[HIGH COURT OF AUSTRALIA.]

J. C. WILLIAMSON'S TIVOLI VAUDEVILLE PROPRIETARY LIMITED . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1929.

MELBOURNE. *Oct.* 10; *Nov.* 7.

Knox C.J., Isaacs, Rich and Starke JJ.

Income Tax (Cth.)—Deduction—Company—Sub-lease—Assignment to company—Consideration—Agreement to allot and accept fully paid-up shares in company—Whether allotment of shares constituted payment of money—Whether payment of amount for transfer of a lease of premises used for production of income—Value of shares—Onus of proof—Set-off—Whether equivalent to payment—Income Tax Assessment Act 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *sec.* 25 (*i*)*.

An agreement made in 1921 between the taxpayer and M. for the purchase by the taxpayer from M. of all his interest in certain sub-leases contained the following provision: "Part of the consideration for the said sale shall be the sum of £170,000 which shall be paid and satisfied by the allotment to the vendor or his nominees of 170,000 fully paid-up shares in the company of £1 each." The taxpayer claimed to be entitled to a deduction of £17,000 under sec. 25 (*i*) of the *Income Tax Assessment Act* 1922-1925 in respect of its income

* Sec. 25 of the *Income Tax Assessment Act* 1922-1925 provides:—"A deduction shall not, in any case, be made in respect of any of the following matters:— . . . (*i*) any wastage or depreciation of lease or in respect of any loss occasioned by the expiration of any lease: Provided that where it is proved to the satisfaction of the Commissioner that any taxpayer (being the lessee under a lease or the assignee or transferee of a lease) has paid any fine, premium or foregift, or consideration in the nature of a fine, premium or foregift for a lease, or a renewal of a lease, or an amount for the assignment or transfer of a lease of premises or machinery used for the production of income, the Commissioner may allow as a deduction, for the purpose of arriving at the income, the amount obtained by dividing the sum so paid by the number of years of the unexpired period of the lease at the date the amount was so paid, but so that the aggregate of the deductions so allowed shall not exceed the sum so paid if paid on or after the thirtieth day of June, one thousand nine hundred and fourteen, or the part of the sum so paid which is proportionate to the unexpired period of the lease from the thirtieth day of June, one thousand nine hundred and fourteen if the sum were paid prior to that date:" &c.

for the financial year 1926-1927. This sum was arrived at by dividing £170,000 by the unexpired period of the leases at the date of payment, namely, ten years.

Held, by *Knox* C.J., *Rich* and *Starke* JJ. (*Isaacs* J. dissenting), that the taxpayer was entitled to the deduction sought.

REFERENCE from Board of Review.

This matter was referred to the High Court by the Board of Review at the request of both the Federal Commissioner of Taxation and the taxpayer, J. C. Williamson's Tivoli Vaudeville Pty. Ltd., for the determination of the questions of law arising upon the following facts :—

1. The taxpayer is a company registered under the *Companies Act* of Victoria and carrying on business in Victoria, New South Wales and South Australia. The taxpayer is the same company under a changed name as the company named Musgrove's Theatres Pty. Ltd., which was a company promoted by Harry George Musgrove.

2. Amongst other objects for which the taxpayer was established was the business of theatre proprietors and the presentation, production, showing, exhibiting, management, conducting and representing at any theatre entertainments of various kinds. The first object for which the taxpayer was so established was "(1) to adopt and carry into effect either with or without modification an agreement dated the fifth day of March one thousand nine hundred and twenty-one and made between Harry George Musgrove of the one part and Walter Charles Jones on behalf of the Company of the other part for the purchase of all the estate and interest of the said Harry George Musgrove in the premises comprised in an agreement in writing dated the eighteenth day of February one thousand nine hundred and twenty-one and made between Harry Rickards Tivoli Theatres Limited of the one part and the said Harry George Musgrove of the other part together with the full benefit and advantage of such last mentioned agreement."

3. Under the said agreement dated 18th February 1921, made between Harry Rickards Tivoli Theatres Ltd. and Henry George Musgrove, the said Musgrove acquired three several sub-leases of the Tivoli Theatre, Melbourne, the Tivoli Theatre, Sydney, and the Prince of Wales Theatre, Adelaide, for ten years from 28th June 1921 for the rent and upon the terms in the said agreement set forth.

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4. Under the said agreement dated 5th March 1921 between the said Musgrove and the said Jones for and on behalf of the taxpayer it was agreed that the vendor, i.e., the said Musgrove, should sell and the taxpayer should purchase all the estate and interest of the vendor in the said sub-leases, and it was further agreed as follows :— "(2) Part of the consideration for the said sale shall be the sum of one hundred and seventy thousand pounds which shall be paid and satisfied by the allotment to the vendor or his nominees of one hundred and seventy thousand fully paid-up shares in the Company of one pound each. (3) As the residue of the consideration for the said sale the Company will observe and perform all the terms and conditions in the said agreement contained and on the part of the vendor to be observed and will keep the vendor indemnified against all actions claims demands and expenses which he may incur or sustain under or on account or by virtue of the said agreement or any non-observance thereof."

5. The said agreement dated 5th March 1921 was duly adopted and carried into effect without modification and the said 170,000 fully paid-up shares of £1 each in the taxpayer Company were allotted to the said vendor in pursuance of the said agreement.

6. The said premises subject to the said sub-leases were so acquired and used by the taxpayer for the production of income in its said business.

7. On 20th April 1927 the Commissioner assessed the taxpayer in respect of the financial year 1926-1927 and duly gave the taxpayer notice thereof dated 20th April 1927.

8. Under the said assessment a deduction was allowed of the sum of £17,000 claimed by the taxpayer under sec. 25 (*i*) of the *Income Tax Assessment Act* 1922-1925 in respect of the said sum of £170,000 so paid for the said transfer of the said leases, the sum of £17,000 being the amount arrived at by dividing the said sum so paid by the number of years of the unexpired period of the said leases at the date at which the said amount was so paid.

9. On 29th September 1927 the Commissioner amended the said assessment by disallowing the said deduction of £17,000 and increasing the assessment accordingly.

10. The reason for the said amendment as set forth in the letter of the Commissioner to the taxpayer of 30th September 1927 was as follows: "Before any claim for depreciation of leases may be allowed, it will be necessary to clearly demonstrate that the shares allotted as consideration for the transfer of the sub-leases were negotiable and of value at the time of allotment."

11. The taxpayer objected to the said alteration in the assessment by notice of objection dated 28th October 1927.

12. The Commissioner considered the said objection and wholly disallowed it, and on 11th January 1929 gave written notice of his decision to the taxpayer.

13. The taxpayer, being dissatisfied with the said decision of the Commissioner, requested him on 23rd January 1929 in writing to refer the said decision to a Board of Review for review.

The questions, as amended, which were referred, were as follows:—

(1) Whether the transaction set out above in pars. 4 and 5 constituted a payment of £170,000 within sec. 25 (*i*) of the *Income Tax Assessment Act* 1922-1925;

(2) If the answer to question 1 is yea, whether before any claim for a deduction under the said section can be established it is in law necessary to demonstrate that the shares so allotted for the transfer of the said leases were transferable and of value at the date of the allotment;

(3) If the answer to question 1 is yea, whether the paid-up value, market value or intrinsic value of such shares at the date of allotment is in law the measure of the amount of the payment.

These questions were argued by counsel before the Full Court, *Isaacs, Gavan Duffy, Rich* and *Starke* JJ., on 23rd May 1929, and on 7th June 1929 were ordered to be reargued.

Ham K.C. (with him *Herring*), for the appellant. As to question 1, the actual agreement was that the transfer should be for £170,000 and that that should be satisfied by transfer of 170,000 fully paid-up shares. The substance of the agreement was that, the appellant having agreed to purchase these sub-leases for £170,000, that purchase price was to be satisfied by the transfer of 170,000 shares.

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The case thus falls within sec. 25 (*i*) of the *Income Tax Assessment Act* 1922-1925. It is admitted that the premises were used for the production of income. The Commissioner was in error, as there was a payment in money by reason of the fact that there was a debt of £170,000 from Musgrove to the Company which was set-off against the debt from the Company to Musgrove. *In re Harmony and Montague Tin and Copper Mining Co.—Spargo's Case* (1), shows that such a transaction amounts to a payment of money. This was approved in *Larocque* v. *Beauchemin* (2). The Commissioner is wrong in contending that the onus is on the taxpayer of showing that £170,000 has been paid.

[ISAACS J. The question is whether the Commissioner is bound to accept the contention that £170,000 has been paid.]

The question of law is whether in the absence of positive evidence as to the value of the shares the Commissioner is right in disallowing the claim. Under sec. 51 the Commissioner or the taxpayer can appeal to the High Court on any matter which involves a question of law. The prima facie face value of the shares is to be taken as their real value (*Commissioner for Stamp Duties* v. *Broken Hill South Extended Ltd.* (3); *The Crown* v. *Bullfinch Pty. (W.A.) Ltd.* (4)). The view of the Commissioner is that the value of the shares must be taken as nil unless the taxpayer proves that they are worth something is wrong.

[ISAACS J. referred to *In re Johannesburg Hotel Co.*; *Ex parte Zoutpansberg Prospecting Co.* (5).]

Sec. 96 of the *Companies Act* 1915 requires a return of allotment to be filed if payment is otherwise than by cash. This is a payment up in money (*Larocque's Case* (6)).

[RICH J. referred to *Buckley* on the *Companies Acts*, 10th ed., p. 210, and *Ooregum Gold Mining Co. of India* v. *Roper* (7).

[ISAACS J. referred to *In re Breech-Loading Armoury Co.—Wragge's Case* (8).

(1) (1873) L.R. 8 Ch. 407, at pp. 411, 414.
(2) (1897) A.C. 358.
(3) (1911) A.C. 439, at pp. 448, 449.
(4) (1912) 15 C.L.R. 443, at pp. 446, 447, 451.
(5) (1891) 1 Ch. 119, at p. 132.
(6) (1897) A.C., at pp. 361-362, 364, 365-366.
(7) (1892) A.C. 125, at pp. 136-137, 140, 148.
(8) (1868) L.R. 5 Eq. 284.

[STARKE J. referred to *In re Barrow-in-Furness and Northern Counties Land and Investment Co.* (1).]

The contract was that the Company took the leases for £170,000 and the vendor agreed to apply for 170,000 £1 shares in the Company, and that created a debt by the Company to Musgrove for the leases and a debt by Musgrove to the Company for the shares. The one debt could be set off against the other, and this would have the effect of payment and would be sufficient to support a plea of payment (*North Sydney Investment and Tramway Co.* v. *Higgins* (2)). Payment within sec. 25 (*i*) does not require to be a payment in money (*Australian Mercantile Land and Finance Co.* v. *Federal Commissioner of Taxation* (3)). Prima facie the value of the shares is the paid-up value, and the onus is on the Commissioner to prove that it is not. But if the shares are not to be taken at their face value as payment in money and if the Court is at liberty to go behind the transaction, the appellant is entitled to have the actual value of the shares taken into consideration.

[ISAACS J. referred to *Sampson* v. *Commissioner of Taxation* (4).]

Gregory, for the respondent. The leases in question were acquired by Musgrove on 18th February 1921. Presumably the consideration he paid for the leases was their full market value, and on 5th March 1921 he agreed to sell the leases to a trustee for the Company when it had no assets. Practically the only assets of the Company would be the leases for which it was agreed to give shares, consequently the nominal value of the shares had no relation to their actual value. Here, there never was a money obligation (*Palmer's Company Precedents*, 12th ed., vol. I., p. 65).

[KNOX C.J. referred to *Palmer's Company Precedents*, 13th ed., part I., p. 468, and *Welton* v. *Saffery* (5).]

Ordinarily if a company allots fully paid-up shares, the instant the allottee accepts those shares there is a pecuniary liability to the company. But in this transaction there was no such bona fide debt and bona fide liability, but the Company was bound to hand over certain shares in consideration of the transfer of the leases.

(1) (1880) 14 Ch. D. 400.
(2) (1899) A.C. 263.
(3) (1929) 42 C.L.R. 145, at p. 150.
(4) (1926) 26 S.R. (N.S.W.) 437.
(5) (1897) A.C. 299.

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The transaction was that the lessee bound himself to transfer the lease in consideration of the allotment of shares which the Company was bound to allot. At no moment of time can one point to there being a debt on the one side and a liability on the other. [He referred to sec. 96 of the *Companies Act* 1915.]

[STARKE J. referred to sec. 10 of the *Companies Act* 1915.]

The Company had no right to go to Musgrove and offer him £170,000.

[KNOX C.J. A document such as that has always been construed as creating a debt.]

The form of the document in this case is quite distinguishable from other documents which have come before the Courts. On the construction of the documents in this case, it is impossible to say that there is a debt (*Larocque's Case* (1)). [He also referred to the *Barrow-in-Furness &c. Co.'s Case* (2).]

[ISAACS J. referred to *Burkinshaw* v. *Nicolls* (3).]

The Crown v. *Bullfinch Pty. (W.A.) Ltd.* (4) is not inconsistent with the views put on behalf of the Commissioner. In construing a taxing Act it has been held that the substance of the transaction should be looked at, and in this case the substance of the transaction was not that there was a payment, for in this case it is clear that no payment in fact was made. The real test is, was there a debt presently payable ?

[ISAACS J. referred to *Re Newport and South Wales Shipowners' Co.—Peter Rowland's Case* (5).]

Cur. adv. vult.

NOV. 7. The following written judgments were delivered :—

KNOX C.J. The question for decision in this matter is whether the taxpayer is entitled, by virtue of the proviso to sec. 25 (*i*) of the *Income Tax Assessment Act* 1922-1925, to a deduction of £17,000 in respect of the assessment of its income for the financial year 1926-1927. That proviso, so far as now relevant, is in the words following, namely, " Provided that where it is proved to the

(1) (1897) A.C. 358.
(2) (1880) 14 Ch. D. 400.
(3) (1878) 3 App. Cas. 1004, at pp. 1015-1016.
(4) (1912) 15 C.L.R. 443.
(5) (1880) 42 L.T. 785, at p. 786.

satisfaction of the Commissioner that any taxpayer (being . . . the assignee or transferee of a lease) has paid . . . an amount for the assignment or transfer of a lease of premises . . . used for the production of income, the Commissioner may allow as a deduction, for the purpose of arriving at the " taxable " income, the amount obtained by dividing the sum so paid by the number of years of the unexpired period of the lease at the date the amount was so paid."

In the year 1921 an agreement was made between the taxpayer and one Musgrove for the purchase by the taxpayer from Musgrove of all his estate and interest in certain sub-leases which he had acquired. This agreement contained the following, among other provisions, namely, " (2) Part of the consideration for the said sale shall be the sum of £170,000 which shall be paid and satisfied by the allotment to the vendor or his nominees of 170,000 fully paid-up shares in the Company of £1 each ; (3) as the residue of the consideration for the said sale the Company will observe and perform all the terms and conditions in the said agreement contained and on the part of the vendor to be observed and will keep the vendor indemnified against all actions claims demands and expenses which he may incur or sustain under or on account or by virtue of the said agreement or any non-observance thereof." This agreement was carried into execution by the transfer of the leases to the taxpayer and the allotment to the vendor of 170,000 shares in the Company issued as fully paid-up. It is common ground that the premises comprised in the leases were used for the production of income. The first question for decision is whether the transaction which consisted of the agreement above referred to, the transfer of the leases and the allotment of the shares, constituted a payment of £170,000 within the meaning of the proviso to sec. 25 (*i*) of the Act. In order to answer this question it is necessary to determine what was the true consideration for the sale and transfer of the leases—was it £170,000 or was it 170,000 shares in the Company of a nominal value of £1 each fully paid up. On this question the decision of the Court in *The Crown* v. *Bullfinch Pty. (W.A.) Ltd.* (1) is directly in point. In that case the question at issue was as to the

(1) (1912) 15 C.L.R. 443.

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amount of stamp duty payable on a transfer of certain mining leases. The consideration stated in the agreement for sale was £400,000 whereof the sum of £300,000 was to be paid and satisfied by the issue of 300,000 fully paid-up shares in the capital of the company and £100,000 in cash on the completion of the transfer. The Court held that the consideration for the sale was £400,000 and not shares in whole or in part. *Higgins* J. said (1):—"It is true that as to £300,000, part of the consideration, the vendors were to be paid and satisfied by the allotment and issue of 300,000 fully paid-up shares of £1 in the capital of the company; and that as to the balance, £100,000, which was to be paid in cash on completion of the transfer of the leases, the vendors were to apply for 100,000 shares and pay for them on application in full. But these collateral stipulations are quite consistent with the consideration being, in truth and in fact, as expressed, a money price, £400,000. Shares cannot be issued at a discount; the capital, which they represent, has to be paid for in money or in kind; and in this case, it has to be paid in money—the money which was to come to the vendors for the leases." In that case, as in this, there was nothing to show that the consideration as stated in the agreement was fictitious or merely colourable. The contract in the present case was in substance that the Company should pay the vendor £170,000 as purchase-money of the leases and that the vendor should pay to the Company £170,000 in payment of £1 each on 170,000 shares in the Company to be issued to him as fully paid up. The transaction was carried out by appropriating the £170,000 payable to the vendor by the Company in payment of the £170,000 payable by him to the Company on the shares which he had agreed to accept in satisfaction of the amount payable to him as consideration for the sale of the leases. The £170,000 stated in the agreement as the consideration for the sale of the leases was paid by the Company by agreed set-off against the amount payable by the vendor on the shares allotted to him. That discharge of an obligation by set-off operates as payment, and even as payment in cash, is clear from the decision in *Spargo's Case* (2). In my opinion the facts agreed on in this case show that the taxpayer paid £170,000 for the transfer to it of the

(1) (1912) 15 C.L.R., at p. 450. (2) (1873) L.R. 8 Ch. 407.

leases in question, and that it is therefore entitled to the allowance of £17,000 which it has claimed, the unexpired period of each lease at the date of payment being ten years. In this view of the case it is not necessary to express an opinion on the other questions discussed during the argument.

ISAACS J. This case has been twice argued, but without convincing me on either occasion that there is the least substance in the taxpayer's contentions. Those contentions may be conveniently reduced to two: first, that *Spargo's Case* (1) applies, whereby it must be taken in law that £170,000 in cash was paid by the Company; next, failing the first, that the value of £170,000, being the agreed value or the nominal value of the shares, must be conclusively assumed to be their true value, or, what comes practically to the same thing, must be accepted by the Commissioner or Board as prima facie their true value, leaving the Commissioner, if he can, to prove the contrary. The first point is distinctly and directly covered by consistent authority of the most eminent character. The second is supported by no statutory provision or relevant authority, is opposed to the very essence of the income tax legislation, and particularly to the provisions of the proviso under which the claim is made, and appears to me to be unjust to the general body of taxpayers.

The material facts are easily compressible. Mr. Musgrove promoted a company with a nominal capital of £250,000 in 250,000 shares of £1 each, and he assigned to the Company certain leases having ten years to run, for a consideration, part of which is stated to be £170,000, to be paid and satisfied by the allotment to him or his nominees of 170,000 fully paid-up shares in the Company, which he duly received. With the exception of two other shares, these are the only shares issued. The Company claims as a right under the proviso to sub-sec. (*i*) of sec. 25 of the *Income Tax Assessment Act* 1922-1925 a deduction of £17,000 for the relevant financial year, and rests on the two contentions I have stated.

1. *Spargo's Case.*—Nothing could be more distinct than *Spargo's Case* (1) and the present case. In *Spargo's Case* the shareholder

(1) (1873) L.R. 8 Ch. 407.

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subscribed for *contributing* shares, and owed the company the whole subscription money, which could have been sued for. On the other hand, the company by an independent agreement bought his property and owed him the price in cash as a debt. The Court allowed the *two pecuniary debts* to be set against each other, and each debt was paid in cash without the form of passing the money backwards and forwards. That is the way also in which the Privy Council viewed the matter in *Larocque's Case* (1), namely, the existence of two independent agreements, each creating a liability to pay presently in cash. Such an agreement as the present, said Lord *Macnaghten*, he regarded as contravening a statute requiring shares to be paid for in cash. That pronouncement, which in itself is sufficient to exclude *Spargo's Case* (2), is only the recognition of a very distinct series of decisions dating back sixty years. In 1879 *In re Government Security Fire Insurance Co.—White's Case* (3) was decided by *James*, *Brett* and *Cotton* L.JJ., which, if sound law, leaves, as to both contentions, no loophole of escape in the present case. There a newspaper proprietor did work for a company, and made a money claim against the company in respect of part of which, £30, they issued to him by agreement six fully paid-up shares of £5 each. No contract was filed under sec. 25 of the Act of 1867, so that it became a question of whether in law there had been *a cash payment* for the shares. It would be impossible, I think, to find a case more directly in point, or more decisive. *James* L.J. said (4):—"The bargain was that Mr. White should accept payment in shares, and *must not look for cash*. Therefore there never was that money demand which was capable of being, I do not say set off in the ordinary legal sense, but set off by the parties meeting and agreeing to put debt against debt. That being so, it seems to me utterly impossible to bring the case within *Spargo's Case*." *Brett* L.J. said (5):—"Now he has not actually paid for these shares in cash. He did not take any money out of his pocket in cash and pay for these shares. The only question, therefore, is whether there has been a transaction which is equivalent to a payment in cash in point of law." Then (6), having examined the contract and found that

(1) (1897) A.C., at p. 364.
(2) (1873) L.R. 8 Ch. 407.
(3) (1879) 12 Ch. D. 511.
(4) (1879) 12 Ch. D., at p. 515.
(5) (1879) 12 Ch. D., at p. 516.
(6) (1879) 12 Ch. D., at p. 518.

on its fair construction White was to be paid in shares and shares only, he says (1) :—" For a breach of the agreement on the part of the company the action would not be for a money demand at all, the action would be for a breach of the agreement to deliver shares, and on a non-delivery of shares the damages would be *the value of the shares.*" Therefore in his opinion *Spargo's Case* (2) was inapplicable. *Cotton* L.J. said (3) that the matter had to be dealt with as a matter of substance, and said :—" What in substance was the real contract and agreement between White and the company ; the only point which is material being this, *whether or no . . . any money ever became due by the company to White. . . . He was to have nothing from the company except fully paid-up shares*, that is to say, the company, wishing to start itself, said to him in substance, ' If you will take fully paid-up shares, shares on which you are to be *subject to no call*, you shall advertise for us, the shares being given to you in consideration of your doing that work.' . . . *He bound himself to accept, as the company were also bound to give, shares*, in consideration of his doing the work." That established that the shareholder owed no debt to the company. Then, on the other side, the learned Lord Justice said there was really no debt of the company to White. I invite attention to the last quoted words of the Lord Justice, and those about to be quoted when we come to the question of value. As if anticipating one main argument in the present case, the learned Lord Justice refers to the money account that was rendered to the company, and he says (4) :—" It was for the purpose of ascertaining what quantity of fully paid-up shares should be allotted to White in the company. It was not, in my opinion, referred to . . . as recognizing the liability on behalf of the company *to pay cash*, but it was merely for the purpose of ascertaining the quantum, as a measure of the number of shares that were to be allotted to this gentleman as fully paid-up shares." So there was no debt by the company either, because the company was *never bound to pay money.*

In *In re Barangah Oil Refining Co.—Arnot's Case* (5), in 1887, another Court of Appeal (*Cotton* L.J., *Bowen* L.J., *Fry* L.J.) had to

(1) (1879) 12 Ch. D., at p. 519.
(2) (1873) L.R. 8 Ch. 407.
(3) (1879) 12 Ch. D., at p. 520.
(4) (1879) 12 Ch. D., at p. 521.
(5) (1887) 36 Ch. D. 702.

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consider a question greatly canvassed in this case, namely, the effect of a promise to pay a *stated sum of money to be paid by paid-up shares.* Referring to what is in fact the doctrine of *Spargo's Case* (1), *Cotton* L.J. said (2):—"In my opinion, it would be wrong to apply that principle to a case where the only transaction which is claimed to amount to a payment in cash is *an agreement to be paid in shares*, which is embodied in the same resolution as that which allots him the sum in respect of which he is to take the shares." *Bowen* L.J. said (3) unless paid-up shares were given the company would not fulfil their contract. *Fry* L.J. said (4): "I think it plain that a mere agreement to give money contemporaneous with an agreement to take shares *cannot be a payment in cash.*" In *In re Rosherville Hotel Co.—Roberts' Case* (5) there was an agreement between vendors to a company and the company, the second clause stating the consideration as £3,000. Clause 4 provided that the £3,000 should be paid £1,000 in cash and £2,000 in fully-paid shares. The shares were allotted. No contract was registered. Held, by *Stirling* J., that the shares had not been paid for in cash. *Spargo's Case* was cited. *White's Case* (6) was acted on. Mr. *Buckley*, of counsel, referred to Lord *Selborne's* decision in *In re New Zealand Kapanga Gold Mining Co.*; *Ex parte Thomas* (7), which was to the effect that in such circumstances the shares were not paid up in cash. In *Credit Co.* v. *Pott* (8) Lord *Selborne* L.C. restated the *Spargo* doctrine. The distinction where independent agreements exist, each resulting in a purely money claim, is at the root of the matter, as shown by *Larocque's Case* (9) already mentioned and the *Barrow-in-Furness &c. Co.'s Case* (10). In the *Johannesburg Hotel Co.'s Case* (11) *Fry* L.J. observed that the contract to take paid-up shares in payment of property does not raise *cross pecuniary debts* which to avoid circuity may be used to extinguish each other mutually, and so work a virtual payment in cash. And the learned Lord Justice said: "A contract to take fully paid-up shares creates a liability to take the shares, but *no liability to pay money, and no debt under any circumstances.*"

(1) (1873) L.R. 8 Ch. 407.
(2) (1887) 36 Ch. D., at p. 706.
(3) (1887) 36 Ch. D., at p. 711.
(4) (1887) 36 Ch. D., at p. 714.
(5) (1890) 2 Megone 60.
(6) (1879) 12 Ch. D. 511.
(7) (1873) L.R. 18 Eq. 17 (n.).
(8) (1880) 6 Q.B.D. 295, at p. 298.
(9) (1897) A.C. 358.
(10) (1880) 14 Ch. D. 400.
(11) (1891) 1 Ch., at p. 132.

Buckley on *Companies* (7th ed., at p. 600, and 8th ed., at pp. 635-636) shows that unless *calls* are due on the shares, the *Spargo* doctrine cannot operate.

During the argument reliance for the taxpayer was placed on *Palmer's Company Precedents*. The reference is adverse. In the 5th ed. (1891), at p. 99, after citing sec. 25 of the Act of 1867, this is said:—"Hence, whenever an agreement provides for the issue of paid-up or partly paid-up shares as the consideration or part of the consideration for property or rights sold or services rendered to the company, the agreement should be duly filed pursuant to the above section before the shares are allotted, otherwise the allottee will be liable to pay the nominal amount thereof *in cash*." The form 15 at p. 113 undoubtedly contemplates a contract in the form as in *Roberts' Case* (1), but there is appended a cautionary note as to registering the contract, and referring back to p. 99, a note scarcely necessary. The quotation from p. 99 is repeated at p. 130 of the 6th ed., the last before the repeal of the 25th section of the Act of 1867, and at pp. 134-135 the cases I have cited up to 1895 are mentioned, with others to the same effect. There is nothing contrary to this in the *Bullfinch Case* (2). I cannot there find any statement that the consideration was payable or was paid "in cash," or that a pecuniary liability or debt was created. *Spargo's Case* (3) was never mentioned, nor had the Court any concern with what we are considering here. What was held, rightly or wrongly, was that the *amount* of the consideration was for the purposes of the particular Act to be taken at the agreed amount, £400,000. Two members of the Court, *Griffith* C.J. and *Barton* J., based their decision avowedly (4), not on the cash price mentioned, but on the nominal value of the shares being taken conclusively as their value. I am not concerned with the accuracy of that decision as applied to its circumstances, for in my opinion it has no relation to the point we have to consider. I am not at present prepared to assent to it. If it is in conflict with the cases I have cited, it is certainly erroneous, and sitting here it would be our duty to say so. I leave that case out of consideration for present purposes.

(1) (1890) 2 Megone 60.
(2) (1912) 15 C.L.R. 443.
(3) (1873) L.R. 8 Ch. 407.
(4) (1912) 15 C.L.R., at pp. 447, 449.

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2. *Money or Money's-worth.—Spargo's Case* (1) being inapplicable for the reason that *no debt on either side* existed, it follows that the only property in fact and in law given for the assignment of the leases was shares in the Company. In addition to the facts set out in the transcript, the full text of the agreement, copies of which were handed up to the Court during the argument, discloses another clause of some materiality as confirming the view I take of the facts as stated. Clause 4 says:—"The purchase shall be completed on or before the thirteenth day of April 1921 when the Company shall allot and issue fully paid-up the said 170,000 shares to the vendor his executors administrators or assigns or as he or they shall direct. Upon the allotment aforesaid being made and from time to time thereafter the vendor" &c. "shall . . . execute . . . such transfers" &c. Not a word of obligation as to £170,000, but solely as to 170,000 shares. Plainly, the consideration was both in law and in the actual contemplation of the parties, the shares and not the money. The Commissioner contends at the threshold that such a transaction is outside the proviso, since the words "amount" and "paid" and "sum" connote money.

The question is not free from doubt. But on the whole I apply to this branch of the case the "substance" doctrine of *Spargo's Case* (1), and other cases such as *Pott's Case* (2). *Spargo's Case*, as Lord *Cozens-Hardy* said in *Parsons* v. *Equitable Investment Co.* (3), is only an illustration of a principle. That is, I treat as "money" whatever was the amount of money that it is considered could on the day of the "payment" have been realized by selling the shares. That and that alone can be the "money's-worth" that was then given. In that sense only I agree with the case of *Sampson* v. *Commissioner of Taxation* (4). And that is obviously the sense in which the Supreme Court understood the matter, for there the Court was careful to note that *the actual value of the shares was proved as at the date of allotment to be the same as their nominal value*. If no one, not even the respondent, would have given £170,000 cash for the shares as a business proposition on that day, then that "amount" was not paid. *Rigby* L.J. in *McIlquham* v.

(1) (1873) L.R. 8 Ch. 407.
(2) (1880) 6 Q.B.D. 295.
(3) (1916) 2 Ch. 527, at p. 530.
(4) (1926) 26 S.R. (N.S.W.) 437.

Taylor (1) said:—" What does 'worth' mean? It means worth in the sense of the real value to be ascertained in some manner. There can be no difficulty in ascertaining it; *it does not mean nominal value.* A thing may be of the nominal value of £100,000, or, as in this case, £1,000, and yet not be worth a farthing." The learned Lord Justice was there speaking of shares in a company.

3. *Value of Shares.*—With respect to the conclusiveness of the agreed value of the shares, or their nominal value, the Crown cannot, as I conceive, even apart from any special statutory provision, be for a moment bound by some arbitrary value, however honest it be, for mistaken it may still be, that parties for their own inscrutable purposes choose to affix to property. Still less, when in a case like the present a man simply declares for himself and for his own purposes, there being no bargaining whatever. In this case, instead of £170,000 the figure might as well have been doubled, and would then have had more efficacy in the taxpayer's favour. *Hunter* v. *The King* (2) is a clear authority based merely on general principles that where income tax deductions are claimed, the reality and not the conventions of the parties must prevail. Payment as between them is not necessarily payment where the Crown revenue is concerned. See particularly per Lord *Robertson* and Lord *Lindley*. There is the strongest inherent reason for not permitting any but actual and real deductions in income tax assessments, and for requiring when disputed that the taxpayer claiming them, and alone in a position to do it, should give the necessary proofs. Especially is that so when the claim is for an exceptional immunity, as in the present case. Whether what is given in payment is money or money's-worth, its *true value*, and not its alleged value, is all that the taxpayer can rightfully claim as a deduction under this proviso. I discard all theories and fictions and rules laid down in cases for quite other purposes having no real relevancy to the purpose of this proviso. I regard it as a plain business question, which the Commissioner or the Board, as the case may be, has almost in the very words of the proviso to consider, namely: How much money in coin, or in a form then convertible into coin, has it been proved to his or their satisfaction that the taxpayer actually gave for the

(1) (1895) 1 Ch. 53, at p. 64. (2) (1904) A.C. 161.

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assignment of leases ? Company cases of the type of *In re Wragg Ltd.* (1) may be at once put aside as altogether irrelevant. In the first place, the agreed value of what is accepted by the company in payment of shares is upheld only " as between the company and its shareholders." See per Lord *Cairns* L.C. in *Burkinshaw* v. *Nicolls* (2). Creditors have no greater right to complain than the company (*In re Baglan Hall Colliery Co.* (3)). It is a mere question of considering as between the parties whether the contract was *intra vires* the company.

In the next place, the type of cases referred to is concerned only with the value of what the company has *received* for its shares, and not the value of what the company has *given*, namely, the shares themselves. In other words, the question here is, " What has the taxpayer given out of his resources ? " The Company might be on the verge of insolvency, still its shares, if issued, would have to be paid for to comply with the Companies Acts. Their *value*, however, when fully paid for, might be less than nil. Cases where the Crown claims taxation of shares on a value exceeding their nominal value are not in point. The party maintaining the affirmative must prove it, but he cannot prove it by manufacturing his own evidence. The cases relied on are altogether out of place in the present connection. It is plain, from what *Cotton* L.J. said in *White's Case* (4), that when the terms of this contract are considered we cannot either in solid fact or in law take the £170,000 as the real consideration for this purpose. That sum fulfilled its purpose as the " quantum " of the shares. The shares were the " consideration." Clauses 2 and 4 of the contract, read together, leave no doubt of that. Therefore it would be wrong in any event and looking at the matter broadly, and even were there no controlling words in the proviso itself, to presuppose, as a matter of law, either conclusively or prima facie, that the value of £170,000 was paid. Whether it was or not depends entirely on whether the shares were actually worth that sum.

There is, however, a third and overriding reason. Putting aside all artificial expedients and all doctrines adopted for quite other

(1) (1897) 1 Ch. 796.
(2) (1878) 3 App. Cas., at p. 1016.
(3) (1870) L.R. 5 Ch. 346, at p. 357.
(4) (1879) 12 Ch. D. 511.

purposes, we have to come to the one true source of information and guidance, the Act itself. Sec. 23 takes the whole assessable income as a basis, and then directs deductions of losses and outgoings in producing that income, but excludes capital outgoings. Sometimes deductions specified are directly described. Others are either left to the judgment of the Commissioner or are dependent on his being satisfied of some circumstance. Sec. 24 allows a special deduction. But sec. 25 is a negative section. It forbids certain matters being allowed as deductions "in any case." So far, the prohibition is absolute. There are, however, as to some of those matters, one possible relaxation, and one only. That is, where something is established to "the satisfaction of the Commissioner" he "may" allow a deduction. Now, one of the items expressly prohibited by sec. 25 as a deduction is "(*i*) any wastage or depreciation of lease or in respect of any loss occasioned by the expiration of any lease." Then comes the permitted relaxation by way of proviso. The only relevant deduction possible is one that "the Commissioner *may* allow as a deduction," namely, the stated annual proportion of "*an amount* for the assignment or transfer of a lease of premises . . . used for the production of income." But the express condition on which the Legislature has insisted before such a deduction is even permissible is that "it is *proved to the satisfaction of the Commissioner* that" the taxpayer "*has paid*" the "*amount.*" Then and then only is the Commissioner at liberty to allow a deduction, which is by dividing "the sum so paid" &c. How in the face of that very explicit language any Court can compel the Commissioner or the Board to be *satisfied* in such circumstances as we have here, passes my comprehension. "Proved" and "satisfaction" are not used technically, but with reference to administration. The proof which the Commissioner or the Board is to require is such as an ordinary fair-minded and prudent man holding a position of public trust in relation to the Treasury would require. The "satisfaction" is such a degree of assurance or conviction that he would desire to reach after the examination of the proof offered, as would lead him to act upon it as true if his own interests were at stake. If he would not be satisfied, supposing his own interests were involved, he would not fulfil his public trust if he

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were to cast the burden on the Treasury. Would any such fair-minded and just man in his own affairs accept mining scrip at its face value without more? or the scrip of some unknown trading company? Would he in such a case say, "Until the contrary is proved I will act on these shares being worth their nominal value"? Certainly not. To come a little closer, would such a man, taking up the contract and scrip in this case, and without more, for that is the proposition, that is, without any reliable information as to the value of the property, or the property of the Company, be content in his own affairs to accept the shares and set off £17,000 a year against them? Would a banker, or any other prudent man? Assuming the man or the banker to be sane, I should unhesitatingly answer in the negative. Such blind trust—for what is here euphemistically called prima facie value is nothing else—is not what the proviso means by "proved to the satisfaction," &c., and, in my opinion, would work a great wrong to the Commonwealth. In truth, the office of the proviso is not far to seek. A premium for a lease, or the price of the assignment of a lease, was not previously allowable as a deduction at all, because it was regarded as a capital outlay (sec. 23 (1) (*a*); *Watney & Co.* v. *Musgrave* (1); *Gillatt & Watts* v. *Colquhoun* (2); *Inland Revenue* v. *Strump* (3)). It was well known that sometimes injustice was done. The line between capital and revenue expenditure in such a case is often very fine. No rigid rule can discriminate, and I agree with what Lord *Cullen* and Lord *Sands* said in *Strump's Case*, that a payment of a premium for a lease may be substantially a capital or substantially a revenue outlay. The purchaser of a hotel lease with ten years to run and carrying a rental of £40 a week, might pay £10,000 for the assignment as a capital outlay, or at all events for some reason beyond the rental value. If, however, the true rental value was then £60 a week, the price might well be regarded as a revenue expenditure. There is no doubt the proviso was intended to meet the difficulty in some way. Whether it does that so flexibly as to enable the Commissioner to distinguish between true capital and true revenue outlay, I need not now consider. That may well receive further consideration by the Legislature.

(1) (1880) 5 Ex. D. 241; 1 Tax Cas. 272.

(2) (1884) 2 Tax Cas. 76.

(3) (1925) S.L.T. 487.

But certain points are beyond any possibility of doubt. First, the proviso is an exception to two positive prohibitions, one in sec. 23 and the other in sec. 25. Next, it is couched in permissive terms only, the word " may " being used in marked contrast to " shall " used elsewhere. And most of all, the Legislature, as an essential condition precedent to even the permission given to the Commissioner to allow a deduction, has required the applicant for the deduction to *prove* to the Commissioner's " satisfaction " that the " amount " has been paid. *Amount* must mean a pecuniary amount: it sounds in money. Scrip may be most elegantly printed, but it may be as valuable as a French assignat or a certificate of a share in a paper gold-mine. If the Commissioner or the Board in this case, on mere presentation of the contract and the scrip, decline to be " satisfied " without some affirmative evidence that the scrip was worth in cash £170,000, what right has this Court to say " You must be satisfied, unless the contrary is shown " ? The true position is that Parliament has placed reliance in the first instance on the Commissioner, and finally on the Board, in respect of business judgment and practical experience, and has therefore made the administrative " satisfaction " the test of whether any deduction may be allowed.

As to substantive law, provision is made for the assistance of this Court, but to require the substitution of legal practice for administrative methods based on practical experience is, in my opinion, a usurpation of function, as well as an error of law. What criterion of real value is a mere statement in printer's ink when third parties are concerned ? A theatrical venture like the one before us may have all the potentialities of good fortune, or may from its birth be on the road to liquidation. Shares in such a venture are not like Commonwealth Bank notes; they are not money; and before permitting them to be taken as money, corresponding with the actual money income against which they are to be set in arriving at the assessment of taxable income, the Act requires the taxpayer to " prove " the true " amount," i.e., of money. How is it possible to work the Act otherwise ? Suppose, for instance, Jones, carrying on a more or less hazardous business, is making a net taxable profit of £10,000 a year. He looks ahead,

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and, perhaps for the purpose of "walking outside" the Probate and Estate Duties Acts, floats a company of £250,000 nominal capital in 250,000 shares of £1 each. He assigns his lease having ten years currency to the company for a stated sum of £100,000, to be paid and satisfied by 100,000 shares of £1 each paid up. All the rest of the shares except six are unissued, the six being issued to his nominees. If the present taxpayer's contention is correct, then instead of contributing to the revenue on an income of £10,000 a year, he almost necessarily contributes nothing, because the income is in law obliterated by the deduction, unless the Commissioner can succeed in either proving some fraud or undervalue. I say "he," because that is the substantial truth. Except for a few formalities, all goes on as before. Not a penny piece has passed. True, the name has changed from "Jones" to "Jones Limited," and Jones, instead of "owner," is "governing director," and though the tree in law belongs to Jones Limited, the fruit is plucked by Jones. Other persons receiving a more humble income have to contribute to the general expenses of the community, and all the more if Jones goes free. Is the Commissioner compelled to accept without question the value assigned to the shares by Jones—because we know the company in that respect is only a *nominis umbra*—or, what may be practically the same thing, is he compelled to admit it unless he can prove to a tribunal all the ramifications of the business in order to show the real value is less? Of course, the genuineness of the assignment is not in question (*Salomon* v. *Salomon & Co.* (1)), and there is nothing illegal in walking outside Acts of Parliament (*Levene* v. *Commissioners of Inland Revenue* (2)). No one suggests the undoing of the bargain. It stands intact and unchallenged as between the parties just as they made it.

Any taxpayer, even in an ordinary case, alleging either to the Board or to the Court that the Commissioner's assessment is wrong, must prove the error. Sec. 39 says so. And common sense dictates the same thing—since the taxpayer knows, or ought to know, more about the matter than the Commissioner or the Board can possibly know, even after questioning the taxpayer. For instance, how can the Commissioner in this case go back to 1921 and collect evidence

(1) (1897) A.C. 22. (2) (1928) A.C. 217, at p. 227.

as to the business chances of the theatrical enterprise launched by Musgrove, as to the artists here and abroad, the pieces, the copyrights, the salaries, and all the thousand speculative elements that entered into the venture at that time, and then give evidence as to the pecuniary value of shares not in the market and not publicly issued. In the case, say, of a proprietary company, shares are never on the market. It seems to me, even apart from the very special wording of the proviso, much more consonant with justice that if the Company and Musgrove really appraised the shares on a business value footing, at anywhere near their nominal value, the Company, or Musgrove, is the party to give some information of the process and the facts on which it was based, to be checked by the Department as best it can.

Otherwise, the Act will prove unworkable, through technicalities. It is common knowledge that the *raison d'être* of the Board was to get free from technicalities and to rely on business methods and experience. The Board should, in my opinion, simply be told that the value of the shares for present purposes is what was their real value when contracted for, or allotted; that they should ascertain this value as best they can, by their own methods, in a fair business way as business men would do it, free from all technical legal rules. And they might be told, as is the case, that, if they thought fit, they would do nothing contrary to law in looking to the taxpayer as the person having all available means of knowledge to satisfy them that the real value of the shares was the sum of £170,000 in cash that the taxpayer alleges and claims to deduct from the income on which it otherwise is bound to pay income tax in common with the rest of the community.

I therefore cannot agree with the result arrived at.

RICH J. This is a reference from a Board of Review in purported pursuance of the amendment introduced into the *Income Tax Assessment Act* 1922-1927 by sec. 22 of Act No. 32 of 1927. The amended assessment before the Board of Review was made in respect of the financial year 1926-1927. In view of sub-sec. 3 of sec. 32 of the Act of 1927 there may be some doubt whether the Board had power to make the reference in respect of an assessment

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of that year. But as the parties did not themselves raise the question and as they have now agreed that the matter may be treated as an appeal from the Board of Review or the Commissioner, I do not feel called upon to consider it. The taxpayer complains that the Commissioner has disallowed a deduction of £17,000 claimed pursuant to sec. 25 (*i*) of the *Income Tax Assessment Act* 1922-1925. This sum was arrived at by dividing an amount of £170,000, which the taxpayer claims to have paid as part of the consideration for an assignment of sub-leases, by the number of years of the unexpired period of the sub-leases at the date at which the consideration for their assignment was given. They were acquired by an agreement made between the vendor and a person who contracted for and on behalf of the taxpayer, by which it was agreed that the vendor "should sell and the taxpayer should purchase all the estate and interest of the vendor in the said sub-leases, and it was further agreed as follows:—(2) Part of the consideration for the said sale shall be the sum of one hundred and seventy thousand pounds which shall be paid and satisfied by the allotment to the vendor or his nominees of one hundred and seventy thousand fully paid-up shares in the Company of one pound each." The agreement was duly adopted by the Company and carried into effect, and the 170,000 fully paid shares of £1 each in the taxpayer were allotted to the vendor. The question, following the language of the proviso of sec. 25 (*i*), is whether the taxpayer in this transaction has paid any and what amount for the assignment or transfer of a lease (it being assumed that the sub-leases were of premises used for the production of income). The transaction is of an ordinary character, and represents a customary method by which a company acquires assets by the use of its share capital. In a well-known passage in *Ooregum Gold Mining Co. of India* v. *Roper* (1) Lord *Watson* described the legal character of such a transaction. He said:—"A company is free to contract with an applicant for its shares; and when he pays in cash the nominal amount of the shares allotted to him, the company may at once return the money in satisfaction of its legal indebtedness for goods supplied or services rendered by him. That circuitous process is not essential. It has been decided that, under

(1) (1892) A.C., at pp. 136, 137.

the Act of 1862, shares may be lawfully issued as fully paid-up, for considerations which the company has agreed to accept as representing in money's-worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may over-estimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The Court would doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined."

Sec. 25 of the English *Companies Act* of 1867, which is not part of the Victorian *Companies Act*, provided that every share in a company should be deemed to have been issued and to be held subject to the payment of the whole amount thereof in cash unless a contract in writing filed with the Registrar otherwise determined. In dealing with the question whether such transactions as this involved a payment in cash within the meaning of this provision, *James* L.J. in *Spargo's Case* (1) said:—"In truth, it appeared to me that anything which amounted to what would be in law sufficient evidence to support a plea of payment, would be a payment in cash within the meaning of this provision. . . . In *Fothergill's Case* (2) the bargain in effect was to give paid-up shares in satisfaction of the money which was to be paid for other shares. But if a transaction resulted in this, that there was on the one side a bona fide debt payable in money at once for the purchase of property, and on the other side a bona fide liability to pay money at once on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Fothergill's Case*, and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money

(1) (1873) L.R. 8 Ch., at p. 412. (2) (1873) L.R. 8 Ch. 270.

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being handed over and taken back again; but that if the two demands are set off against each other the shares have been paid for in cash. If it came to this, that there is a debt in money payable immediately by the company to the shareholders, and an equal debt payable immediately by the shareholders to the company, and that each was accepted in full payment of the other, the company could have pleaded payment in an action brought against them, and the shareholder could have pleaded payment in cash in a corresponding action brought by the company against him for calls."

These authorities are conclusive to show that the obligations imposed upon the vendor or his nominee by the allotment of shares to satisfy the full sum of £170,000 was discharged. If the contract imposes upon the Company a liability for the sum of £170,000 which is to be satisfied by the agreed extinguishment of the cross-demand for the sum of £170,000 (the consideration for the assignment of the sub-leases), not only is the discharge properly called a payment but it also answers to the description of the statute of payment in cash. It is true that in the *Ooregum Co.'s Case* (1) Lord *Halsbury* regretted that it should have been considered a payment in cash, but he had no doubt that it was a payment, and the other Lords seem to have had no qualms as to the authorities which treated it as a payment in cash. The Privy Council in *Larocque* v. *Beauchemin* (2) fully approved of the passage cited. (See also *North Sydney Investment and Tramway Co.* v. *Higgins* (3).) It is not clear, however, that the contract should be interpreted as imposing an immediate obligation upon the Company to pay £170,000 and then providing for a mode of satisfying this liability. Similar, although not identical, provisions in other contracts have been interpreted as imposing upon the Company, not a money liability, but an obligation to satisfy a money sum by the issue of shares. (See *In re Rosherville Hotel Co.* (4) and *In re Gibson Little & Co.*; *Ex parte James and Bewley* (5).) But this interpretation would only mean that the transaction did not satisfy the expression payment in cash. The discharge of the sum of £170,000 would nevertheless, in my opinion, satisfy the expression " paid . . . an amount " in sec. 25 (*i*) of the

(1) (1892) A.C., at p. 134.
(2) (1897) A.C., at pp. 365-366.
(3) (1899) A.C., at p. 273.
(4) (1890) 2 Megone 60.
(5) (1880) 5 L.R. Ir. 139, at pp. 155-156.

Income Tax Assessment Act 1922-1925. Many cases can be cited from other branches of the law which show that it is a payment. Two interesting cases arising from the old law, which did not allow of variance in pleadings, are well stated in *Selwyn's Nisi Prius*, 11th ed., at p. 656 :—" The plaintiff declared *in assumpsit* (*Brown* v. *Fry* (1)) that in consideration that the plaintiff had bought of the defendant a horse for so much money, the defendant warranted the horse to be sound. In proof of the plaintiff's case a receipt, which had been given by the defendant, was produced, purporting to be a receipt of so much money, for a horse warranted sound. On cross-examination of the witness who produced the receipt, it appeared, that the plaintiff had given a mare as well as a sum of money in exchange for defendant's horse. It was objected, that there was a variance ; but *Graham* B., was of a different opinion, observing, that the receipt admitted that the defendant had taken the mare as money. So where the declaration stated (*Hands* v. *Burton* (2), recognized in *Saxty* v. *Wilkin* (3)) that in consideration that the plaintiff would buy of the defendant a horse for £31 10s., to be paid by the plaintiff to the defendant, the defendant promised that the horse was sound ; and that the plaintiff did buy of the defendant the horse for that price, and did pay to the defendant the said £31 10s., and then alleged as a breach that the horse was unsound ; it appeared in the proof, that the defendant agreed to dispose of his horse, which he warranted sound, to the plaintiff, for thirty guineas, but agreed, at the same time, that if the plaintiff would take the horse at that value, he, the defendant, would purchase of the plaintiff's brother another horse for fourteen guineas, and that the difference only should be paid to the defendant. The witness described it as *one deal* between the parties, and that, but for the latter consideration, he did not believe that the bargain would have been made. It was, therefore, objected, that the proof varied from the contract as laid, and showed rather a contract for the exchange of horses, paying the difference only in money, than an entire money payment for the horse in question. But the Court overruled the objection ; Lord *Ellenborough* C.J. observing,

(1) Devon. Summ. Ass. 1808, MS. (2) (1808) 9 East 349.
(3) (1843) 11 M. & W. 622.

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that the parties agreed to consider the brother's horse as fourteen guineas, in their mode of reckoning the payment for the defendant's horse; but still the consideration for the latter was thirty guineas, and the defendant received thirty guineas in money and value." In *Hart* v. *Nash* (1) and *Hooper* v. *Stephens* (2) it was decided that, if the goods are accepted as payment or *anything is received upon agreement* in reduction of a debt, that is a payment sufficient to take a debt out of the *Statute of Limitations*; and so too *Halsbury*, vol. 7, p. 444, says: "Payment need not necessarily be made in money; thus, the delivery of goods which are taken by the creditor in satisfaction of the debt is equivalent to payment (*Hands* v. *Burton* (3); *Saxty* v. *Wilkin* (4); *Smith* v. *Battams* (5)); and a settlement of accounts by which items on one side are agreed to be set off against items on the other side amounts to payment of the sums stated in the account." (See also *Wilkins* v. *Casey* (6), followed in *Cannan* v. *Wood* (7); *Maillard* v. *Duke of Argyle* (8), cited in *Australian Mercantile Land and Finance Co.* v. *Federal Commissioner of Taxation* (9).)

For these reasons I am of opinion that the Company paid within the legal meaning of that expression an amount of £170,000 for the assignment of the sub-leases.

Sec. 25 (*i*) of the *Income Tax Assessment Act* 1922-1925 is concerned with what the taxpayer has paid, not with what he ought to have paid. In this case the taxpayer is a company, and in all its accounts it must be taken to have expended £170,000 out of its share capital in the acquisition of the sub-leases. If it can be shown that the directors have in breach of the Company Law accepted an asset of less value than this in discharge of this contribution of capital, they can be dealt with and the Company recouped, but until this is done it seems no concern of the Commissioner unless the transaction was devised to avoid tax. But if this were the case the Commissioner could disregard the transaction by availing himself of the provisions of sec. 93 of the *Income Tax Assessment Act*. It is

(1) (1835) 2 C. M. & R. 337.
(2) (1835) 4 A. & E. 71.
(3) (1808) 9 East 349.
(4) (1843) 11 M. & W. 622.
(5) (1857) 26 L.J. Ex. 232.
(6) (1798) 7 T.R. 711.
(7) (1837) 2 M. & W. 465.
(8) (1843) 6 Man. & G. 40, at p. 45.
(9) (1929) 42 C.L.R., at p. 150.

right, however, to point out that " where shares have been issued as paid up, upon the footing that certain specified property shall be accepted by the company as the consideration for such issue, the Court will not, whilst the contract stands, inquire as to the value of the consideration, even at the instance of a liquidator " (*Palmer's Company Precedents*, 12th ed., part I., and cases cited, pp. 58-59). I therefore am of opinion that the allotment to the said Musgrove of 170,000 fully paid-up shares in the taxpayer Company of £1 each in pursuance of the said agreement was a " payment " of a " fine " &c. " for the assignment " &c. " of a lease " within the meaning of sec. 25 (*i*) of the *Income Tax Assessment Act* 1922-1925.

This answers the first question.

I adhere to the view which I expressed in *Australian Mercantile Land and Finance Co.* v. *Federal Commissioner of Taxation* (1) that " The satisfaction of a definite pecuniary sum due to the assignee of the lease seems to me fairly to come within the meaning of the words ' payment of the amount ' used in par. (*i*) of sec. 25." I must not be taken as deciding that in sec. 25 (*i*) of the *Income Tax Assessment Act* payment has no wider meaning than this. Before such a conclusion is arrived at, it will be necessary to consider various sections in the Act relating to money and payments possibly in a loose sense.

The second question appears to inquire whether the taxpayer has thrown upon him the burden of " demonstrating " what the market value of the shares was. In the view I have taken, the answer is of course No.

My answer to the third question is that the paid-up value of the shares is the measure of the amount of the payment.

STARKE J. This is a reference by a Board of Review to this Court of certain questions of law arising upon the proviso to sec. 25 (*i*) of the *Income Tax Assessment Act* 1922-1925. That sub-section enacts that a deduction shall not be made in respect of any wastage or depreciation of lease or in respect of any loss occasioned by the expiration of any lease; but a proviso is added that " where it is proved to the satisfaction of the Commissioner that any taxpayer

(1) (1929) 42 C.L.R., at p. 150.

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(being . . . the assignee or transferee of a lease) has paid . . . *an amount* for the assignment or transfer of a lease of premises . . . used for the production of income, the Commissioner may allow as a deduction, for the purpose of arriving at the income, the amount obtained by dividing the sum so paid by the number of years of the unexpired period of the lease at the date the amount was so paid," &c. Upon its true interpretation, this section does not, I think, require that the payment should be in money; it is sufficient if money's-worth be given. This view accords with the reasoning of *Street* C.J. upon a somewhat similar section in *Sampson* v. *Commissioner of Taxation* (1), which I adopt.

Turning to the facts, and omitting immaterial steps, we find that one Musgrove sold to the taxpayer certain sub-leases of Tivoli Theatres in consideration of (*inter alia*) £170,000, to be paid and satisfied by the allotment to the vendor of 170,000 fully paid-up shares in the Company of £1 each. The consideration for the sale was (*inter alia*) £170,000, and not fully paid shares: it was paid or satisfied in shares. If the transaction were one of business, and honest—not colourable, unreal or illusory—then the sum of £170,000 has been paid and satisfied by the issue of fully paid-up shares. Consequently the shares are or must be accepted as of that value unless the Commissioner can establish an illusory, unreal or colourable transaction. (See *In re Heyford Co.—Pell's Case* (2); *In re Baglan Hall Colliery Co.* (3); *In re Wragg Ltd.* (4); *Hong Kong and China Gas Co.* v. *Glen* (5); *The Crown* v. *Bullfinch Pty. (W.A.) Ltd.* (6).)

In my opinion, the questions reserved should be answered as follows:—(1) The amount of money which the parties treated the shares as an equivalent, namely, £170,000, is the amount paid, unless the transaction between the parties be fraudulent or unreal or colourable or illusory. (2) The transferability of the shares need not be demonstrated. The value of the shares is dealt with under question 3. (3) Unless the transaction between the parties be fraudulent or unreal or colourable or illusory (which is a question

(1) (1926) 26 S.R. (N.S.W.) 437.
(2) (1869) L.R. 5 Ch. 11.
(3) (1870) L.R. 5 Ch. 346.
(4) (1897) 1 Ch. 796.
(5) (1914) 1 Ch. 527.
(6) (1912) 15 C.L.R. 443

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for the Board to consider) the amount of money which the parties treated the shares as an equivalent is the amount paid by the taxpayer.

Questions answered as follows:—(1) *Yes.* £170,000 *was paid within the meaning of the Act and satisfied by the allotment of* 170,000 *fully paid-up shares.* (2) *No.* (3) *Prima facie the paid-up value is the measure of the amount of the payment. Costs of reference to High Court to be paid by Commissioner.*

Solicitor for the appellant, *H. M. Lee.*

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

H. D. W.

Appl *Davis* v *Cth* 82 ALR 633 | Cons *Harris & Caladine, In the Marriage of* 97 FLR 224 | Not Foll *Harris* v *Caladine* (1991) 65 ALJR 280 | Cons *Harris* v *Caladine* (1991) 172 CLR 84 | Cons *Russell* v *Russell* (1976) 134 CLR 495 | Cons *Kotsis* v *Kotsis* (1970) 122 CLR 69 | Cons *Bond* v *George A Bond & Co Ltd* (1930) 44 CLR 11 | Cons *Peacock* v *Newtown Marrickville & General Co-op Building Society (No4)* 67 CLR 25 | Appl *Public Prosecutions, Director of (Cth)* v *Bayly* (1994) 126 ALR 290

Appl *Public Prosecutions, Director of (Cth)* v *Bayly (No1)* (1994) 75 ACrimR 549 | Cons *Public Prosecutions, Director of (Cth)* v *Bayly (No1)* (1994) 63 SASR 97 | Refd to *Reid* v *R* [1999] 2 VR 605 | Cons *Reid* v *R* (1999) 152 FLR 26 | Cons/Appl *Beneficial Finance Corp* v *Multiplex Constructions* (1995) 36 NSWLR 510 | Appl *McMahon* v *Queensland* (2000) 158 FLR 458 | Appl *McMahon* v *Queensland* [2002] 1 QdR 195

[... OF AUSTRALIA.]

LE MESURIER . . . . . APPELLANT;
APPLICANT,

AND

CONNOR . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE COURT OF BANKRUPTCY DISTRICT OF WESTERN AUSTRALIA.

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MELBOURNE, *Oct.* 7, 8, 9.

SYDNEY, *Dec.* 10.

Knox C.J., Isaacs, Rich, Starke and Dixon JJ.

Bankruptcy—Constitutional law—Powers of Federal Parliament—Proclamation of Bankruptcy Districts—Duties of Registrars—To be such as the Federal Attorney-General directs—Validity—Courts having jurisdiction in bankruptcy—Power to invest "such State Courts . . . as are specially authorized by Governor-General" —Validity—Purported investiture of State Courts—Power to Court to delegate to Registrar powers of administrative nature—Validity—Purported delegation by three Judges—Powers conferred on Registrar—Validity—Agreement between Commonwealth and States as to State officers acting as Registrars—Appointment