[HIGH COURT OF AUSTRALIA.]

KNIGHT AND OTHERS . . . . . APPELLANTS;

AND

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

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BRISBANE, *June* 25, 26, 30.

Isaacs, Higgins, Rich and Starke JJ.

Income Tax—Assessment—Income—Shareholder in company—Undistributed income of company—Income Tax Assessment Act 1915-1921 (*No.* 34 *of* 1915—*No.* 32 *of* 1921), *secs.* 14, 16—*Income Tax Assessment Act* 1922-1924 (*No.* 37 *of* 1922—*No.* 51 *of* 1924), *secs.* 2, 21, 32.

In May 1922 the Federal Commissioner of Taxation—having, under sec. 16 (2) of the *Income Tax Assessment Act* 1915-1921, formed the opinion that a company had not, for the year ending June 1920, distributed to its members a reasonable proportion of its taxable income—assessed the company as having no taxable income in respect of that year. After the *Income Tax Assessment Act* 1922 had come into operation the Commissioner, purporting to act under sec. 21 thereof, by amended assessment assessed the company for one-third of its total assessable income for the year ending June 1920 on the basis that two-thirds of such taxable income was to be deemed to have been distributed.

Held, that a member of the company might properly, under the Act of 1922, be assessed for income tax for the year ending June 1920 in respect of his proportion of the income of the company which was so deemed to have been distributed, but which had never been distributed, and in respect of which he had not been assessed prior to the Act of 1922.

CASE STATED.

On an appeal by J. J. Knight, Eugenia Marion Withers and E. H. Macartney, the trustees of the estate of E. I. C. Browne deceased, from an assessment of the estate for Federal income tax for the

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year 1919-1920, *Isaacs* J. stated a case, which was substantially as follows, for the opinion of the Full Court of the High Court:—

1. The appellants are the trustees of the estate of E. I. C. Browne deceased, and as such trustees are shareholders in the Brisbane Newspaper Co. Ltd. (hereinafter called " the Company "), a company duly incorporated under the *Companies Acts* 1863-1913 (Q.) and carrying on business in Queensland. The income derived from the estate of the said E. I. C. Browne deceased is payable to the said Eugenia Marion Withers as life tenant.

2. The Company having on 19th August 1920, through its public officer, duly made a return setting forth its income derived from all sources in Australia during the year ended on 30th June 1920, the respondent on 13th July 1921 assessed the taxable income of the Company at £21,256 and the tax payable at £2,834 2s. 8d.—a deduction being allowed to the Company of £3,564, being the amount of the dividends distributed to its shareholders during the said year.

3. On 13th July 1920 the appellants furnished to the respondent a return for the said year showing a net income of £4,635; which said sum included an amount of £3,500, being the appellants' proportion of the said dividends.

4. On the said 13th July 1920 the said Eugenia Marion Withers furnished to the respondent a return for the said year showing a net income of £4,635, being the amount received by her as life tenant from the appellants.

5. No notice of assessment was issued by the respondent to the appellants in respect of their return hereinbefore mentioned, but on 19th January 1921 the respondent assessed the taxable income of the said Eugenia Marion Withers at £4,635 and the tax payable at £1,150 14s. 6d.; which said tax was duly paid.

6. On 15th January 1921 the respondent, by letter quoting sec. 16 (2) of the *Income Tax Assessment Act* 1915-1918, called on the public officer of the Company to show cause why the said section should not be applied to the profits of the Company for the year ended 30th June 1920; and subsequently thereto representations were made to the respondent or his deputy on behalf of the Company.

7. On 11th March 1921 the respondent approved of the application of sec. 16 (2) of the *Income Tax Assessment Act* 1915-1918 to the profits derived by the Company during the year ended 30th June 1920, and subsequently communicated such approval to the Deputy Commissioner of Taxation (Q.), who on 21st December 1921 informed the Company in writing that the respondent had directed that the profits of the Company for the said year should be taxed in accordance with the said section.

8. Except as appears in the notices of assessment hereinafter mentioned, no communication of the said approval or direction was made by or on behalf of the respondent to the appellants or to the said Eugenia Marion Withers.

9. On 22nd May 1922 the respondent caused to be issued to the public officer of the Company a notice of amended assessment; which said notice stated that the assessment was "amended on account of treating whole of net income as distributed under sec. 16 (2) of the *Income Tax Assessment Act*," and showed the following particulars:—Amended net income, £24,820; dividend, £24,820: Tax as now amended—Nil. Tax previously assessed and paid, £2,834 2s. 8d.: Credit—£2,834, 2s. 8d.

10. On 31st May 1922 the respondent issued to the said Eugenia Marion Withers a notice of amended assessment, whereby the sum of £20,440 described as being "your share of assessable income for the period ending 30th June 1920 of the Brisbane Newspaper Co. Ltd. distributed under sec. 16 (2), £20,440," was added to the assessable income already returned by her. The additional tax claimed was £8,667 16s. 6d.

11. The said Eugenia Marion Withers objected to the said assessment; and, her objection having been allowed, the respondent on 21st February 1923 issued to the appellants a notice of assessments whereby their taxable income for the year ended 30th June 1920 was assessed at £12,483 and the amount of tax payable at £4,480 10s. 7d. The said sum of £12,483 was described in the adjustment sheet accompanying the said notice as being an amendment of the amount of £20,440 previously assessed to the said Eugenia Marion Withers.

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12. The respondent, in making the assessment in the last preceding paragraph hereof mentioned, purported to act in accordance with the provisions of sec. 21 of the *Income Tax Assessment Act* 1922, and the said sum of £12,483 represented two-thirds of the £20,440 previously assessed to the said Eugenia Marion Withers less certain deductions in the meantime allowed to the Company.

13. The respondent had previously, on 8th February 1923, further amended the Company's assessment by assessing the Company on one-third of its total taxable income of £24,820. By the subsequent allowance of further deductions the taxable income of the Company was reduced to £23,138, and the Company was accordingly on 29th July 1924 assessed on one-third of such amount.

14. On 23rd March 1923 the appellants lodged a written objection with the respondent against the assessment mentioned in par. 11 hereof, stating as reasons for the objection: (a) that they, the appellants, are not liable in law to be assessed in respect of income which was never distributed to them and in respect of which they were not assessed prior to the date of the *Income Tax Assessment Act* 1922; (b) that the said assessment is contrary to law; (c) that if any person is liable to be assessed in respect of such income, which has not been distributed, the proper person to be so assessed is the Brisbane Newspaper Co. Ltd.

15. The respondent on 29th October 1924 issued to the appellants a notice of amended assessment, whereby the taxable income £12,483 hereinbefore referred to was reduced to £10,426, and the amount of tax payable was fixed at £3,603 1s. 9d. in lieu of £4,480 10s. 7d. The difference in the said amounts is due to the fact that the respondent had allowed to the Company further deductions from its total taxable income.

16. The said objection referred to in par. 14 hereof was treated by the respondent as extending to the last-mentioned amended assessment; and on 28th November 1924 the respondent gave to the appellants written notice that their objection had been considered and not allowed, and that the appellants were then entitled to have their notice of objection treated as a notice of appeal in accordance with the provisions of sec. 50 (4) of *Income*

Tax Assessment Act 1922-1923, and specified the Courts to which such appeals might be made under the said sub-section.

17. On 24th December 1924 the appellants asked the respondent to treat their objection as an appeal, and to forward it to the High Court of Australia at Brisbane.

18. On the hearing of the said appeal before me the following question arose, which, being in my opinion a question of law, I state for the opinion of the High Court:—

> Are the appellants liable in law to be assessed for income tax in respect of income of the Company which was never actually distributed to them, and in respect of which they were not assessed prior to the date of commencement of the *Income Tax Assessment Act* of 1922?

Real, for the appellants. When the assessment of the appellants was made, the *Income Tax Assessment Act* 1924 had not been passed and the appellants were not assessable under the *Income Tax Assessment Act* 1915-1921, for that Act was repealed by the *Income Tax Assessment Act* 1922; nor were they assessable for the year ending June 1920 under the Act of 1922, for the first assessment which could be made under that Act was for the year commencing 1st July 1922. The reinstatement of the Act of 1915-1921, which was effected by the proviso in sec. 2 of the Act of 1924, restored certain powers of assessment subject, however, to sec. 21 of the Act of 1922, sub-secs. 1 and 2 of which substitute the liability of the company for that of its members, and in effect discharged the appellants from any liability to which they formerly were subjected. Sub-sec. 6 strengthens this contention, for it applies only to cases where the tax has been assessed and actually paid under the Act of 1915-1921; and a right to refund has arisen. Sec. 21 (7) should be construed as applying only to assessments of companies which are assessable under sec. 21 (1) and (2), and has no application to the individual shareholders or members. The appellants as members of the Company were discharged from any liability to taxation to which under the earlier Acts they were subject; the earlier policy of taxing shareholders of a company was completely abandoned; the liability to pay the tax, however,

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was not extinguished: it was preserved by the proviso in sec. 2 of the Act of 1924, and by the effect of sec. 21 of the Act of 1922 any liability formerly resting on the appellants was imposed upon and transferred to the Company.

Henchman, for the respondent. The proviso in sec. 2 of the *Income Tax Assessment Act* 1924 restored the power to tax individual members of a company which had existed under sec. 16 (2) of the *Income Tax Assessment Act* 1915-1921, but which had been repealed by the *Income Tax Assessment Act* 1922, and that restoration dated back to the date of the commencement of the Act of 1922. The restriction in the proviso that the restoration was subject to the Act of 1922 means, in the present case, that any assessment of members of a company under sec. 16 (2) of the Act 1915-1921 is subject to the right of members to the refund given by sec. 21 of the Act of 1922. (On the interpretation of sec. 16 see *Cornell* v. *Deputy Federal Commissioner of Taxation* (1).) Although the new scheme of taxation of companies introduced by sec. 21 (1) and (2) of the Act of 1922 casts the liability to tax wholly on the company in respect of assessments made on a determination by the Commissioner, after the date of that Act, that a reasonable distribution of profits had not been made, yet in cases where under sec. 16 (2) of the Act of 1915-1921 the income of the company has been deemed to have been distributed pursuant to the opinion formed by the Commissioner before the commencement of the Act of 1922, many shareholders had already become liable either as having been assessed or as being liable to assessment. Then sec. 21 (7) of the Act of 1922 states that sec. 21 shall also apply to all assessments made before 1st July 1922; but this generality must be limited, for sec. 21 (1) and (2) cannot apply where the Commissioner had acted under sec. 16 (2) of the Act of 1915-1921. In fact sec. 21 deals with two classes of cases: first, those in which the company has not distributed and the Commissioner has not formed an opinion, and, secondly, those in which he has formed an opinion under sec. 16 (2) of the Act of 1915-1921; and the most reasonable and only intelligent interpretation of sub-sec. 7 is that it applies the appropriate clauses

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of sec. 21 to appropriate cases arising in any financial year prior to 1st July 1922. Sub-sec. 6 is appropriate in the present case. Hence, by the effect of the whole of sec. 21 of the Act of 1922 and sec. 2 of the Act of 1924, when the Commissioner before July 1922 formed an opinion under sec. 16 (2) of the Act of 1915-1921 that a reasonable proportion of taxable income was not distributed by the Company to the appellants as shareholders for the year 1919-1920, they became liable to assessment under the Act of 1915-1921, because they were deemed to have received their proportionate part, but their liability was subject to the modification contained in the appropriate provisions of sec. 21 of the Act of 1922, namely, the right to the refund given by sub-sec. 6. Any other construction would necessarily create inequality of taxation in some cases. For instance, a company has taxable income which is not distributed; the Commissioner forms an opinion under sec. 16 (2) of the Act of 1915-1921; at the commencement of the Act of 1922 some shareholders have been assessed and have paid, some were assessed but have not paid, and some have not been assessed. On the appellants' argument only the first class fall within sec. 21 (6) and delay in and inequality of taxation are created. The question submitted should be affirmatively answered.

Real, in reply.

Cur. adv. vult.

The following written judgments were delivered:—

June 30.

ISAACS J. This was a case stated under sec. 51 of the *Income Tax Assessment Act* 1922-1924. The only important facts are these:—The appellants are, and at all material times were, shareholders in a limited company registered in Queensland. On 22nd May 1922 the Commissioner, by amended assessment, assessed the Company at "Nil" in respect of the financial year ending 30th June 1920, the notice of assessment stating that the assessment was "amended on account of treating whole of net income as distributed under sec. 16 (2) of the *Income Tax Assessment Act*." After the passing of the Assessment Act of 1922, the date of which was 18th October

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1922, the Commissioner, acting under sec. 21 of that Act as it then stood (which is the form applicable to this case), assessed the Company on the basis of one-third of its taxable income for the year referred to, and assessed the appellants on the basis that, for the year in question, their taxable income included so much of two-thirds of the Company's taxable income as is imputable to their interest in the Company. The question for the Court is whether the appellants are liable to be assessed on that basis.

The case has been well argued on both sides, the reasoning being clear and concise. Mr. *Henchman,* on whom, for the Commissioner, there specially rested the onerous task of tracing and reconciling some complicated enactments, performed it with commendable precision and brevity.

The Acts of 1915-1918, so far as material to the matter in hand, were framed on a distinct policy. By sec. 14 a person's income included company dividends credited or paid to him. By sec. 16, in ascertaining the taxable income of a company, there was deducted from its assessable income so much of it as was distributed to its shareholders. But further, by sub-sec. 2, it was provided that "where, in the opinion of the Commissioner, a company has not in any year distributed to its members or shareholders a reasonable proportion of its taxable income, the taxable income of the company shall be deemed to have been distributed to the members or shareholders in proportion to their interests in the paid-up capital of the company, if the Commissioner is satisfied that the total tax payable on it as distributed income is greater than the tax payable on it by the company." By thus deeming the Company's income to have been distributed to shareholders, the individuals became liable personally as if they had actually received it.

In the Act of 1922 this policy was abandoned for the future, and was also, to the extent marked out in sec. 21, reversed as to the past. Sec. 21, in sub-secs. 1 and 2, has direct reference to the company and not to its individual shareholders. It enables the Commissioner to determine, upon the conditions and within the limits there set out, whether the company has "in any year" made a reasonable distribution of its profits. "In any year" is seen on reference to the subsequent words of the sub-section to

cover both past and future years. The Commissioner can go back to any period covered by the Income Tax Acts. But the result of a determination adverse to the company arrived at under sec. 21 is to place the liability for additional tax, not on individual shareholders but on the company itself. The unreasonably retained taxable income is no longer deemed to have been actually distributed. That policy is definitely gone, as far as the results of all future determinations as to unreasonable retentions are concerned. But Parliament did not stop there. Its enactments in sub-secs. 1 and 2 would, as already stated, necessarily relieve individual shareholders in respect of past years where the determination as to unreasonable retention was made after October 1922, but those only. It would relieve them, because there was no longer any provision which would in law transform the company's income undistributed in fact into individual income actually received. But, so far, there would be left untouched the large number of individual shareholders who had already become liable under the pre-existing law, some having already paid, and the others, either assessed or assessable, being still bound to pay, upon the notionally distributed income. To leave the matter so, would create great disparity of treatment in respect of the same financial years. To meet that position in the manner and to the extent thought just on the whole was the object of sub-sec. 6 of sec. 21. The contest ultimately concentrates upon the question : " In what manner and to what extent does sub-sec. 6 operate ? " Before answering that question it is necessary to bear in mind the proviso to sec. 2 of the Act of 1922. Although inserted in 1924 (by Act No. 51 of that year), it is inserted in terms which show that the Legislature meant to act upon its provisions from the beginning of the Act of 1922. It is to be deemed as enacted originally. Its effect is to keep alive the Act of 1915-1918 as it stood on 17th October 1922, for the purposes of income tax, " subject," however, " to this Act," that is the Act of 1922. Anything found in that Act conflicting with the earlier Acts must *pro tanto* prevail. Now, in sub-sec. 7 of sec. 21 of the Act of 1922 it is enacted : " This section shall also apply to all assessments hereafter to be made in respect of any financial year prior to that beginning on the first day of July one thousand nine hundred and twenty-two." It is

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urged for the taxpayer that the word "assessments" in that sub-section does not include assessments of individual shareholders. It must be borne in mind that sub-sec. 7 does not create any power to assess for that antecedent period. It assumes the power. The power itself is found only in the earlier Acts, which are kept alive for the purpose by the proviso to sec. 2 of the Act of 1922. Under those Acts, unqualified, the taxpayer in this case would be liable to the full for all the income deemed in May 1922, at latest, to have been distributed. That, however, by force of sub-sec. 7 of sec. 21, is to be qualified by whatever sec. 21 itself provides applicable to the case.

Mr. *Real* contends that there is nothing in the section applicable to the assessment of an individual at all, the new assessments referred to in sub-sec. 7 being referable to company assessments under sub-secs. 1 and 2; individuals being provided for under sub-sec. 6 by way of refund where there has been already an overpayment by them. On the other hand, Mr. *Henchman* suggests that sub-sec. 6, when read in conjunction with the rest of the section and with the proviso to sec. 2, leads to the conclusion that individual shareholders may still be assessed on the basis of any "opinion" of the Commissioner under sec. 16 (2) of the former Act, by which taxable income of the company was "deemed to have been distributed to the shareholders," but that this is "subject to" the modification provided by sub-sec. 6 of sec. 21 of the Act of 1922.

The construction suggested for the Commissioner appears very plainly to be right. In the first place, looking at the mere words of sec. 21, there is no reason for the restricted operation contended for on behalf of the taxpayer. The words "his taxable income shall be reduced" and the words "total amount of income to be excluded from the assessments of the shareholders" would, without express language so requiring, be deprived of much of their natural force and scope. Sub-sec. 6, though necessarily providing for the case of actual overpayment, is not in terms confined to that, and therefore, the matter is left to be determined by considering the legislative scheme as a whole. Disparity of treatment has already been referred to. It was the evident intention of sub-sec. 6 to remove and remedy inequalities and injustice created by the former

scheme. But the relief under sub-sec. 6 is on the basis that under the old Acts some income not actually distributed was "deemed to be distributed." That legal notion was preserved in all specific cases where, by the past application of sec. 16 (2) of the former Acts, it had arisen. To that extent, consequently, the operation of sub-secs. 1 and 2 must, of course, be limited with a corresponding limitation not of the meaning but of the application of sub-sec. 7. There is nothing, however, to further limit the application of sub-sec. 7 in respect of individual shareholders. The proviso to sec. 2 of the Act applies to them; and, in assessing them under the old Acts, sub-sec. 7 of sec. 21 of the new Act requires the application of sub-sec. 6 in a case like the present, so that "his taxable income shall be reduced" as directed. This gives full effect to all relevant legislative provisions, literally read, and to the evident altered scheme of adjustment, and leaves no gaps in the operation.

In the result the question should be answered in the affirmative.

HIGGINS J. I concur in the judgment of the Court, but with much doubt. My doubt is not as between two or more possible interpretations of the Act, but as between the interpretation adopted and the unintelligible. If there were another interpretation equally possible, and more favourable to the taxpayer, it might be our duty to adopt it; but, as there seems to be none, we have to apply to these ill-drawn Acts of Parliament the only meaning that seems to us possible.

RICH J. I also concur in the judgment of the Court.

STARKE J. The legislation which we are called upon to construe is somewhat confused, and the learned counsel who argued the case have greatly assisted us. A company called the Brisbane Newspaper Co. Ltd. carried on business in Queensland, and for the year ended 30th June 1920 made certain income which was assessable to income tax. About March 1921 the Commissioner formed the opinion that the Company had not in the year 1920 distributed to its members a reasonable proportion of its taxable income (Act 1915-1921, sec. 16, sub-sec. 2), and in December communicated his view to the Company.

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The Act provided in such a case that the taxable income of the Company should be deemed to have been distributed to the members in proportion to their interests in the paid-up capital of the Company (sec. 16 (2); *Cornell's Case* (1)). Consequently, in May 1922 the Commissioner reduced the Company's assessment to nothing, and proceeded to reassess its members as if they had received the income (cf. *Income Tax Assessment Act* 1915-1916, sec. 16 (2)). But before this proceeding was completed the *Income Tax Assessment Act* of 1922 was passed. It repealed the Acts of 1915-1921, without any saving clause other than that contained in the *Acts Interpretation Act*, sec. 8. And sec. 21 of the Act of 1922 contained a new scheme for the taxation of companies that had not made a reasonable distribution of their taxable incomes. Soon, however, it was recognized that a blunder had been made, and in 1924 an Act (1924, No. 51) was passed providing that the Acts 1915-1921 repealed by the 1922 Act should, subject to the Act of 1922, continue and be deemed to have at all times continued for all purposes in connection with income tax payable for any financial year prior to 1st July 1922, and that this section of the 1924 Act should be deemed to have commenced at the date of the commencement of the Act of 1922. The Commissioner, in February 1923, purporting to act under sec. 21 of the Act of 1922, reassessed the Company for one-third of its total taxable income, and he assessed the appellants, members of the Company, for so much of two-thirds of that income as was proportional to their interest in the paid-up capital of the Company, on the basis that such income must be deemed to have been distributed to them. The Company has not appealed, and all we have to consider is whether the assessment of the appellants is in accordance with the Acts.

The provisions of sec. 21 of the 1922 Act refer, on their face, to the case of companies that have not made a reasonable distribution of their taxable income in any year, whether before or after the passing of the Act. The provisions contained in sec. 21, sub-secs. 1 to 5, both inclusive, cannot well be applied to transactions past and closed under preceding Acts—by which I mean cases in which assessments have been made and liability ascertained. The present

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case does not belong to that category for, though the provisions of sec. 16 of the 1915-1921 Act had been applied to the case and the assessment of the Company reduced to nothing, still the members of the Company to whom the taxable income of the Company was deemed to be distributed were not assessed at the time of the passing of the 1922 Act, though they were liable under the Acts of 1915-1921 to be so assessed. They could not be assessed under the 1922 Act, for the first assessment of income under that Act was for the financial year commencing on 1st July 1922 (see sec. 32). But here the Act of 1924 becomes important. In preserving the Acts of 1915-1921, the liability of the members of the company to whom taxable income was deemed to have been distributed and also the power to assess them were preserved under those Acts—subject, however, to the Act of 1922. One view was that these words discharged and freed the appellants from the liability so preserved and substituted the liability of the Company under sec. 21, sub-sec. 2A; the other, that they gave the appellants the benefit of sec. 21, sub-sec. 6. Mr. *Real* claimed, however, that sub-sec. 6 really supported his view; for, he rightly said, the sub-section contemplates cases in which tax had been assessed and paid, and in which refunds were necessary to give effect to its provisions, and not cases of assessments made after the passing of the Act of 1922. But I think sub-sec. 7 destroys the effect of this argument, for the section (including sub-sec. 6) applies "to all assessments hereafter to be made in respect of any financial year prior to that beginning on the first day of July one thousand nine hundred and twenty-two." And the provision in sub-sec. 6 that the company shall repay to the Commissioner the tax previously refunded to it in respect of the total amount of income to be excluded from the assessments of the shareholders of the company under this sub-section, also militates against the argument. But perhaps a more weighty reason still is that the argument destroys the uniformity and equality of taxation between members of companies that had not distributed a reasonable proportion of their taxable income amongst members, and even between members of the same company in respect of the same period of time. And yet the aim of sub-sec. 6 is to give shareholders

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in companies who were taxed pursuant to the 1915-1921 Acts relief equal to that given by the Act of 1922, or, in other words, to produce equality of treatment.

My opinion, therefore, is that the question stated should be answered in the affirmative.

Question answered Yes.

Solicitors for the appellants, *Flower & Hart.*

Solicitors for the respondent, *Chambers, McNab & McNab,* for *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

J. L. W.

[PRIVY COUNCIL.]

THE BROKEN HILL PROPRIETARY COMPANY LIMITED . . . . . APPELLANTS;

AND

THE MUNICIPAL COUNCIL OF BROKEN HILL . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

PRIVY COUNCIL.* 1925.

Nov. 10.

Local Government—Rates—Valuation—Ascertainment of unimproved value—Mine—Valuation based on output—Average annual value of ore during such part of preceding three years as mine had been worked—Work stopped by strike—Decision as to valuation for previous year—Estoppel by judgment—Res judicata—Local Government Act 1919 (*N.S.W.*) (*No.* 41 *of* 1919), *sec.* 153; *Sched. III., sec.* 12.

Sec. 153 (3) of the *Local Government Act* 1919 (N.S.W.) and sec. 12 (3) of Schedule Three to that Act each provides that "In the case of a mine other than a coal

* Present—Viscount Cave L.C., Lord Carson, Lord Blanesburgh and Mr. Justice Duff.