had only a very small percentage of the concentrate in each 10 ounce bottle and at least 90 per cent of other articles including sugar, water, citric acid, &c., which had not been obtained from the plaintiff. The passing off, if any, in this case was not in passing off of a beverage as a beverage of the plaintiff Company's manufacture or sale (see clause 7 of plaintiff's statement of claim) and could not be one, as the plaintiff was not the manufacturer, or the seller, of any beverage called " Orange Crush."

H. C. OF A. 1928. ORANGE CRUSH (AUSTRALIA) LTD. v. GARTRELL. Powers J.

Appeal dismissed with costs.

Solicitor for the appellant, *D. R. Hall.*
Solicitor for the respondent, *F. H. King.*

J. B.

[HIGH COURT OF AUSTRALIA.]

THE EXECUTOR TRUSTEE AND AGENCY COMPANY OF SOUTH AUSTRALIA LIMITED (As Administrator of the Estate of JAMES HENRY GIBBON Deceased) . . . . . } Appellant;

AND

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION FOR SOUTH AUSTRALIA . } Respondent.

H. C. OF A. 1928. ADELAIDE, *Sept.* 24. MELBOURNE, *Oct.* 18. Knox C.J., Higgins and Gavan Duffy JJ.

Income Tax—Assessment—Income—Shares distributed by company—Capitalization of profits—Income Tax Assessment Act 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *secs.* 14 (*m*), 16 (*b*), 19—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (ii.), 55.

The *Income Tax Assessment Act* 1922-1925 provides, by sec. 16 (*b*) (ii.), that the assessable income of a shareholder in a company shall include " the paid-up value of shares distributed by a company to its . . . shareholders to the extent to which the paid-up value represents the capitalization of . . . profits of the company, derived subsequent to the first day of July one thousand

H. C. OF A. 1928.

EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXATION (S.A.).

nine hundred and fourteen, except profits . . . (2) upon which the company has paid or is liable to pay income tax for any financial year prior to the financial year commencing on the first day of July one thousand nine hundred and twenty-three; . . . or (4) not subject to income tax."

A company increased its capital, and offered certain of its unissued shares to members. It also capitalized part of its undivided profits and declared a bonus payable to members out of the moneys so capitalized. It circularized its members stating that it desired to capitalize the moneys distributable by means of the bonus and asked each member to accept the new shares offered to him, and to direct that the amount of the bonus payable to him should be appropriated to paying the amount due on allotment of the new shares. A shareholder complied with the company's request, new shares were allotted to him, the amount of the bonus due to him was applied in part payment for the shares, and scrip was issued to him.

Held, by *Knox* C.J. and *Gavan Duffy* J., that the assessable income of the shareholder did not include the paid-up value of the shares issued to him except so far as such paid-up value was attributable to profits not excepted by sec. 16 (*b*) (ii). (2) and sec. 16 (*b*) (ii.) (4).

Inland Revenue Commissioners v. *Wright*, (1927) 1 K.B. 333, followed.

By *Higgins* J., that the shareholder's estate was assessable to income tax to the extent of the bonus shares distributed to him, but subject to such deductions as are prescribed by sec. 16 (*b*) (ii.) (2) and by the provisoes thereto contained in sec. 16 (*b*) (iii.).

Inland Revenue Commissioners v. *Wright*, (1927) 1 K.B. 333, distinguished.

APPEAL referred to the Full Court of the High Court.

The Executor Trustee and Agency Co. of South Australia Ltd. appealed to the High Court from the assessment by the Deputy Federal Commissioner of Taxation for the State of South Australia of the income of James Henry Gibbon deceased for the year ending 30th June 1925.

For the purposes of the appeal certain facts were agreed to between the parties, which were stated in the judgment of *Knox* C.J. and *Gavan Duffy* J. as follows:—

"The appellant is the executor of James Henry Gibbon deceased, who was the holder of 600 shares in the Adelaide Cement Co. Ltd. At an extraordinary meeting of the Company held on 27th February 1925 a special resolution was carried which is in the words following:— '(1) That the capital of the Company be increased to £300,000 by the creation of 150,000 new shares of £1 each. (2) That the articles of association be altered by inserting immediately after article 136 the

following article: "136 (*a*). (1) The Company in general meeting may in the year 1925 pass a resolution to the effect that it is desirable to capitalize the sum of £55,372 10s., being part of the undivided profits of the Company standing to the credit of the reserve and other funds, and accordingly the directors may in the year 1925 declare a bonus amounting to that sum to be paid out of such moneys to the members in proportion to the existing ordinary shares held by them. (2) It shall be no objection to any resolution passed under paragraph 1 of this article that it is passed at the meeting at which the resolution introducing this article was passed as a special resolution, provided that due notice of the intention to propose such first-named resolutions shall have been given prior to such meeting." (3) That it is desirable to capitalize the sum of £55,372 10s., being part of the undivided profits of the Company standing to the credit of the reserve and other funds, and accordingly the directors may, in the year 1925, declare a bonus amounting to the sum of £55,372 10s., to be paid out of such moneys to the members in proportion to the existing ordinary shares held by them. (4) That 110,745 shares (to be numbered 150,001 to 260,745 inclusive) of the unissued ordinary shares of the Company be offered to members in proportion to the existing ordinary shares held by them, that is to say one new share for every one existing ordinary share, such shares to participate in any dividend declared hereafter equally with the existing ordinary shares, proportionately, however, to the amounts paid up thereon or deemed so to be, and such shares shall be allotted upon the terms that 10s. per share shall be paid on allotment and the balance of 10s. per share as and when called, and subject to the directions contained in these resolutions, article 57 shall apply, but the directors may limit different times within which the offer, if not accepted, will be deemed to be declined as regards members being holders of ordinary shares whose registered addresses are in South Australia and in other parts of the world. (5) That the directors be and are hereby authorized to dispose of the said 110,745 shares (to be numbered 150,001 to 260,745 inclusive) on the terms set out in the next preceding resolution. (6) That the directors be authorized to dispose of any ordinary shares offered to members under paragraph 4 and declined or deemed to be declined by them within such time

H. C. OF A. 1928.

EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXATION (S.A.).

as the Board may appoint to such persons and upon such terms as the Board may think fit. (7) That the directors of the Company may from time to time and at all times hereafter pay to the registered holders of the existing preference shares in the Company a dividend in any one year at the rate of £8 per centum per annum in place of the existing rate of £7 10s. per centum per annum.'

"The notice sent to shareholders of the meeting at which this resolution was carried contained a foot-note in the words following: —'N.B.—If the above resolutions are carried it is the intention of the directors to immediately declare a bonus of 10s. a share, and, with the consent of each shareholder, to apply that bonus in payment of the 10s. per share on the shares offered to each such shareholder. Shareholders will be duly notified in this respect.'

"On the same day by a circular (marked D) notice was given to each shareholder that, in pursuance of the resolutions set out above, the directors had declared a bonus of 10s. per share payable at the office of the Company on 14th March, and that the directors offered to him as the holder of a stated number of ordinary shares in the Company an equal number of new ordinary shares of £1 each subject to the sum of 10s. per share being paid up thereon on allotment and the balance of 10s. per share as and when called. The notice proceeded as follows:— 'And take notice that if you do not accept the above offer of new shares on or before the 16th day of March 1925, being fourteen clear days from the posting of this notice, you will be deemed to have declined such offer. The Company desires to capitalize the moneys distributable by means of the above-mentioned bonus, and accordingly the directors ask you to accept the above offer of new shares and to request and direct them to appropriate the amount of such bonus payable to you in respect of your existing shares, to paying the amount payable by you on allotment of the new shares offered to you. If you are willing to accept the new shares offered, and to authorize the Company to pay and the secretary to receive your said bonus, please sign the attached form of acceptance marked A and return same to me on or before the 16th day of March 1925.' The said James Henry Gibbon thereupon signed and sent to the Company a reply in the words following:—'The Directors of Adelaide Cement Co. Ltd., 12-15 Brookman Buildings, Grenfell Street, Adelaide.—Gentlemen,—

In reply to your circular of 27th February 1925, and in terms thereof, and of the memorandum and articles of association of the Company, I, as the holder on 27th February 1925 of 600 existing ordinary shares, accept your offer of 600 new ordinary shares of £1 each; and I agree to pay the sum of 10s. per share on allotment and the balance of 10s. per share as and when called; and, after allotment, I authorize you to register me as the holder of such new shares, and agree to be bound by the memorandum and articles of association of the Company; and I request and direct you to appropriate the amount of the bonus of 10s. per share declared pursuant to article 136 (*a*) on 27th February 1925, and payable to me in respect of my said 600 existing ordinary shares, to paying the amount payable by me on allotment of the shares hereby accepted.—Dated this day of 1925.'

"At a meeting of the directors of the Company held on 30th June 1925 the following resolution was carried:—'Resolved under the authority conferred by resolution of extraordinary general meeting, held on 27th February 1925, that a bonus to members be declared amounting to £55,372 10s., to be paid out of the under-mentioned funds, and to be paid to shareholders in proportion to the existing ordinary shares held by them—(a) out of profits accumulated at 31st May 1922, £53,000; (b) out of interest derived from 4½ per cent war loans, accumulated to 31st December 1924, £2,000; (c) out of the net profits of the year ended 31st May 1923, £372 10s.: £55,372 10s. And that this resolution shall be deemed to have been passed and take effect as on 29th May 1925.'

"At a meeting of the directors of the Company held on 29th May 1925 the directors allotted 110,055 shares in the Company, numbered 150,001 to 260,055, to the shareholders of the Company upon the terms of the said circular D and such allotment included 600 shares to the said James Henry Gibbon. On 29th May 1925 the above-named James Henry Gibbon was registered in the books of the Company as a shareholder in respect of 600 shares of £1 each paid up to 10s. The scrip for the said shares was forwarded to the said James Henry Gibbon on the 1st day of September 1925."

In the facts as agreed upon by the parties it was also stated that the appellant contended that in the circumstances above set out

H. C. OF A. 1928.

EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXATION (S.A.).

shares were distributed by the Company to the said James Henry Gibbon in respect of which his estate was, for the financial year 1925-1926, liable to income tax (if at all) under sec. 16 (*b*) (ii.) of the *Income Tax Assessment Act* 1922-1925; and that the respondent contended that the said James Henry Gibbon's estate was liable to income tax under sec. 16 (*b*) (i.) to the extent of the dividend, bonus or profit credited, paid or distributed to him in the manner already referred to.

By consent of the parties *Knox* C.J. directed the appeal to be argued before the Full Court of the High Court.

Cleland K.C. and *Ligertwood,* for the appellant. The Act has been materially altered since the decision in *Federal Commissioner of Taxation* v. *Hyland* (1). The substance of the transaction must be looked at rather than the machinery employed. Here the substance was that the Company, with the assent of shareholders, capitalized profits and distributed them as shares. The policy of the Act is this: if the shareholder takes not cash but shares, the transaction is a capitalization; nevertheless he is taxable, unless the money involved has already been the subject of taxation. In *Inland Revenue Commissioners* v. *Wright* (2) what took place was a method of capitalization. [Counsel referred to *Inland Revenue Commissioners* v. *Blott* (3); *Inland Revenue Commissioners* v. *Fisher's Executors* (4).] Here the Company has already paid tax, so that if this is capitalization the taxpayer escapes under sec. 16 (*b*) (ii.). Sec. 14 (*m*) deals with two matters—cash and shares—and it shows that these matters are dealt with distributively in sec. 16. Shares that reach the shareholder are treated by the Act in a different way from cash that reaches the shareholder. Sec. 16 (*b*) (ii.) is exhaustive as regards cash that reaches the shareholder. Sec. 19 of the Act does not apply. [Counsel also referred to *James* v. *Federal Commissioner of Taxation* (5); *Bouch* v. *Sproule* (6).]

[KNOX C.J. referred to *Webb* v. *Federal Commissioner of Taxation* (7).

(1) (1926) 37 C.L.R. 569.
(2) (1927) 1 K.B. 333.
(3) (1920) 2 K.B. 657; (1921) 2 A.C. 171.
(4) (1926) A.C. 395.
(5) (1924) 34 C.L.R. 404.
(6) (1887) 12 App. Cas. 385.
(7) (1922) 30 C.L.R. 450.

[HIGGINS J. referred to *Knowles and Haslem* v. *Ballarat Trustees Executors and Agency Co.* (1).]

O'Halloran K.C. (with him *Powers*), for the respondent. The Company decided to capitalize reserve funds and declared a dividend in cash. Having done so, it lost control of the money; but it gave the shareholder an option to enter into a further agreement. This position is the reverse of that in the reported cases where there were resolutions for a distribution of shares with an option to take cash instead. Sec. 16 (*b*) (ii.) is designed to cover the case of a distribution of shares only (*Hyland's Case* (2)). Sec. 19, especially the last words, is important. That section applies, because it is inherent in sec. 16 that the capitalization therein referred to is to be by the company. [Counsel referred to *Inland Revenue Commissioners* v. *Fisher's Executors* (3).]

Cleland K.C., in reply. The expression used is "capitalization," not "capitalization by the company." If the shareholder elected to take cash it might bring him within sec. 16 (*b*) (i.).

Cur. adv. vult.

Oct. 18.

The following written judgments were delivered:—

KNOX C.J. AND GAVAN DUFFY J. The question for decision in this case is whether the assessable income of the taxpayer includes a sum of £300 said to be income received by one James Henry Gibbon from the Adelaide Cement Co. Ltd. The relevant facts are as follows:—[Their Honors then stated the facts as above set out, and continued:—] By sec. 14 (*m*) of the *Income Tax Assessment Act* 1922-1925 it is provided that dividends, bonuses, or profits, or the face value of bonus shares distributed by a company among its members or shareholders, shall be exempt from income tax, except as provided under sec. 16 of the Act. Sec. 16 of the Act, so far as now relevant, is in the words following: "The assessable income of any person shall include . . . (*b*) in

(1) (1916) 22 C.L.R. 212. (2) (1926) 37 C.L.R., at pp. 580, 588.
(3) (1925) 1 K.B. 451, at p. 463 (C.A.)

H. C. OF A. 1928.

EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXATION (S.A.).

Knox C.J. Gavan Duffy J.

the case of a . . . shareholder . . . of a company . . . (i.) dividends, bonuses or profits . . . credited, paid or distributed to the . . . shareholder from any profit derived from any source by the company . . . (ii.) the paid-up value of shares distributed by a company to its . . . shareholders to the extent to which the paid-up value represents the capitalization of the whole or any part of the profits of the company, derived subsequent to the first day of July one thousand nine hundred and fourteen, except profits . . . (2) upon which the company has paid or is liable to pay income tax for any financial year prior to the financial year commencing on the first day of July one thousand nine hundred and twenty-three; . . . or (4) not subject to income tax."

It is conceded that the profits out of which the bonus in question was paid consisted, as to £53,000, of profits derived after 1st July 1914, on which the Company had paid or was liable to pay income tax for a financial year prior to that commencing on 1st July 1923, and, as to £2,000, of profits not subject to income tax. The balance is so small as to be negligible. The question, then, is whether the receipt by the shareholder of 600 shares in the Company, paid up to 10s. each, in the circumstances above set forth, came under sec. 16 (*b*) (i.) or under sec. 16 (*b*) (ii.) of the Act. In other words, did the transaction amount to a crediting, payment or distribution to the said James Henry Gibbon of a dividend, bonus or profits, or to a distribution by the Company to him of the paid-up value of shares representing the capitalization of profits of the Company? If the former, the respondent is entitled to succeed; if the latter, the appellant.

The relevant provisions of sec. 16 may, we think, be paraphrased thus: If a shareholder receives from the company a share of its profits either (a) by means of a dividend or bonus paid or credited to him, or (b) by means of shares in the company issued to him as fully or partly paid up as a result of the capitalization by the company of the whole or part of its profits earned after 1st July 1914, the value of the share of the profits so received by or credited to him shall be included in his assessable income, except to the extent to which the paid-up value of shares issued to him represents the

capitalization of profits upon which the company has paid, or is liable to pay, income tax for any financial year before that commencing on 1st July 1923, or of profits not subject to income tax.

Now, at the time when these provisions were inserted in the Act, both the Court of Appeal in England and the House of Lords had pronounced judgment in *Blott's Case* (1). In that case it was recognized that a company cannot issue fully or partly paid-up shares by simply capitalizing the reserve funds or undistributed profits and applying them to the payment of the shares, and that, as a matter of machinery, a bonus or dividend payable to the shareholder must be declared and then appropriated to the payment up of the bonus shares, so that the shareholder pays for his shares by his bonus or dividend (see per *Scrutton* L.J. (2)). And it was held by the House of Lords, both in *Bouch* v. *Sproule* (3) and in *Blott's Case* (4), that the substance rather than the form of the transaction must be looked at in determining whether the transaction amounted on the one hand to a capitalization of profits or on the other to payment of a dividend ; and that the fact that the machinery adopted included the declaration of a dividend and an option to the shareholder to demand payment in cash of the dividend so declared did not prevent the transaction from amounting to a *capitalization* as opposed to a *distribution* of profits. We think we are entitled to assume that the draftsman of sec. 16 was aware of these decisions, familiar as they were to lawyers generally. In this view we think the expression " capitalization of profits " in that section must be regarded as including a capitalization effected by means of the declaration of a dividend and its appropriation to the payment by each shareholder who accepted the offer of shares of the amount represented as paid up thereon. It is now well settled that, in determining whether a given transaction is or is not a capitalization of profits, the intention of the company must be regarded as the dominant consideration (per Viscount *Haldane* in *Blott's Case* (5)). The question to be answered is, according to *Atkin* L.J. in *Inland Revenue Commissioners* v. *Burrell* (6) : " Did

(1) (1920) 2 K.B. 657 ; (1921) 2 A.C. 171.
(2) (1920) 2 K.B., at p. 673.
(3) (1887) 12 App. Cas. 385.
(4) (1921) 2 A.C. 171.
(5) (1921) 2 A.C., at p. 188.
(6) (1924) 2 K.B 52, at p. 68.

H. C. OF A. 1928.

EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXATION (S.A.).

Knox C.J. Gavan Duffy J.

the company intend to distribute as profits or as capital ? " ; and in *Wright's Case* (1) Lord *Hanworth* M.R. said that the company had the dominant voice in what it gave, and in what form it gave the undivided profits to the shareholder. He said further (2) :— " Inasmuch as there was the same article in *Bouch* v. *Sproule* (3), for effective purposes, as in the present case, we cannot hold that the mere existence of an option prevents the process adopted from being one of the distribution of capital. The dominance of the company, the resolutions passed by the shareholders at their general meeting, the notices issued by the company, all point in the same direction as *Bouch* v. *Sproule* the principle of which, as Lord *Sumner* points out in *Fisher's Case* (4), has now become embedded in the authorities relating to the collection of taxation." In the same case *Scrutton* L.J. said (5) :—" There being in *Bouch* v. *Sproule* that real option, I cannot see how the fact that there is an option here, which, as it appears, some people thought it was more profitable to exercise by taking cash, makes any difference. I think that the principle laid down in *Bouch* v. *Sproule*, and accepted by the Court in *Blott's Case* (6), governs this case, and that it is conclusive here that this company, as expressed in its resolutions, intended to capitalize £90,000 for distribution amongst the shareholders as capital free of income tax. That being the intention of the company, and that, according to the principle stated in *Bouch* v. *Sproule*, being a matter which is determined by the company whether the shares are capital or income, it appears to me that whatever we might have said if we had not been bound by the decisions of the House of Lords, whether or not we might have accepted Lord *Sumner's* analysis in *Swan Brewery Co.* v. *The King* (7), we are bound to carry out the view which I think has been laid down by the three decisions of the House of Lords, and to hold that in this case the fact that there was a legal option makes no difference ; that the intention of the company prevails, and that therefore these bonus shares coming to this gentleman are not assessable as income, but are capital." And *Russell* J. adds (8) :

(1) (1927) 1 K.B., at p. 344.
(2) (1927) 1 K.B., at p. 345.
(3) (1887) 12 App. Cas. 385.
(4) (1926) A.C. 395.
(5) (1927) 1 K.B., at pp. 349-350.
(6) (1921) 2 A.C. 171.
(7) (1914) A.C. 231.
(8) (1927) 1 K B., at pp. 350-351.

—" How this " (the issue of shares) " is effected and by what resolutions, confirmations, and instruments, does not matter, for such things are ' bare machinery.' In what the company has said and done is found the answer to the question : What has the subject matter of the distribution now become or ceased to be, when first it reaches the taxpayer ? "

The relevant facts in the present case are, in our opinion, not distinguishable from the facts in *Wright's Case* (1), and we feel compelled, as did the Court of Appeal in that case, to hold that the transaction between the Adelaide Cement Co. Ltd. and such of its shareholders as elected to accept the shares offered to them amounted to a capitalization of profits, and not to the payment or crediting of a dividend or bonus within the meaning of sec. 16 of the *Income Tax Assessment Act* 1922-1925. For these reasons we are of opinion that the appeal should be allowed and a declaration made that the assessable income of the said James Henry Gibbon deceased for the year in question does not include the paid-up value of the 600 shares in the Adelaide Cement Co. Ltd. issued to him, except so far as such paid-up value is attributable to profits other than the sums of £53,000 transferred from the depreciation reserve and £2,000 representing interest on war loans. The respondent is to pay the costs of the appeal.

HIGGINS J. The question is, as I understand it (for there is no specific question asked, though rival contentions are stated in the " statement of agreed facts "), was the deceased Gibbon assessable for Federal income tax in respect of 600 new shares in the Adelaide Cement Co. Ltd., accepted by him in pursuance of resolutions of the Company made on 27th February 1925—shares paid up to 10s. each by appropriation of the bonus payable to him on his existing 600 shares. We have not been supplied with the memorandum or articles of the Company ; but it is not contended that the resolutions were invalid under the constitution of the Company.

The answer depends on the provisions of the Australian *Income Tax Assessment Act* 1922-1925 (now 1922-1927) ; and, in particular, on sec. 16 of that Act, taken with secs. 14 and 19. The answer

(1) (1927) 1 K.B. 333.

H. C. OF A. 1928.

EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXATION. (S.A.).

Higgins J.

does not depend on the English *Income Tax Acts*, or (directly) on any English cases. The Federal Parliament has unlimited power to impose such taxation as it thinks fit (sec. 51 (II.) of the Constitution), and, if it tax "income," to say what it means by income for the purpose of the tax. We are not dealing with super-tax under the English *Finance* (1909-10) *Act* 1910, under which Act the total income of an individual has to be taken to be "the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated . . . under the" English "*Income Tax Acts*" of 1842 and 1853, 1918, &c. (secs. 66 (2), 96 (4)). It cannot be too clearly grasped that our Parliament has power to treat as income anything that may not be income under the English Acts; that our Parliament can, in effect, take from the pocket of anyone subject to it anything that it chooses; and that the question is, first and last, what has our Parliament said. In making this statement, I have not omitted to consider sec. 55 of the Constitution.

Now, sec. 16 of the Australian Act is a definition section, a section amplifying the meaning of "income" for taxation purposes. It provides that "The assessable income of any person shall *include*" not only "(*a*) profits derived from any trade or business and converted into stock-in-trade or added to the capital of or in any way invested in the trade or business," but also "(*b*) in the case of a member, shareholder, depositor or debenture-holder of a company which derives income from a source in Australia . . . (i) dividends, bonuses or profits . . . *credited, paid or distributed* to the member or shareholder from any profit derived from any source by the company." Probably most people would have thought it sufficiently clear that by virtue of these words the bonuses credited to Mr. Gibbon in the Company's books, and applied by his direction to the payment of 10s. per share as allotment money on the new issue of shares, in pursuance of the Company's resolution of 29th May 1925, would be a payment of dividend to him. The appropriation by him of the bonus payable to him in respect of his original 600 shares to the payment of the allotment money on the new shares would support a plea of payment to him in an action for the bonus. But a doubt seems to have arisen on the subject in consequence of

certain statements made in judgments in *Webb* v. *Federal Commissioner of Taxation* (1), although that was a case of transfer of assets from an old company to a new company, not a distribution of shares internal to one company only; and so Parliament was induced to make it clear that the paid-up value of the new shares was taxable (see *Federal Commissioner of Taxation* v. *Hyland* (2)); and that end was achieved by the express words of sec. 16 (*b*) (ii.). Under this paragraph, the assessable income is to include "the paid-up value of shares distributed by a company to its members or shareholders to the extent to which the paid-up value represents the capitalization of the whole or any part of the profits of the company, derived subsequent to the first day of July one thousand nine hundred and fourteen except profits" (*inter alia*) "(2) upon which the company has paid or is liable to pay income tax for any financial year prior to the financial year commencing on the first day of July one thousand nine hundred and twenty-three."

It is not disputed that the profits capitalized here were profits derived after 1st July 1914. There is no express statement in the agreed facts that the profits capitalized were profits on which the company has paid or is liable to pay income tax for any financial year prior to that commencing on 1st July 1923. My learned colleagues, as I understand, regard this position as "conceded." I know of no such concession; and if there were, it would involve a concession of law, which we cannot, in discharge of our duty, accept. The parties have limited themselves to certain "agreed facts" (it is not a special case stated, but an appeal). But the possibility that the Company may have been liable to pay income tax on some or all of the £53,000 part of the £55,372 10s., should influence us in shaping our order, so that the actual facts, which have not yet been stated, and which have not been the subject of discussion, may be ascertained and applied.

Much ingenuity has been used in arguments to show that sec. 16 (*b*) (ii.) applies only to shares which have been *forced* by the Company on the shareholders, not to shares which, as in this case, the shareholder has voluntarily elected to accept. But Parliament has not made any such fine distinction: it has simply tried to make it clear

(1) (1922) 30 C.L.R. 450.

(2) (1926) 37 C.L.R., at p. 588.

H. C. OF A. 1928.

EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXATION (S.A.).

Higgins J.

beyond doubt that bonus shares which are the result of dividends or bonuses on shares previously held shall be taxable on their paid-up value, just as much as if the amount treated as paid up were directly distributed in money dividends.

This simple explanation is confirmed to my mind by sec. 19: "Income shall be deemed to have been derived by a person within the meaning of this Act although it is not actually paid over to him, but is re-invested, accumulated, *capitalized*, carried to any reserve, sinking fund or insurance fund however designated, or otherwise dealt with on his behalf or as he directs." This sec. 19 applies the very same principle to income generally as is applied by sec. 16 (*b*) (ii.) to shares distributed by a company. As for sec. 14 (*m*), on which Mr. *Cleland* has laid much emphasis in his argument, the object with which it was inserted among the exceptions is clear enough:—"The following incomes, revenues and funds shall be exempt from income tax: . . . (*m*) dividends, bonuses, or profits, or the face value of bonus shares distributed by a company among its members or shareholders, except as provided under section sixteen of this Act."

The company being a taxpayer as well as the shareholder, Parliament wanted to prevent double taxation on the same profits of the company; and, in the same amending Act (that of 1923) as provided for a distinctive rate of tax for a company (sec. 13 (1A)), Parliament provided that no dividends or bonus shares should be taxed except as (specially) provided in sec. 16; and sec. 16 by (*b*) (i.) deals with dividends, and by (*b*) (ii.) with bonus shares; and (*b*) (ii.) (2) excepts from a shareholder's assessment for bonus shares any profits upon which the company has paid or is liable to pay income tax for any financial year before the financial year commencing on 1st July 1923.

Now, I agree with the argument of the Company that if sec. 16 (*b*) (ii.) applies to this case, it excludes the application of (*b*) (i.); that even if (*b*) (i.) would have normally covered the case of dividends, &c., capitalized, the special provision for bonus shares in sec. 16 (*b*) (ii.) governs the position: *Generalia specialibus non derogant.* But, following out (*b*) (ii.) unreservedly, we must find what Parliament has provided under the present circumstances. The provision is

made by the proviso which appears after sec. 16 (*b*) (iii.) :—" Provided where the dividends, bonuses, profits or shares referred to in sub-paragraphs (i.) or (ii.) of this paragraph have been distributed out of profits upon which any company has paid or is liable to pay tax under the provisions of any Income Tax Act which comes into operation after the thirtieth day of June one thousand nine hundred and twenty-three the amount of those dividends, bonuses, profits or shares shall, where the shareholder is not a company, be *excluded* from the assessment of the income of the taxpayer unless the rate of tax payable by him on income from property, if the dividends, bonuses, profits or shares are included, exceeds the rate of tax paid or payable by the company: Provided further that if the rate of tax is *not less* than the rate of tax paid or payable by the company, the taxpayer shall be entitled to a rebate in his assessment of the amount of tax paid by the company on that part of the said dividends, bonuses and profits, and of the face value of the said shares, which is included in his taxable income."

If we were at liberty to draw inferences from the " agreed facts " (I do not think we are), I should infer that the provisoes do not apply to the £53,000, the greater part of the £55,372 10s. in question. Unfortunately, the facts have not been made quite clear on this subject, as the rival contentions were based on a mistaken theory that if sec. 16 (*b*) (ii.) applied the taxpayer must succeed, whatever the figures and dates. It is clearly impossible for us to say that no part of the £55,372 10s. capitalized is assessable for taxation—the £372 10s. is expressly assessable, even if the £2,000 is not, as it represents interest on war stock. I do not say that the imperfections in the statement of agreed facts should deter us from declaring our view of the construction of the sections, the matter as to which the parties sought the aid of the Court. In my opinion, our answer should be that the estate of Gibbon is liable to be assessed under sec. 16 (*b*) (ii.), but subject to such deductions as are allowed by sec. 16 (*b*) (ii.) (2) and the provisoes thereto. There seems to be no doubt that the provisoes are really applicable to (*b*) (ii.) although they appear under (*b*) (iii.).

I hope I have made it clear that in my opinion the problem in this case can be solved without resort to the much contested English

H. C. OF A. 1928.

EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXATION. (S.A.).

Higgins J.

cases of which *Blott's Case* (1) is the storm centre. These cases rest, ultimately, on the meaning of "income" as assessable under the English *Income Tax Acts*, and do not affect the extension of meaning of "income" made by sec. 16 (*b*) (i.) or (ii.) of the Australian Act. This is the view which I took when concurring with the decision of the majority in *Hyland's Case* (2) as well as in *Webb's Case* (3); and, as there is no binding decision of this Court to the contrary, I feel at liberty to say that I think so still. In other words, I read sec. 16 (*b*) (ii.) as meaning that even if no money be actually paid to the shareholder as dividend or bonus, the amount treated as paid up on the bonus shares is to be brought into the shareholder's assessment.

As to *Blott's Case* itself (1), I may add that whether the majority of the Law Lords was right, or the minority, it has recently been accepted and followed by the House of Lords in *Fisher's Executors' Case* (4), and by the Court of Appeal in *Wright's Case* (5); and it must be accepted as law. But I may point out (1) that in *Wright's Case* there was no dividend in money for which the shareholder could have sued, or have insisted on receiving; for any bonus shares not accepted had to be disposed of by the directors in such manner as they thought most beneficial to the company, and the shareholder was merely to be paid cash for the full nominal amount of his bonus out of *the proceeds* (6); and (2) that there are no such words in the Act imposing the English super-tax (*Finance* (1909-10) *Act* 1910) as are contained in the Australian *Income Tax Assessment Act* 1922-1927, sec. 16 (*b*) (ii.), words expressly making bonus shares assessable whether capital or income in the hands of the shareholder (compare English *Income Tax Act* 1918, sec. 1 and scheds. A, B, C, D and E). The provisions of the English *Income Tax Act* 1918 are not a guide to the meaning of our Australian *Income Tax Assessment Act*.

In my opinion, therefore, the Commissioner is entitled to treat the estate of Gibbon as assessable to income tax to the extent of the bonus shares distributed to him; but subject to such deductions as are prescribed by sec. 16 (*b*) (ii.) (2) and by the provisoes thereto.

It may be found that my view differs little, in practical result, from that of my learned colleagues; but it is my duty to call

(1) (1921) 2 A.C. 171.
(2) (1926) 37 C.L.R., at p. 588.
(3) (1922) 30 C.L.R. 450.
(4) (1926) A.C. 395.
(5) (1927) 1 K.B. 333.
(6) (1927) 1 K.B., at p. 337.

attention, with a view to any further litigation, to what I regard as the taking of a wrong turning because of *Blott's Case* (1), and to the need for a more complete statement of the facts as to which there is agreement.

Appeal allowed. Declare that assessable income of James Henry Gibbon deceased does not include the paid-up value of the 600 *shares in the Adelaide Cement Co. Ltd. issued to him except so far as such paid-up value is attributable to profits other than the sums of* £53,000 *transferred from the depreciation reserve and* £2,000 *representing interest on war loans. Order assessment to be amended accordingly. Costs of appeal to be paid by respondent.*

Solicitors for the appellant, *Baker, McEwin, Ligertwood & Millhouse.*

Solicitors for the respondent, *Fisher, Powers & Jeffries.*

C. C. B.

(1) (1921) 2 A.C. 171.