reasons I am of opinion that the judgment of the Supreme Court of Queensland is correct, and this appeal must, therefore, be dismissed with costs.

The judgment of ISAACS, GAVAN DUFFY and RICH JJ. was read by

ISAACS J. The appellant raises three contentions: (1) that the premiums are profits of the company; (2) that they were made in the course of business; and (3) that sec. 31 (i.) is satisfied so long as they are profits, whether made in the course of business or not.

It is evident that if the first contention fails there is an end of the appeal, and the other questions need not be determined.

The respondent bank was formed by deed of settlement 23rd August 1850. It was then an unincorporated company; and, therefore, unlimited in liability to creditors, and perfectly free to the same extent as any other partnership to divide among its shareholders its property, whatever it consisted of—capital, profits, and assets of any kind.

Mr. *Stumm* relies upon the very wide words of clauses CIV. and CV. of the deed of settlement, to show that premiums on the sale of new shares were to be carried to the credit of profit and loss, and thus made available for dividends to the extent of the balance of net profit shown. On 23rd September 1850, however, an Act of the New South Wales legislature was passed by which the bank was incorporated, but, said the Act, "subject nevertheless to the conditions restrictions regulations and provisions hereinafter contained."

Sec. 2 enacted that the provisions of the deed of settlement, or any future regulations made thereunder, were to be the by-laws of the corporation "save and except in so far as any of them are or shall or may be altered varied or repealed by or are or shall or may be inconsistent or incompatible with or repugnant to any of the provisions of this Act or of any of the laws or Statutes in force in the said Colony."

Then sec. 8 enacts: "That it shall be lawful for the said corporation from time to time to extend or increase their capital for the time being by the creation allotment and disposal of new shares in the manner specified and set forth and subject to the rules regulations and provisions contained in the hereinbefore in part recited indenture or deed of settlement."

Sec. 16 provides: "That no dividend shall in any case be declared or paid out of the subscribed capital for the time being of the said corporation or otherwise than out of the net gains and profits of the business."

Now, sec. 16 is a clear restriction on the power of distributing the property of the corporation in the way of dividends, and is part of the price which the shareholders paid for the limitation of their liability, contained in sec. 23 of the Statute. It limits

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dividends to profits of the business, and excludes profits otherwise made, as by the sale of land not wanted for banking premises (see *Melbourne Trust Case* (1) and *In re Spanish Prospecting Co. Ltd.* (2)). Consequently, so far as capacity for distribution of property other than profits by way of dividends is concerned, that no longer exists.

Sec. 23 is in these terms:—"And be it enacted that in the event of the assets of the said corporation being insufficient to meet its engagements then and in that case the shareholders shall be responsible to the extent of twice the amount of their subscribed shares only (that is to say) for the amount subscribed and for a further and additional amount equal thereto."

Now, there are certain provisions as to the issue of new shares which are contained in the deed of settlement, and which are not affected by the Act, and, indeed, are preserved by sec. 8, already quoted.

Some of them, Nos. VII., XV. and XVII., may be referred to. So far as relevant to this case, they amount to this: that £125,000 was the original capital produced by the sale of 6,250 shares at £20 each; that further issues of shares were contemplated to provide additional capital; that those further issues were to be of shares of the same amount—the price was not to be for any sum less than £20, but might be for any sum above £20, the excess being termed a premium; that when the total price was paid the shares were to be assigned, giving to the purchaser, however, only a share of the amount of £20, and entitling him to an interest in the profits, and subjecting him to the losses of the company in proportion to the number of shares he held.

Now, Mr. *Stumm* says, in effect, that shows that the corporation, when it creates a share, is in possession of something worth or deemed in law to be worth exactly £20, whatever its financial position may be; and whether its assets greatly, or at all, exceed its liabilities, or, on the other hand, fall below them. Then, says learned counsel, any sum over £20 received by way of premium is so much profit. He contends that in the bank's balance sheet there should appear a liability to capital, as a debt of the bank,

(1) 15 C.L.R., 274, at pp. 302-305. (2) (1911) 1 Ch., 92, at p. 106.

but only to the extent of £20, while, on the other side, there should appear receipts £20 as for capital, £5 as for profit.

But this question cannot be settled by conventional forms of balance sheets, and accountancy documents.

In *Lindley on Companies*, 6th ed., p. 544, is found the following passage:—"Although accountants and business men frequently speak of a company being debtor to capital, the expression, though useful if properly understood, is not accurate: the capital, properly so called, of a company is not a debt of the company. The expression merely means that when it becomes necessary to ascertain the financial position of the company its capital must be brought into account, and this is done by treating the company as though it were a debtor to capital." The learned author judicially said in *Lee* v. *Neuchatel Asphalte Co.* (1):—"No one is debtor to any one. If there is any surplus to divide, then, and not before, is the company debtor to the shareholders for their aliquot portions of that surplus. But the notion that a company is debtor to capital, although it is a convenient notion, and does not deceive mercantile men, is apt to lead one astray. The company is not debtor to capital; the capital is not a debt of the company." See also *Halsbury's Laws of England*, vol. v., "Companies," p. 87, note (*d*). The question is whether premiums on shares are in reality capital or profits.

In *York and North Midland Railway Co.* v. *Hudson* (2), *Romilly* M.R. did not decide whether they were properly capital or income, because he thought it immaterial in that case.

There are some opinions on the point. In *Palmer's Company Precedents*, 11th ed., vol. I., p. 286, the learned author takes the view that premiums are revenue, and not capital.

On the other hand, *Romer* L.J., in *In re National Bank of Wales Ltd.* (3), said, *in arguendo*, "premiums on the issue of shares are not ordinary trading profits; they are rather of the nature of an increase of capital." *Stiebel's Company Law*, p. 412, adopts that view. *Halsbury's Laws of England*, vol. v., p. 88, note (*q*), says:—"Where shares are issued at a premium, the sums paid up will partly represent the premium, and the shares will

(1) 41 Ch. D., 1, at p. 23. (2) 16 Beav., 485, at p. 496.
(3) (1899) 2 Ch., 629, at p. 655.

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not of course be 'fully paid' until the full nominal amount has been paid in addition to the premium."

The weight of opinion so expressed seems to us to be on the side of considering premium as capital. The South Australian decision cited is to the same effect.

The principle of the matter supports that view. In *Lindley on Companies*, 6th ed., at the page already cited, we find the capital of a company defined as "the money intended to be contributed, or agreed to be contributed by its members for carrying out its objects." At p. 543 it is said:—"The idea underlying the various meanings of the word capital in connection with a company is that of money obtained or to be obtained for the purpose of commencing or extending a company's business as distinguished from money earned in carrying on its business."

If all shares are disposed of by a company at their nominal value, then all members contribute equally to the common fund; but if on some shares a premium is required, it means that the allottees of those shares are required to make a greater contribution to that fund by paying a higher price for their shares, and yet, according to the articles, they may be entitled to no greater interest in the profits or assets of the company than their fellow members. There is, in this respect, no difference in principle or result from the case of two partners contributing unequally to the common purse of the partnership. What is thus contributed seems to us clearly capital. It is not an accretion to any other capital; it has not arisen from the use of any other capital: it is as much an original sum brought into the general stock of working capital, as is the residue of the money consideration paid by the allottee for permission to become a partner in the joint concern.

In *Hilder* v. *Dexter* (1), Lord *Davey* defines "capital money" of a company as "money derived from the issue of its shares," and "discount" as "a rebate on what would justly be due from the subscriber on his shares."

This position is tacitly assumed by the House of Lords in *Koffyfontein Mines Ltd.* v. *Mosely* (2). By the articles the directors were authorized to create shares, thus increasing the

(1) (1902) A.C., 474, at p. 480. (2) (1911) A.C., 409.

nominal capital. They also issued them, but, as was held, without authority. This power the company had reserved to itself in general meeting, and to be exercised on any terms it might declare, including issue at a premium. Lord *Robson* (1), refers to the fact that the shareholders retained the power to control what he termed the "price" of the shares. The "price" is entire as between the company and the applicant, and this justifies the note cited from *Halsbury*.

If we look at the matter from the standpoint of "profit," we arrive at the conclusion that it is not profit. As was said by Lord *Moulton* (then *Fletcher Moulton* L.J.) in *In re Spanish Prospecting Co. Ltd.* (2), where the rights of third persons intervene—whether the Crown claiming income tax, or an individual having a contractual claim—the domestic documents of a firm or company are not conclusive, and in the absence of express provision "profits" mean actual profits. The fundamental meaning of profits is the amount of gain made (3).

Now, how is that applicable to the sale of a share? A share is an interest not merely in the existing property of the company, but in its profits, and includes liability to losses. The mere nominal amount of the share, which may be £1 or £100, and of which only a portion may have been paid up, is not to be taken as the true present value of the share in the property and goodwill of the company, less its liabilities. Those are continually varying, and yet the nominal amount of the share may remain the same. The nominal amount fixes the limit of liability of the member as contributory, either absolutely, or, as in this case, by forming a standard. But to ascertain whether the company was selling a share for more or less than its real commercial worth would entail an account every time a share was sold. Even with the premium included, the share might on that basis be sold at a loss. And without any premium, there might be a profit. But that is an impossible quest.

The company, in selling a share, really parts with nothing of its own. It retains all its property, its assets, its liabilities. There is nothing, therefore, as to which it can be said to have made a

(1) (1911) A.C., 409, at pp. 411, 412. (2) (1911) 1 Ch., 92, at p. 101.
(3) (1911) 1 Ch., 92, at p. 98.

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profit. The original shareholders are affected. Mr. *Stumm's* contention really has no resting place, except the contention already mentioned, namely, that the nominal amount of the share is its true and incontestable value, and gain or loss is measured by comparison with that unalterable standard, and that the company parts with the true value of the share in return for a sum which is greater.

This is altogether untenable, and so, from whichever aspect the matter is considered, the premium is not profit, but capital, and is not "income" such as is intended to be struck at by the *Income Tax Act.*

The appeal should, therefore, be dismissed.

POWERS J. I have had the privilege of reading the judgments just delivered by my brothers *Barton* and *Isaacs.*

I agree, for the reasons given in both those judgments, that, on the facts set out in the special case, premiums on new shares are not profits of the bank, and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellant, *T. W. McCawley*, Crown Solicitor for Queensland.

Solicitors, for the respondents, *Feez, Ruthning & Baynes*, Brisbane, by *Allan, Allan & Hemsley.*

B. L.