[HIGH COURT OF AUSTRALIA.]

CAMERON . . . . . APPELLANT,

AND

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

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SYDNEY, *April* 2, 9, 21.

Rich A.C.J., Starke, McTiernan and Williams JJ.

Income Tax (Cth.)—Assessable income—Deduction—Company—Mining operations in Australia for gold—Shares—Calls—Instalments of purchase price—Income Tax Assessment Act 1936-1937 (*No.* 27 *of* 1936—*No.* 18 *of* 1937), *sec.* 78 (1) (*d*).

A prospectus inviting applications for shares in a mining company stated that the shares were payable two shillings on application, two shillings on allotment, and the balance in four calls of four shillings each, payable on stated dates. The appellant applied for shares on the terms set out in the prospectus, and shares were allotted to him pursuant thereto. On the day the shares were allotted the board of directors passed a resolution making calls of the four amounts, payable on the dates set out in the prospectus. The appellant made payments accordingly and claimed a deduction from his assessable income in respect of them, pursuant to sec. 78 (1) (*d*) of the *Income Tax Assessment Act* 1936-1937, as for "calls on shares in a mining company . . . carrying on mining operations in Australia." The commissioner disallowed the claim on the ground that the payments were payments of instalments of purchase money, not of calls.

Held that the amounts so paid were calls on shares and were therefore deductible from the assessable income of the appellant.

CASE STATED.

On the hearing of an appeal to the High Court by Allan Cumming Cameron from an assessment made upon him by the Federal Commissioner of Taxation under the *Income Tax Assessment Act* 1936-1937 in respect of income derived by him during the year ended 30th June 1938, at the request of the parties, *McTiernan* J., pursuant

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to sec. 198 of the Act, stated for the opinion of the Full Court a case which was substantially as follows :—

1. On 18th July 1929 Mount Morgan Ltd. (hereinafter called the company) was incorporated under the provisions of the *Companies Act* 1899 (N.S.W.) as a company limited by shares.

2. At all times material to this appeal the company was a mining company carrying on mining operations in Australia for gold, within the meaning of sec. 78 (1) (*d*) of the *Income Tax Assessment Act* 1936-1937.

3. On 20th January 1938 the nominal capital of the company was £350,000 divided into 2,800,000 ordinary shares of two shillings and sixpence each, of which shares the appellant was the registered holder in his own right of 6,887 shares.

4. On 20th January 1938 the company sent to each of its members, including the appellant, the following documents, namely :—(*a*) A circular dated 20th January 1938, recommending to shareholders that an issue be made of 200,000 eight per cent cumulative preference shares, and the reasons therefor. (*b*) A prospectus dated 19th January 1938, which showed that the shares " offered for subscription, subject to the necessary resolutions being passed by the company in general meeting, were 200,000 eight per cent redeemable cumulative preference shares of £1 each at par, payable as to 2s. per share on application, 2s. per share on allotment, and the balance in four calls of 4s. each per share, payable 15th April, 16th May, 15th July, and 15th August 1938, respectively." It also showed that " calls when made may be paid in advance and interest at 8 per cent per annum will accrue from date of payment." (*c*) A printed form of application for redeemable preference shares in which the applicant, after providing for the payment of 2s. per share on application, undertook to pay a further sum of 2s. per share on allotment, and to pay the balance by calls according to the conditions of the prospectus, and agreed to be bound by the memorandum and articles of association of the company. (*d*) A notice dated 20th January 1938, convening an extraordinary general meeting of the company to be held on 15th February 1938. In the notice were set forth terms of resolutions proposed to be put to the meeting as special resolutions for the purpose of conferring power upon the company to issue preference shares redeemable out of profits or otherwise as provided by sec. 149 of the *Companies Act* 1936 (N.S.W.); authorizing the increasing of the capital of the company by £200,000, by the creation of 200,000 new redeemable preference shares; authorizing that such redeemable preference shares be issued with

certain specified rights and privileges and be redeemed as therein provided.

5. On 15th February 1938 the extraordinary general meeting convened by the said notice was duly held and the proposed resolutions set forth in the notice were duly passed as special resolutions.

6. On or about 15th February 1938 the company received from the appellant an application for 10,000 eight per cent redeemable cumulative preference shares of £1 each, together with appellant's cheque for £1,000, being 2s. per share payable on application, and on or about 25th February 1938 the company received from the appellant an application for 8,000 of the same class of shares, together with appellant's cheque for £800, being 2s. per share payable on application.

7. In response to the appellant's applications for an aggregate of 18,000 shares the board of directors of the company allotted to him, on 3rd March 1938, 8,000 eight per cent redeemable cumulative preference shares, and the appellant was duly entered in the register of members of the company as the holder of the 8,000 shares so allotted to him and duly received notices of such allotment.

8. On 3rd March 1938 the board of directors of the company further resolved as follows: "It was resolved that in respect of the 200,000 £1 redeemable preference shares allotted at this meeting the progressive numbers of which are 1 to 200,000 inclusive, four calls of 4s. each per share be made payable to the secretary at the registered office of the company, or in respect of London shareholders to the London agents, Old Broad Street, London, E.C., on the following dates:—4s. per share on 15th April 1938; 4s. per share on 16th May 1938; 4s. per share on 15th July 1938; 4s. per share on 15th August 1938."

9. The appellant duly received from the company notices of such calls and he was informed in the notices that the calls were payable to the secretary at the registered office of the company and that the amounts due from him were £1,600 on 15th April, 16th May, 15th July and 15th August respectively; in all the sum of £6,400.

10. From the £1,800 paid by the appellant to the company as mentioned in par. 6 hereof the company applied £1,600 as payment of 2s. per share on application and 2s. per share on allotment in respect of the 8,000 shares so allotted to the appellant and credited him with the balance, namely £200.

11. On 4th April 1938 the appellant sent to the company and the company duly received on the following day a cheque for £1,400 and a letter which, omitting formal parts, was as follows:—"Referring to the preference shares in Mount Morgan Ltd. allotted

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to me recently (allotment letters No. 349 and 571), you still hold £200 at my credit after paying application and allotment money. Please apply this together with my cheque for £1,400 enclosed (total £1,600) in payment of the first call due by me on the 15th instant and let me have a receipt for the full amount, viz. £1,600, at your convenience. Thanking you in anticipation." The company duly applied the sum of £200 mentioned in par. 10 hereof in accordance with the direction contained in the letter and gave the appellant a receipt for £1,400, " being balance first call on 8,000 redeemable preference shares."

12. On 19th April 1938 the appellant paid to the company and the company accepted the further sum of £1,600 as and for payment in advance of the second sum of 4s. per share payable on 16th May 1938 in respect of the 8,000 shares and the company gave the appellant a receipt for £1,600 " being second call " on 8,000 redeemable preference shares.

13. In his return of income for the twelve months ended 30th June 1938, which was duly lodged with the respondent under the provisions of the *Income Tax Assessment Act* 1936-1937, the appellant claimed a deduction in respect of the sum of £3,200 (being the total of the sums of £1,400 and £200 mentioned in par. 11 hereof and £1,600 mentioned in par. 12 hereof), as being calls paid to a company carrying on mining operations in Australia for gold, within the meaning of sec. 78 (1) (*d*) of the *Income Tax Assessment Act* 1936-1937.

14. On 22nd February 1939 the respondent issued to the appellant a notice of assessment, with adjustment sheet attached. The adjustment sheet showed, *inter alia*, " £3,200 calls (Mount Morgan) disallowed, as it is not considered that the company is mining for gold, etc., within the meaning of the Act."

15. The appellant, being dissatisfied with the assessment, by his agent, duly lodged with the respondent an objection in writing to the assessment dated 8th March 1939, on the ground that the calls were deductible as the company was " definitely a company carrying on mining operations in Australia for gold and base metals as defined in sec. 78 (1) (*d*) of the " Act. The respondent disallowed the objection and by letter dated 29th June 1939 gave the appellant notice of such disallowance.

16. The appellant, being dissatisfied with the aforesaid disallowance of his objection, duly requested the respondent in writing to treat the objection as an appeal and to forward the same to the High Court of Australia. Subsequently the respondent wrote to the appellant a letter dated 14th September 1939, wherein he stated

that "in connection with the disallowance of £3,200 paid to Mount Morgan Ltd. . . . on review it has been noticed that the explanation given in the" previous "adjustment sheet" as set forth in par. 14 hereof "was incorrect"; that it had been decided that the £3,200 was in respect of instalments of the purchase price of shares in Mount Morgan Ltd. which became payable under the terms and conditions stated in the prospectus, and that such instalments were not calls within the meaning of sec. 78 (1) (*d*). The appellant's solicitors replied thereto in a letter stating that the appellant had been advised by counsel that he was entitled to the allowance, and accordingly it was his intention to proceed with the appeal to the High Court.

The following question was reserved for the opinion of the Full Court:—

> Whether in assessing the income tax payable by the appellant in respect of income derived during the year ended 30th June 1938, the respective sums of (*a*) £1,400, (*b*) £200, and (*c*) £1,600, totalling £3,200, mentioned in par. 13 of the case stated, were deductible to the extent allowed by sec. 78 (1) (*d*) of the *Income Tax Assessment Act* 1936-1937 as being calls on shares in a mining company carrying on mining operations in Australia for gold within the meaning of sec. 78 (1) (*d*).

Mitchell K.C. (with him *Kitto*), for the appellant. The payments deducted by the appellant were calls. The form of application for the shares and the prospectus show that the balance after payment of moneys payable on application and allotment was to be paid "by calls." Unless "calls" were made there would not be any obligation on the part of the appellant to pay the balance. It was intended that the balance should be paid as calls and not *ex contractu* for two principal reasons: (*a*) to enable the company to get the benefit of all the provisions in its articles which are incidental to its powers, and (*b*) to encourage application for the shares because of (i) the absence of liability for payment of the balance unless and until calls therefor were made, and (ii) the right under sec. 78 (1) (*d*) of the *Income Tax Assessment Act* to deduct such calls from assessable income. If calls had not been made, the company could not sue the appellant *ex contractu* for the balance (*Campbell* v. *Commissioner of Taxation (Commonwealth)* (1); *Croskey* v. *Bank of Wales* (2); *Alexander* v. *Automatic Telephone Co.* (3)). In *In re Cordova*

(1) (1927) 33 A.L.R. 450.
(2) (1863) 4 Giff. 314, at p. 331 [66 E.R. 726, at p. 733].
(3) (1900) 2 Ch. 56, at pp. 63, 64.

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Union Gold Co. (1) instalments of the purchase price of shares unpaid at the date of the winding up of the company were ordered to be paid by calls. What constitutes a call is shown in *Shaw* v. *Rowley* (2). The balance owed in respect of the shares was payable by calls and not by instalments; therefore the remarks of *Kelly* C.B. in *Hubbersty* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (3), referred to in *Stroud's Judicial Dictionary*, 2nd ed. (1903), vol. I, p. 249, are not applicable; those remarks were *obiter dicta*.

Weston K.C. (with him *Henry*), for the respondent. Any sum of money due under ordinary contract without the machinery of a call is not a call (*Re Port Arthur Waggon Co. Ltd.*; *Tudehope's Case* (4)). The statute does not contain any express reference to the making of a call. A share is taken subject to an inchoate or contingent liability to pay a sum of money. Specific obligations which flow from the initial contract are not obligations redeemable by way of call (*New Good Hope Consolidated Gold Mines* (*N.L.*) v. *Stutterd* (5)). Moneys payable under a contract to become a shareholder by virtue of that contract and that contract alone are not calls (*Lysnar* v. *Mammoth Molybdenite Mines* (*N.L.*) (6); *In re Hartley and Riley Consolidated Gold-Dredging Co. Ltd.* [*No.* 2] (7))—See also *Gore-Browne* on *Joint Stock Companies*, 35th ed. (1924), p. 179, and *Palmer's Company Precedents*, 14th ed. (1931), Part 1, p. 602. The contract is the source of the liability to pay; therefore moneys paid in pursuance of that obligation to pay are instalments and not calls. If a sum of money be due by virtue of a contract to become a member of a company, that sum is not a call, and the cases indicate there are two relevant contracts to be considered, first the contract to become a member constituted by application, allotment and notice of allotment; that contract when executed creates the second contract, which is the contract of membership and, for the most part, the terms and conditions of that contract are found in the articles and, perhaps, in the memorandum of association of the company. Even assuming that the machinery of calls was intended to be used in this case, it was so bargained between the parties and it was further bargained between them that the moneys should be paid, not at the option of the company, but in specified amounts on specified dates; that under the articles the appellant should get either interest or dividend on the paid-up basis, and that he should get exemption

(1) (1891) 2 Ch. 580.
(2) (1847) 16 M. & W. 810 [153 E.R. 1419].
(3) (1867) L.R. 2 Q.B. 471, at p. 473.
(4) (1920) 54 D.L.R. 211, at pp. 216, 218.
(5) (1916) V.L.R. 580.
(6) (1918) N.Z.L.R. 759, at p. 760.
(7) (1933) N.Z.L.R. 336, at p. 346.

from income tax. The directors were not able to exercise the discretionary power conferred by the articles but were bound to demand payment of the specified amounts on the specified dates; therefore there was an obligation to pay moneys by virtue of the contract.

Mitchell K.C., in reply. It was a condition precedent of the obligation to pay calls that the calls should be made. The proper reading of the prospectus is that the balance was to be called up by calls and was not to be payable otherwise than by calls.

Cur. adv. vult.

April 21.

The following written judgments were delivered :—

RICH A.C.J. Mount Morgan Ltd. is duly registered in New South Wales as a company limited by shares. It was at the relevant time a mining company carrying on mining operations in Australia for gold within the meaning of sec. 78 (1) (*d*) of the *Income Tax Assessment Act* 1936-1937. In 1938 the company proposed to increase its capital by the issue of 200,000 eight per cent redeemable cumulative preference shares of £1 each, payable as to two shillings per share on application, two shillings per share on allotment and the balance in four calls of four shillings each per share, payable 15th April, 16th May, 15th July, and 15th August, 1938, respectively. With this object the company sent to its shareholders, of whom the appellant was one, a circular to this effect and also a prospectus dated 19th January 1938, a printed form of application for redeemable shares, and a notice convening an extraordinary general meeting for the purpose of carrying out the increase of capital. The material part of the prospectus states: "Shares now offered for subscription (subject to the necessary resolutions being passed by the company in general meeting) 200,000 eight per cent redeemable cumulative preference shares of £1 each at par, payable as to 2s. per share on application, 2s. per share on allotment and the balance in four calls of 4s. each per share, payable 15th April, 16th May, 15th July, and 15th August, 1938, respectively." It also states that "calls when made may be paid in advance and interest at eight per cent per annum will accrue from date of payment." The application form provides so far as material :— "I hereby apply for.....8 per cent redeemable cumulative preference shares of £1 each in the company in accordance with the terms and conditions as stated in the company's prospectus dated 19th January 1938. I enclose herewith the sum of ..... (£.....) being 2s. per share payable on application, and I undertake to pay a further sum of 2s. per share on allotment and to pay the balance

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by calls according to the conditions of the prospectus. I authorize you to register me as the holder of the said shares or any smaller number that may be allotted to me and I agree to be bound by the memorandum and articles of association of the company."

The meeting convened by the notice already referred to was held on 15th February 1938, and a resolution was passed for the increase of the capital on the terms, *inter alia*, set out in the prospectus. On 14th and 25th February 1938 respectively the appellant applied for two several parcels of shares. The form in each case being identical, I set out one :—" I hereby apply for ten thousand 8 per cent redeemable cumulative preference shares of £1 each in the company in accordance with the terms and conditions as stated in the company's prospectus dated 19th January 1938. I enclose herewith the sum of one thousand pounds (£1,000) being 2s. per share payable on application and I undertake to pay a further sum of 2s. per share on allotment and to pay the balance by calls according to the conditions of the prospectus. I authorize you to register me as the holder of the said shares or any smaller number that may be allotted to me and I agree to be bound by the memorandum and articles of association of the company."

In respect of these applications the appellant was allotted 8,000 shares, for which he paid the application and allotment money. He was entered on the register of members as the holder of these shares and received notices of allotment. On 3rd March 1938 the directors made four calls of four shillings per share on the appellant's shares. The notices sent to the appellant stated that " these calls are payable to the secretary at the registered office of the company, 53 Martin Place, Sydney, on 15th April, 16th May, 15th July and 15th August 1938," and also stated the amounts due by the appellant on each of these dates.

In his return of income for the year ended 30th June 1938 the appellant claimed a deduction in respect of £3,200, the amount paid by him for calls on his shares, and based his claim on the provisions of sec. 78 (1) (*d*) of the *Income Tax Assessment Act* 1936-1937. The respondent both in his original and amended notices of assessment disallowed this deduction, but on different grounds. The position finally taken up by the respondent was that " the instalments of the purchase price of the shares in Mount Morgan Ltd. were considered to have become payable under the terms and conditions stated in the prospectus." The appellant objected to the disallowances, and, his objection being treated as an appeal, the case now under consideration was stated and the following question submitted: " Whether in assessing the income tax payable by the appellant in

respect of income derived during the year ended 30th June 1938, the respective sums of (*a*) £1,400, (*b*) £200, and (*c*) £1,600, totalling £3,200, mentioned in par. 13 of the case stated, were deductible to the extent allowed by sec. 78 (1) (*d*) of the *Income Tax Assessment Act* 1936-1937 as being calls on shares in a mining company carrying on mining operations in Australia for gold within the meaning of the said sec. 78 (1) (*d*)."

The statute relevant in this case is the *Companies Act* 1936 (N.S.W.), which takes the place of the repealed Acts mentioned in Schedule 1 to the Act (sec. 3 (4)). The articles of Mount Morgan Ltd. contain provisions for calls and forfeiture. The Act is silent as to calls, and the liability of a shareholder in Mount Morgan Ltd. as to calls is defined by articles 18-23—in the present case limited so far as amounts and due dates are concerned by the agreement to which I have already referred. In the case of a company limited by shares, where the amount payable on the shares is payable in cash, the balance, after the deposit money on application and allotment has been paid, may be made payable in stated sums at stated times, or, as is more usual, the amounts and due dates may be left to the discretion of the directors.

In the instant case the payment of this balance is provided for in the prospectus on certain fixed dates in fixed amounts, and the application form which accompanied the prospectus sets out an undertaking "to pay the balance by calls according to the conditions of the prospectus." It is contended that this constitutes a contract to pay instalments of the purchase price of the shares and payment of the instalment thereunder would not amount to payment of a call within the meaning of sec. 78 (1) (*d*) of the *Income Tax Assessment Act* 1936-1937. I am unable to agree with this contention. Such an agreement merely operates to fix the dates and amounts of the calls and the directors would still be required to pass a resolution or resolutions making the calls in question. Indeed, the directors in this case, as I have already stated, made the calls embodying the terms of the prospectus as to dates and amounts. Such an agreement would not be operative after winding up, and the liquidator could call up the whole amount payable immediately. What does a "call" mean? It means a call or application for money and the amount to be paid (*Newry and Enniskillen Railway Co.* v. *Edmunds* (1), per *Parke* B.). The call or application is made to a shareholder to pay his proportion of the capital payable in respect of each of his shares. A call does not lose its character as such, nor is a share deprived of the rights or

(1) (1848) 2 Ex. 118, at pp. 120, 121 [154 E.R. 429, at pp. 430, 431].

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freed from the liabilities (such, for example, as forfeiture) attaching to it, by reason of the limited operation of the agreement referred to. In fine, the appellant's liability to calls is derived from his membership of the company and not from the agreement.

For these reasons I am of opinion that the question submitted should be answered in the affirmative. Costs, costs in the appeal.

STARKE J. Mount Morgan Ltd. is a company limited by shares incorporated in New South Wales. It is a mining company carrying on mining operations in Australia for gold and base metals. It issued a prospectus offering for subscription 200,000 eight per cent redeemable cumulative preference shares of £1 each at par, payable as to two shillings per share on application, two shillings per share on allotment, and the balance in four calls of four shillings each per share, payable on 15th April, 16th May, 15th July, and 15th August, 1938, respectively. The appellant applied for shares in the company in accordance with the terms and conditions of the prospectus and enclosed in respect of the shares for which he applied two shillings per share with his application, and undertook to pay a further two shillings per share on allotment and to pay the balance by calls according to the conditions of the prospectus. The company allotted to the appellant 8,000 shares and appropriated moneys in its hands belonging to him in discharge of his obligation to pay two shillings per share on allotment. On 3rd March the directors of the company made four calls of four shillings each per share on the shares allotted to the appellant, payable on 15th April, 16th May, 15th July, and 15th August, 1938, respectively.

The appellant in his return of income to the Commissioner of Taxation for the financial year which ended on 30th June 1938 claimed to deduct the sum of £3,200 which he paid to the company in respect of the calls on the shares payable on 15th April and 16th May 1938, pursuant to the provision for deduction contained in the *Income Tax Assessment Act* 1936, sec. 78 (1) (*d*), as follows: "Calls on shares in a mining company or syndicate carrying on mining operations in Australia for gold, silver, base metals, rare minerals."

The commissioner disallowed the deduction claimed by the appellant on the ground that the sum did not represent calls but moneys paid under and upon the terms and conditions stated in the prospectus and in the appellant's application for shares. Ordinarily, payments made on application for or on allotment of shares are not calls, because the payments are made by persons who are not members or because no calls are in fact made and the

payments are made in accordance with the conditions of the prospectus: See *Croskey* v. *Bank of Wales* (1); *Alexander* v. *Automatic Telephone Co.* (2). But every person who agrees to take shares becomes, upon the entry of his name in the register, a member of the company, liable to pay to the company the full amount of his shares as a debt due from him to the company in the nature of a specialty debt, and bound by the memorandum and articles of association: See *Companies Act* 1936 (N.S.W.), secs. 36, 22 (1) and (2). And the eighteenth article of association of the company provides that the directors may from time to time make such calls as they may think fit upon the members in respect of all moneys unpaid on the shares held by them respectively.

In the present case, the directors gave to the appellant what on its face is styled "Notice of Calls," required him to pay the debt due to the company in respect of shares registered in his name as a member of the company, and explicitly stated that they had made four calls for that purpose. Even if the terms and conditions of the prospectus and the application of the appellant involved an obligation on the part of the appellant to pay the balance of the unpaid capital according to the terms of the prospectus, without any call, still in my opinion the directors might well choose to enforce the obligation flowing from the membership of the company and the provisions of the Act itself in respect of uncalled capital by means of calls so long as the calls were not inconsistent with any lawful agreement made with any members of the company. In this case, the calls made by the directors were in conformity with the prospectus and the appellant's application and were not inconsistent with any agreement made by the company.

Further, I agree with the argument on the part of the appellant that the prospectus and application do not require the appellant to pay the balance of the amount due upon the agreed dates unless a call or calls be made upon him. But it appears to me that the appellant is also entitled to the deduction he claims upon the broader ground already mentioned.

The question stated should be answered in the affirmative.

McTiernan J. I have read the judgment of the Acting Chief Justice and agree with it.

The word "calls" does, in my opinion, describe the real nature of the payments which the appellant claims to be deductible to the extent allowed by sec. 78 (1) (*d*) of the *Income Tax Assessment Act*

(1) (1863) 4 Giff. 314 [66 E.R. 726]. (2) (1900) 2 Ch. 56.

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1936-1937. They were liabilities which arose by virtue of the appellant's membership of the company.

The question should be answered: Yes.

WILLIAMS J. At all material times Mount Morgan Ltd. has been a company carrying on mining operations in Australia for gold within the meaning of sec. 78 (1) (*d*) of the Federal *Income Tax Assessment Act* 1936-1937. On 20th January 1938 the company issued a prospectus to its members inviting them to subscribe for redeemable eight per cent cumulative preference shares in its capital. In February 1938 the appellant applied for 18,000, and, on 3rd March 1938, the company allotted him 8,000 of these shares. The prospectus stated that the shares were payable two shillings on application, two shillings on allotment, and the balance in four calls of four shillings each payable 15th April, 16th May, 15th July, and 15th August, 1938, respectively. It also stated that calls when made could be paid in advance and interest at eight per cent per annum would accrue from the date of payment. The form of application, after referring to the application and allotment moneys, stated that the applicant undertook to pay the balance by calls according to the conditions of the prospectus.

On 3rd March 1938 the board of directors passed a resolution making calls of the four amounts, and a notice of the calls was posted to each of the new preference shareholders on the same day.

The appellant paid the sum of £3,200 in respect of the calls made payable on 15th April and 16th May 1938, and claimed this amount as a deduction in his income-tax return for the year ended 30th June 1938. The commissioner disallowed the deduction on the ground that the payments were not payments of calls but of instalments of purchase money; and, on this appeal, Mr. *Weston* has submitted on his behalf that an obligation to make the payments described in the prospectus as calls would flow from the contract constituted by the application for the shares on the terms set out in the prospectus and their allotment pursuant thereto, irrespective of whether the board of directors of the company formally passed resolutions making the calls or not.

It is true that shares may be allotted upon the basis that all or some part of the purchase money may be made payable by instalments of certain amounts at certain stated times. But the prospectus specifically stated that the balance of the moneys would be payable in four calls, and this implied a promise by the company that it would make them, and so bring into existence those rights and obligations which then arise between a shareholder and the

company, and between the shareholders, *inter se*, under the articles of association.

The four calls were all made on the day the shares were allotted and by the same resolution, but it would have been proper to have passed four separate resolutions at different meetings of the board so long as fourteen-days' notice of the call, under article 19, was given to the shareholders. If this had been done, the holders of shares transferred before the date of the call would have been freed from further liability. On the other hand, the company, after a call had become payable, would have the rights to claim interest and of lien and forfeiture contained in the articles where a member has failed to pay any call or instalment thereof. As between the shareholders, a member, who was in arrears with the payment of his call, would be disentitled from voting under article 79. Article 27 states that, for the purpose of the articles relating to lien sale and reallotment of shares, a sum payable upon the allotment of shares shall be deemed to be a call payable upon such shares on the day of allotment, but it does not refer to instalments of purchase money. Such instalments, if not paid, would not therefore incur interest or give the company a lien, or a right of forfeiture, or prevent the shareholder from voting.

These considerations show that the question whether the four sums under discussion were to be recovered as calls or as instalments of purchase money involved matters of substantive right between the intending shareholder and the company and the shareholders *inter se*.

When the provisions of sub-sec. 78 (1) (*d*) of the Act are considered, it is plainly a matter of considerable importance to the applicant for shares and to the company to clearly define the nature of the four amounts. The applicant would want to be placed in a position where he could deduct the amount of the calls from his taxable income, and the company would want to give him this right so as to make the shares as attractive as possible to investors. Well might the beautiful Juliet implore enraptured Romeo standing in the moonlit orchard of Capulet: "Oh be some other name! What's in a name? That which we call a rose by any other name would smell as sweet." But could a worldly mining company, whose object was to induce subscribers to endow it with their worldly goods by dazzling them with the attractions of avoiding taxation provided by the sub-section, say that a call would, like Romeo, "retain that dear perfection which he" (*sic*—it) "owes without that title." Common sense answers an emphatic "No".

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For these reasons I am of opinion that it is impossible to construe the word " calls " in the prospectus as a mere misnomer for " instalments " or " sums " or some other similar word. It would not smell as sweet by any other name.

The question asked in the special case should be answered in the affirmative.

Question answered: Yes. Costs, costs in the appeal.

Solicitors for the appellant, *Norman C. Oakes & Sagar.*

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J. B.