[HIGH COURT OF AUSTRALIA.]

ARCHIBALD HOWIE PROPRIETARY LIMITED AND OTHERS . . . } APPELLANTS;

AND

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1948.

SYDNEY, *Aug.* 19.

MELBOURNE, *Oct.* 18.

Rich, Dixon, and Williams JJ.

Stamp Duties—Company—Shares—Reduction in capital—Distribution in specie—Transfers by company of shares owned in other companies—Consideration—Liability of transfers to ad valorem duty—Rate—Stamp Duties Act 1920-1940 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 50 *of* 1940), *s.* 66 (3), (3A), (3B).

A company, pursuant to a resolution for reduction of capital (duly confirmed by the court), returned capital to holders of paid-up shares to the extent of 19s. 6d. per £1 share by distributing *in specie* at the values in the company's books certain paid-up shares in other companies. The actual values of these shares were considerably greater than the values appearing in the company's books.

Held that the transfers to shareholders were made upon a bona-fide consideration in money or money's worth of not less than the unencumbered value of the property conveyed, within the meaning of s. 66 (3B) of the *Stamp Duties Act* 1920-1940 (N.S.W.).

Decision of the Supreme Court of New South Wales (Full Court): *Archibald Howie Pty. Ltd.* v. *Commissioner of Stamp Duties*, (1948) 48 S.R. (N.S.W.) 318; 65 W.N. (N.S.W.) 123, reversed.

APPEAL from the Supreme Court of New South Wales.

A case stated by the Acting Commissioner of Stamp Duties (N.S.W.) for the opinion of the Supreme Court of New South Wales pursuant to s. 124 of the *Stamp Duties Act* 1920-1940 (N.S.W.) was substantially as follows:—

H. C. OF A. 1948.

ARCHIBALD HOWIE PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

1. Archibald Howie Pty. Ltd. (hereinafter called the company) is a company duly incorporated and entitled to sue in its said corporate name.

2. On 24th March 1947 the capital of the company was £125,000 divided into 125,000 shares of £1 each.

3. Of those shares 85,470 had been issued and were fully paid and 39,530 were unissued.

4. The members of the company on 24th March 1947, and at all material times and the number of shares held by each were as follows :—

Name.	Number of Shares.
Archibald Howie Henry William Knight	83,464
Archibald Howie	2,000
Henry William Knight	5
Fred Wilson	1
	85,470

5. On 24th March 1947 the company was possessed, *inter alia*, of the following shares standing in the books of the company at the figures hereunder set forth.

Shares.	Standing in the books of the Company at :
82,000 Fully paid shares of £1 each in Navua Pty. Ltd.	£82,000 0 0
825 Fully paid shares of £1 each in Nicholson's Investments Ltd.	£209 1 9
800 Fully paid shares of £1 each in North Shore Gas Co. Ltd.	£630 0 0
1,143 Fully paid shares of 10s. each in Port Jackson & Manly Steamship Co. Ltd.	£341 19 0

6. By special resolution passed by the unanimous vote of all members at an extraordinary general meeting of the company held on 24th March 1947 it was resolved :—" That the capital of the company be reduced from £125,000 divided into 125,000 shares of £1 each to £41,666 15s. divided into 39,530 shares of £1 each and 85,470 shares of 6d. each and that such reduction be effected by returning to the holders of the 85,470 shares which have been issued paid up capital to the extent of 19s. 6d. per share by distributing *in specie* at the values thereof appearing in the books of the company to the said holders proportionately to their holdings the following

assets of the company, namely, 82,000 fully paid shares of £1 each in Navua Pty. Limited, 825 fully paid shares of £1 each in Nicholson's Investments Limited, 800 fully paid shares of £1 each in North Shore Gas Company Limited and 1,143 fully paid shares of 10s. each in Port Jackson and Manly Steamship Company Limited and the sum of £152 4s. 3d. in cash."

7. Upon the petition of the company an order was made by the Supreme Court in its equitable jurisdiction on 12th May 1947 that the reduction of capital resolved on by the special resolution be confirmed and that the following minute be approved :—" The capital of Archibald Howie Pty. Limited henceforth is £41,666 15s. divided into 39,530 shares of £1 each and 85,470 shares of 6d. each instead of £125,000 divided into 125,000 shares of £1 each. At the date of registration of this minute 85,470 of the said shares of 6d. each are issued and on each of them the sum of 6d. is deemed to be paid up. The residue of the said shares of £1 each are unissued."

8. Office copies of the order and minute were duly filed with the Registrar-General for registration.

9. On 21st May 1947 the company pursuant to that reduction of capital executed the following transfers of shares in favour of the respective persons whose names are set opposite the said shares :—

Shares.	Transferee or Transferees.
806 shares Nicholson's Investments Ltd.	Archibald Howie and Henry William Knight.
19 shares Nicholson's Investments Ltd.	Archibald Howie.
781 shares North Shore Gas Co. Ltd.	Archibald Howie and Henry William Knight.
19 shares North Shore Gas Co. Ltd.	Archibald Howie.
1,116 Port Jackson & Manly S.S. Co. Ltd.	Archibald Howie and Henry William Knight.
27 Port Jackson & Manly S.S. Co. Ltd.	Archibald Howie.
1,253 Navua Pty. Ltd.	Archibald Howie.
659 Navua Pty. Ltd.	Archibald Howie.
6,527 Navua Pty. Ltd.	Archibald Howie and Henry William Knight.
7,185 Navua Pty. Ltd.	Archibald Howie and Henry William Knight.
17,964 Navua Pty. Ltd.	Archibald Howie and Henry William Knight.
17,964 Navua Pty. Ltd.	Archibald Howie and Henry William Knight.

H. C. OF A. 1948.

ARCHIBALD HOWIE PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

Shares		Transferee or Transferees.
17,965	Navua Pty. Ltd.	Archibald Howie and Henry William Knight.
12,476	Navua Pty. Ltd.	Archibald Howie and Henry William Knight.

10. On 18th June 1947 the accountants for the company submitted the transfers for stamping and forwarded therewith the company's cheque for £293 13s. 6d. in payment of what was considered by the accountants to be the appropriate amount of stamp duty.

11. At the same time the accountants requested that if in my opinion the amount paid was not the appropriate amount of duty payable on the transfers I should issue assessments.

12. The accountants also submitted to me a form of declaration in Form "S" prescribed by the regulations under the *Stamp Duties Act* 1920-1940 declaring that the unencumbered value of the property comprised in the transfers was £117,362 7s. and that the transfers were not subject to any encumbrances, and that there were no other conveyances made by the company either without consideration or for consideration of less than the unencumbered value of the property comprised therein during the period of three years immediately preceding the execution of the transfers.

13. The value of the shares the subject of the transfers as shown in the books of the company and the actual value of the shares on 21st May 1947 and at all relevant times were as follows :—

Shares.	Standing in Books of Company.	Actual Value.
806 Nicholson's Investments Ltd.	£204 5 5	£906 15 0
19 Nicholson's Investments Ltd. ..	4 16 4	21 7 6
781 North Shore Gas Co. Ltd. ..	615 0 9	1,044 11 9
19 North Shore Gas Co. Ltd. ..	14 19 3	25 8 3
1,116 Port Jackson & Manly S.S. Co. Ltd.	333 17 6	1,227 12 0
27 Port Jackson & Manly S.S. Co. Ltd.	8 1 6	29 14 0
1,253 Navua Pty. Ltd.	1,253 0 0	1,743 15 2
659 Navua Pty. Ltd.	659 0 0	917 2 2
6,527 Navua Pty. Ltd.	6,527 0 0	9,083 8 2
7,185 Navua Pty. Ltd.	7,185 0 0	9,999 2 6
17,964 Navua Pty. Ltd.	17,964 0 0	24,999 18 0
17,964 Navua Pty. Ltd.	17,964 0 0	24,999 18 0
17,965 Navua Pty. Ltd.	17,965 0 0	25,001 5 10
12,476 Navua Pty. Ltd.	12,476 0 0	17,362 8 8

14. On 26th June 1947 I notified the accountants that duty had been assessed on the transfers as follows :—

	Value.	Rate of Duty.	Duty.
806 shares Nicholson's Investments Ltd.	£906 15 0	1%	£9 1 5
19 shares Nicholson's Investments Ltd.	21 7 6	1%	– 4 4
781 shares North Shore Gas Co. Ltd.	1,044 11 9	1%	10 8 11
19 shares North Shore Gas Co. Ltd.	25 8 3	1%	– 5 1
1,116 shares Port Jackson & Manly S.S. Co. Ltd. . .	1,227 12 0	1½%	18 8 4
27 shares Port Jackson . .	29 14 0	1½%	– 8 11
1,253 shares Navua Pty. Ltd.	1,743 15 2	1½%	26 3 2
659 shares Navua Pty. Ltd. . .	917 2 2	2%	18 6 11
6,527 shares Navua Pty. Ltd.	9,083 8 2	2%	181 13 5
7,185 shares Navua Pty. Ltd.	9,999 2 6	2½%	249 19 7
17,964 shares Navua Pty. Ltd.	24,999 18 0	3%	750 0 0
17,964 shares Navua Pty. Ltd.	24,999 18 0	3½%	875 0 0
17,965 shares Navua Pty. Ltd.	25,001 5 10	4%	1,000 1 1
12,476 shares Navua Pty. Ltd.	17,362 8 8	5%	868 2 6
			£4,008 3 8

15. At the same time I advised the accountants that duty had been assessed on the transfers as conveyances without consideration in money or money's worth in accordance with s. 66 (3) (*a*) of the *Stamp Duties Act* 1920-1940 and the Sixth Schedule thereto.

16. On 3rd July 1947 the company paid to me the sum of £3,714 10s. 2d. being the balance of duty as assessed by me in respect of the transfers.

17. At the same time the company paid to me the sum of £20 as security for costs and gave me notice in writing that the parties were dissatisfied with the said assessment and required me to state a case for the opinion of this Honourable Court in pursuance of the *Stamp Duties Act* 1920-1940.

18. The case is stated in accordance with the requirements of the said notice in writing, the questions for the decision of this Court, being :—

(1) Whether the said transfers of shares were liable to be assessed for duty—

H. C. OF A. 1948.

ARCHIBALD HOWIE PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

(*a*) under the provisions of s. 66 (3) of the *Stamp Duties Act* 1920-1940; or

(*b*) under the provisions of s. 66 (3A) of the Act; or

(*c*) under the provisions of s. 66 (3B) of the Act.

(2) How the costs of this case stated should be borne.

The Full Court of the Supreme Court (*Jordan* C.J. and *Street* J., *Davidson* J. dissenting), answered the questions submitted as follows: —(1) Under the provisions of s. 66 (3) of the *Stamp Duties Act* 1920-1940, and (2) By the appellants (*Archibald Howie Pty. Ltd.* v. *Commissioner of Stamp Duties* (1)).

From that decision Archibald Howie Pty. Ltd., Archibald Howie and Henry William Knight appealed to the High Court.

Kitto K.C. (with him *Bowen*), for the appellants. The interest of a shareholder in a company consists of various rights including the right to share in the distribution of profits made by the company as a going concern and in the distribution of assets in a winding up. For most purposes the company is a separate legal entity from its shareholders. In reality, however, the shareholders are the beneficial owners of the property of the company, they are "the real and only masters of the property under the general law of the land" (*Osborne* v. *The Commonwealth* (2); *Morgan* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (3); *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (4); *Webb* v. *Federal Commissioner of Taxation* (5)). When a reduction of capital takes place in which assets of the company are distributed *in specie*, each shareholder receives a divided portion of assets in which previously he had an undivided interest and each gives up his interest in the assets distributed to the others. Each shareholder originally takes his shares subject to the articles of association and the general law including the rules relating to reduction of capital. When a reduction takes place the capital interest of the shareholder and the capital liability of the company are *pro tanto* extinguished (*Commissioner of Taxation* (*N.S.W.*) v. *Stevenson* (6); *Thornett* v. *Federal Commissioner of Taxation* (7)). In the present case each shareholder received 39/40ths of the distributed assets of the company, therefore 39/40ths of his interest were extinguished. These considerations afford an answer to the view taken by the

(1) (1948) 48 S.R. (N.S.W.) 318; 65 W.N. (N.S.W.) 123.
(2) (1911) 12 C.L.R. 321, at p. 366.
(3) (1912) 15 C.L.R. 661, at pp. 666, 667.
(4) (1915) 20 C.L.R. 148, at p. 176.
(5) (1922) 30 C.L.R. 450, at pp. 460, 461.
(6) (1937) 59 C.L.R. 80, at pp. 90, 104.
(7) (1938) 59 C.L.R. 787, at pp. 796, 801.

majority in the Court below. It is not a question of how much the shareholder's share depreciated in value by reason of the distribution. He lost 39/40ths of the total assets distributed and he received the remaining 1/40th. He obtained a divided share instead of an undivided share and those two things must balance. There is no ground for construing s. 66 as meaning that there could not be consideration within the meaning of that Act unless it was consideration which moved to the company. If what the shareholder surrendered was equal to what he received, that was sufficient to bring the transaction within s. 66 (3B).

Wallace K.C. (with him *McLelland*), for the respondent. The fair construction of the words " upon a bona fide consideration " in sub-s. (3A) and sub-s. (3B) of s. 66 indicates that the legislature had in mind that there had to be some *quid pro quo* for the conveyance amounting to a consideration; there must be some connection between the conveyance and the consideration. Whether a dictionary definition or a contractual definition be applied to the word " consideration " the factor of equivalence does appear to be common to the conception. From the legal point of view there has not been any *quid pro quo* for the conveyance. Even though some detriment may be sufficient—about which there is some controversy—that was not the equivalent for the transfer of the shares. In no legal sense was there any connection between any detriment suffered and the conveyance, more especially in the case of shareholders who did not attend the meeting and did not take any part in the transaction. There must be a real nexus between any detriment that may be suffered on the one hand and the transfer on the other hand. There appears to be a very distinct gap. This case is similar in principle to *Wigan Coal and Iron Co. Ltd.* v. *Inland Revenue Commissioners* (1), because in both cases it could be argued that there was a detriment to the shareholders. Although detriment was not actually argued the same sort of issue arose in *Associated British Engineering Ltd.* v. *Inland Revenue Commissioners* (2). The precise point in that case was that from no legal viewpoint was there any consideration passing on the actual conveyance or transfer of the shares. *Thornett* v. *Federal Commissioner of Taxation* (3) and other cases cited on behalf of the appellants are not applicable to this case, they merely dealt with facets of reduction. In this case the simple issue is whether there was any connection between the alleged detriment and the transfer. There was no

(1) (1945) 1 All E.R. 392, at pp. 394, 395.
(2) (1941) 1 K.B. 15.
(3) (1938) 59 C.L.R. 787.

H. C. OF A. 1948.

ARCHIBALD HOWIE PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

pre-existing contract nor any offer and acceptance followed by consideration. The conveyance was not the return or equivalent for something given up by the shareholders. Alternatively, the transaction is caught up by s. 66 (3A) and there must be duty paid under that sub-section within the intermediate position approved in the majority judgment in the Court below. There were secret reserves and the shares in the other companies were brought in at considerably less than their true value, so on the wording of s. 66 (3A) they should be dutiable to that extent. In fact and in truth there has been a conveyance for less than the unencumbered value of the shares. As there has been a distribution *in specie*; as there has been the handing over of these assets to the shareholders then the transaction falls within the provisions of s. 66 (3A).

Kitto K.C., in reply. When one is considering what is the result of reduction of capital it is irrelevant to ascertain by what amount the nominal value of the shares has been reduced. In *Re Artisans' Land & Mortgage Corporation* (1) there was an express recognition of the right that accrues to a shareholder when a reduction of capital is determined and sanctioned by the court. It can be said because of the contract in the articles that gives rise to the position that there was an agreement under seal that each shareholder should receive a proportionate part of the assets which hitherto were held by the company. It is the carrying out of that contract which leads to the transference now under question. The correct approach to this case is shown in *Attorney-General* v. *Earl of Sandwich* (2). The two rights, the right to an undivided interest in property which was surrendered, and the right to the divided portion of the property received did counterbalance and therefore s. 66 (3B) is the appropriate section.

Cur. adv. vult.

Oct. 18.

The following written judgments were delivered :—

RICH J. In this appeal I have come to the conclusion that the case falls within s. 66 (3B) of the *Stamp Duties Act* 1920-1940 (N.S.W.), and as I agree with the judgments of my brothers *Dixon* and *Williams* it is unnecessary for me to detail similar reasons for the same conclusion. The appeal should be allowed.

DIXON J. The question upon this appeal is under which sub-section of s. 66 of the *Stamp Duties Act* 1920-1940 (N.S.W.) certain transfers of shares fall. The choice is among sub-ss. (3) (*a*); (3A)

(1) (1904) 1 Ch. 796, at p. 802. (2) (1922) 2 K.B. 500, at p. 517.

and (3B). The sub-sections relate to conveyances, an expression which by s. 65 and the definition of s. 3 of "property" includes, among other things, transfers of personal property and things in action.

Sub-section (3) (*a*) prescribes the duty to be charged upon conveyances without consideration in money or money's worth; sub-s. (3A) prescribes the duty to be charged upon a conveyance made upon a bona fide consideration in money or money's worth of less than what is called the unencumbered value of the property conveyed; and sub-s. (3B) prescribes the duty to be charged upon a conveyance made upon a bona-fide consideration in money or money's worth of not less than the unencumbered value of the property conveyed.

The transfers were made by the appellant company to two shareholders, who held the issued share capital of the company, with the exception of one share. The subject of the transfers was certain shares in other companies, forming part of the assets of the appellant company. The purpose of the transfers was to carry out a resolution, duly confirmed, for the reduction of the share capital of the appellant company. The reduction was carried out by a distribution of these assets *in specie*.

The share capital of the appellant company was £125,000 divided into 125,000 shares of £1 each. A little less than two-thirds of the shares had been issued and they were fully paid up. The special resolution for the reduction of capital provided that the reduced capital should be divided into shares of £1 each (the number of which corresponded with the unissued capital) and shares of 6d. each (the number of which corresponded with the issued capital) and that the reduction should be effected by returning to the holders of the issued shares paid up capital to the extent of 19s. 6d. per share. The special resolution proceeded to say that the capital should be returned by distributing *in specie* at the value thereof appearing in the books of the company to the shareholders proportionately to their holdings assets of the company consisting in the shares in other companies already mentioned. The value so appearing in the books of the company is the equivalent of 19s. 6d. in the £1 of the issued capital and doubtless in this fact is to be found the reason for reducing the shares issued from a paid up value of £1 to a paid up value of 6d. each. But in the aggregate the book value of the shares was little more than seventy per cent of their actual or market value at the date of transfer.

Upon this state of facts *Jordan* C.J. and *Street* J. in the Supreme Court were of opinion that the transfers were made without con-

H. C. OF A. 1948.

ARCHIBALD HOWIE PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

Dixon J.

sideration in money or money's worth and *Davidson* J. was of opinion that they were made for a consideration in money or money's worth but that for all that appeared that consideration might be less than the full unencumbered value of the shares transferred. In my opinion the view that the transfers were made for a consideration in money or money's worth within the meaning of s. 66 is correct.

In the context I think that the word "consideration" should receive the wider meaning or operation that belongs to it in conveyancing rather than the more precise meaning of the law of simple contracts. The difference is perhaps not very material because the consideration must be in money or money's worth. But in the law of simple contracts it is involved with offer and acceptance: indeed properly understood it is perhaps merely a consequence or aspect of offer and acceptance. Under s. 66 the consideration is rather the money or value passing which moves the conveyance or transfer.

In a distribution *in specie* in consequence of a reduction of capital brought about because of the possession of surplus assets there are in my opinion two aspects of the transaction in which an adequate consideration in money or money's worth may be seen. They are perhaps two sides of the same thing, but for clearness I shall distinguish between them in stating reasons for my conclusion.

(1) A reduction of capital involving the payment off of any paid up share capital, or what is in essence the same thing, the distribution of assets *in specie* in satisfaction of paid up share capital, is a transaction which must be provided for by the articles of association. We have not been furnished with the articles in the present case, but they must contain the requisite clauses. While a shareholder has not a proprietary right or interest in the assets of an incorporated company, his "share" is after all an aliquot proportion of the company's share capital with reference to which he has certain rights. He is entitled among other things to have share capital applied in pursuance of the memorandum and articles of association and, so far as assets are available for the purpose, to have his paid up capital returned in a liquidation or upon a reduction of capital if that method of returning it is decided upon pursuant to the articles of association. These rights all arise out of the contract *inter socios*.

It is not unimportant that s. 158 (1) of the *Companies Act* 1936 (N.S.W.) (which is based on s. 55 (1) of the English *Companies Act* 1929) empowers a company to reduce its capital only "if so authorized by its articles." The reduction involving the payment off of part of the paid up share capital must therefore be considered an effectuation of a provision of the contract of membership. The

allotment of the share and the payment up of the liability thereon conferred upon the holder for the time being of the share a right to have the assets of the company used and applied in the various ways in which the articles expressly or impliedly require or authorize and this is one of them. It is an effectuation or realization of the rights obtained by the acquisition of the share in the same way as is the distribution of a dividend. The consideration given is the payment up of the share capital in satisfaction of the liability for the amount of the share incurred on allotment.

(2) From the standpoint of company law the division of the capital of a company into shares and the payment up of shares issued are regarded as respectively significant and real. The shareholder contributes the amount of the share to the capital of the company. This contribution measures his right to any return of capital which the company may make either as a going concern or in a winding up. Subject to any regulation the articles may make as to the basis upon which assets in excess of share capital may be distributed, the amount of the share determines the proportion in which he shares with other shareholders in a distribution of excess assets.

Thus when the amount of the issued shares in the case of this company was reduced from £1 each to 6d. each, it meant that if any of the unissued £1 shares were afterwards issued the proportion in which the respective holders of a share of the former issue and of one of the subsequent issue would in a winding up share in any funds exceeding the share capital would be as 1 is to 40. This is but an illustration of the significance of the division of the share capital into shares, shares now of a different denomination.

The truth is, however, that the return of 19s. 6d. of the amount paid up is the discharge *pro tanto* of a claim of the shareholder upon the assets of the company. If the transaction had taken the form of a reduction pursuant to par. (*c*) of s. 158 (1) of the *Companies Act* the resolution must have been expressed as a payment off of part of the share capital. If that had been followed by a requirement that assets should be accepted in satisfaction of the amount paid off, it would have doubtless been regarded as the acquisition of assets for a consideration expressed in money.

But s. 158 (1) confers a power of reduction which, if the authorization in the articles is sufficiently wide, may go outside the three paragraphs of the sub-section (*Re Thomas de la Rue & Co. and Reduced* (1)). The direct allocation of assets for distribution in reduction of the amount of the shares is doubtless within the

(1) (1911) 2 Ch. 361.

H. C. OF A. 1948.

ARCHIBALD HOWIE PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

Dixon J.

provision. But that means that the shareholder in satisfaction of his proportionate " interest " in the assets, an interest consisting of a congeries of rights *in personam*, takes an aliquot part of the assets. There is an equivalence not only from a logical but from a realistic point of view. The reduction in both the amount and value of the share affords an adequate consideration in money and in money's worth.

It was said that the decision of *Lawrence* J. in *Associated British Engineering Ltd.* v. *Inland Revenue Commissioners* (1) and of *Wrottesley* J. in *Wigan Coal & Iron Co. Ltd.* v. *Inland Revenue Commissioners* (2) tended against the foregoing conclusions. But they are decisions on very different provisions and I do not think either of those learned judges adverted to the considerations upon which my opinion is founded.

I think that the appeal should be allowed with costs and that the order of the Supreme Court should be discharged. The first question in the case stated should be answered " under the provisions of s. 66 (3B)." The costs of the case stated should be borne by the respondent the Commissioner of Stamp Dutie .

WILLIAMS J. The question that arises for decision on this appeal is whether the transfers of shares referred to in the case stated were liable to be assessed for duty under the provisions of s. 66 (3) (*a*) or s. 66 (3A) or s. 66 (3B) of the *Stamp Duties Act* 1920-1940 (N.S.W.).

Section 66 (3) (*a*) applies to a conveyance made without consideration in money or money's worth ; s. 66 (3A) to a conveyance made upon a bona-fide consideration in money or money's worth of less than the unencumbered value of the property conveyed ; s. 66 (3B) to a conveyance made upon a bona-fide consideration in money or money's worth of not less than the unencumbered value of the property conveyed.

The majority of the Supreme Court (*Jordan* C.J. and *Street* J.) held that the transfers were made without consideration in money or money's worth and were liable to be assessed under the provisions of s. 66 (3) (*a*). The Chief Justice said that in essence the company was simply giving property to its shareholders who gave nothing in the nature of consideration [in] exchange. *Street* J. said that no consideration moved from the shareholders to the company. *Davidson* J. was of opinion that the transfers were made upon a bona-fide consideration in money or money's worth and were liable to be assessed under the provisions of either s. 66 (3A) or s. 66 (3B), and that the choice between these sub-sections depended upon

(1) (1941) 1 K.B. 15. (2) (1945) 1 All E.R. 392.

whether the values of the interests in the company which were surrendered were less or not less than the value of the shares transferred. He said that he could not decide this question without additional evidence. The appellants contend the transfers should be assessed under the provisions of s. 66 (3B). In my opinion they are right.

The facts are set out in the case stated and need not be repeated. Prior to the special resolution to reduce the capital of the company, which was passed at an extraordinary general meeting held on 24th March 1947, the capital of the company was £125,000 divided into 125,000 shares of £1 each, of which 85,470 shares had been issued and were fully paid and 39,530 were unissued. The company held shares in other companies standing in its books at the value of £83,181 0s. 9d. The special resolution provided that the capital of the company should be reduced from £125,000 divided into 125,000 shares of £1 each, to £41,666 15s. divided into 39,530 shares of £1 each and 85,470 shares of 6d. each, and that such reduction should be effected by returning to the holders of the 85,470 shares which had been issued paid up capital to the extent of 19s. 6d. per share by distributing *in specie* at the values thereof appearing in the books of the company to the shareholders proportionately to their holdings certain assets of the company consisting of shares in other companies and the sum of £152 4s. 3d. in cash. The total amount of the reduction was therefore £83,333 5s. and the sum of £152 4s. 3d. was evidently included so that when it was added to the book values of the shares the amount to be distributed would be equal to the amount of the reduction of capital.

The special resolution was passed pursuant to the authority conferred by s. 158 (1) of the *Companies Act* 1936 (N.S.W.) which provides, so far as material, that subject to confirmation by the court, a company limited by shares may, if so authorized by its articles, reduce its capital in any way, and in particular may, either with or without extinguishing or reducing liability on any of its shares, pay off paid up capital which is in excess of the wants of the company. The reduction of capital was confirmed by the court on 12th May 1947, and office copies of the order and minute approved by the court were duly registered with the Registrar-General. The special resolution then took effect (s. 161 (2) of the *Companies Act*). Subsequently on 21st May 1947 the company executed the transfers of shares in favour of the shareholders required to give effect to the special resolution. The actual value of the shares distributed was £117,362 7s. The shareholders also received £152 4s. 3d. in cash, so that they received assets and cash to the value of £117,514 11s. 3d.

H. C. OF A. 1948.

ARCHIBALD HOWIE PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

Williams J.

The issued capital of the company was reduced from £85,470 to £2,136 15s., that is to say by the sum of £83,333 5s.

In *Borland's Trustee* v. *Steel Bros. & Co. Ltd.* (1), *Farwell* J., in a passage which Lord *Russell of Killowen* in *Inland Revenue Commissioners* v. *Crossman* (2) described as an accurate exposition of the nature of a share, stated that a share is the interest of a shareholder in the company measured by a sum of money for the purpose of liability in the first place and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with . . . the Companies Act . . . a share is an interest measured by a sum of money and made up of various rights contained in the contract, *including the right to a sum of money of a more or less amount* (the italics are mine). Lord *Russell* himself said in *Crossman's Case* (3) that the nature of the property in a share is that "it is the interest of a person in the Company, that interest being composed of rights and obligations which are defined by the Companies Act and by the memorandum and articles of association of the company."

Such rights include the right to participate in dividends whilst the company is a going concern and the right to participate in the distribution of assets available for the shareholders upon a winding up. They also include the right to receive capital in excess of the wants of the company which the company resolves to distribute upon a reduction of capital. Such a reduction requires to be confirmed by the court mainly to ensure that the creditors will not be prejudiced but also to ensure that the reduction will not operate unfairly between the shareholders. Distributions of profits to shareholders by way of dividend or of capital upon a winding up or upon a reduction of capital are usually made in money. But where the articles so provide in the case of dividends or upon a winding up, and where the special resolution so provides in the case of a reduction of capital, the distribution may be made *in specie*.

Except in the case of a compulsory liquidation, all these distributions originate in a voluntary act on the part of the company. But when the company voluntarily declares a dividend it becomes indebted to the shareholders for the sums they are entitled to be paid (*In re Severn & Wye & Severn Bridge Railway Co.* (4); *Bond* v. *Barrow Hæmatite Steel Co.* (5); *In re Accrington Corporation Steam Tramways Co.* (6)). When the company goes into voluntary liquidation s. 282 of the *Companies Act* provides that the property

(1) (1901) 1 Ch. 279, at p. 288.
(2) (1937) A.C. 26, at p. 66.
(3) (1937) A.C., at p. 66.
(4) (1896) 1 Ch. 559.
(5) (1902) 1 Ch. 353, at p. 362.
(6) (1909) 2 Ch. 40, at p. 47.

of the company shall be applied in satisfaction of its liabilities, and subject to that application shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company. When the company voluntarily passes a special resolution to pay off capital in excess of the wants of the company and the special resolution takes effect, the company becomes indebted to the shareholders to whom the money is payable in the same manner as it becomes indebted upon a declaration of dividend (*In re Artisans' Land and Mortgage Corporation* (1)). The decision of *Byrne* J. that the debts for unpaid dividends and unpaid capital are specialty debts may be open to criticism (*R.* v. *Williams* (2)). But there is no reason to doubt his statement that " when you have to consider the question of dividends and unpaid returns of capital the shareholders' claims depend in each case on their rights which arise out of the articles of association " (3). In each case the shareholders become legally entitled in due course to part of the sum of money of more or less amount to which *Farwell* J. referred in the passage cited (*Borland's Trustee* v. *Steel Bros. & Co. Ltd.* (4)).

A company obtains capital by the issue of its shares. These shares cannot be issued at a discount but may be issued subject to the payment of their nominal amount or at a premium. The amount payable may be satisfied by the payment of money or by some other proper consideration. But all shares must be paid for in full by money or money's worth. When the person to whom the shares are allotted pays or assumes the liability to pay for the shares in money or money's worth, full consideration in money or money's worth moves from him to the company for all the rights which he acquires under the memorandum and articles of association. Amongst the most valuable of these rights are the rights to share in the distributions of moneys and assets already mentioned. The declaration of a dividend and the taking effect of a special resolution to return capital create debts because the shareholders have acquired the legal right to be paid these moneys for valuable consideration. If the moneys were not payable as debts but as gifts the shareholders would have no legal rights to sue for them. The authorities already cited show that the shareholders have these legal rights. They are legal rights which flow from the original issue of the shares. They are ingredients in the chose in action which each original shareholder purchased from the company. If an original shareholder sells and transfers his shares the transferee upon registration " will

(1) (1904) 1 Ch. 796.
(2) (1942) A.C. 541, at p. 555.
(3) (1904) 1 Ch., at p. 802.
(4) (1901) 1 Ch., at p. 288.

H. C. OF A. 1948.

ARCHIBALD HOWIE PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

Williams J.

become legally entitled to all the rights of a member, e.g. the right of attending meetings and voting and of receiving dividends " (*R.* v. *Williams* (1)).

We were referred to two English decisions upon s. 74 of the English *Finance* (1909-1910) *Act* 1910. That section imposes a stamp duty on gifts *inter vivos*. Sub-section (1) provides that any conveyance or transfer operating as a voluntary disposition *inter vivos* shall be chargeable as if it were a conveyance or transfer of sale. Sub-section (5) provides that any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos*, and . . . the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred. In the first case, *Associated British Engineering Ltd.* v. *Inland Revenue Commissioners* (2), a company passed a resolution to distribute as a capital bonus amongst its shareholders a number of fully paid shares and stock units which it held in two other companies. It was held that the transfers were liable to duty under the section because the bonus was a voluntary disposition by the company of its reserves. *Lawrence* J. said: " I do not think that it can successfully be argued that the company was not acting voluntarily because it was acting in pursuance of the wishes of the majority of the corporators legally expressed " (3). With this statement there can be no quarrel. It does not appear to have been argued that the transfers were dispositions made in favour of other persons in good faith and for valuable consideration within the meaning of the words in brackets in sub-s. (5). If it had, his Lordship might have acceded to the argument for he said that " the resolution no doubt gave to the shareholders in the appellant company a right of action in respect of the declaration of this capital bonus " (3). The further point would then have arisen whether the consideration should not be deemed not to be valuable consideration because of the particular provisions of the latter part of the sub-section. The decision of his Lordship that the disposition of the shares was voluntary because the company was under no legal obligation to make it does not appear to me to throw any light on the meaning

(1) (1942) A.C., at p. 558.
(2) (1941) 1 K.B. 15.
(3) (1941) 1 K.B., at p. 19.

of s. 66 of the *Stamp Duties Act*. In the second case, in *Wigan Coal & Iron Co. Ltd.* v. *Inland Revenue Commissioners* (1), the company paid off its capital to the extent of 10s. per £1 share, and effected the reduction by the transfer to its shareholders of shares which it held in another company the market value of which considerably exceeded the 10s. by which the capital had been reduced. The Inland Revenue Commissioners considered that the consideration for the transfers of the shares was inadequate because the transfers conferred a substantial benefit on the transferees. The only question which *Wrottesley* J. had to decide on appeal was whether there was sufficient material on which the Commissioners could come to this conclusion. He held that there was and in the course of his judgment said with reference to the latter part of sub-s. (5) that "where a statute says that A is to be deemed to be B it deals purposely with things that are not B; and it would not be necessary to say that A was deemed to be B if A and B were the same thing." The case is therefore a decision on the words of the particular statute. It is not a decision that a shareholder who receives money or assets by virtue of his shareholding in a company receives something for which he has not given full consideration in money or money's worth.

In the present case the capital was reduced by £83,333 5s. whereas the shareholders received shares and cash worth £117,514 11s. 3d. But in my opinion this is immaterial. The capital of a successful company is usually represented by assets which, after providing for the claims of creditors, exceed in value the amount of the paid up capital. But as I have said the amount payable to a company for a share is limited. Unless the share is issued at a premium it is the nominal amount of the share. The payment of that amount or the assumption of liability to pay it must therefore provide, in the absence of some special provision like that in the English *Finance Act*, full consideration for the right to receive any distributions of money or assets which the shareholder subsequently receives from the company. Any other conclusion would lead to wide repercussions. Distributions of money are not liable to stamp duty under the *Stamp Duties Act* because that Act taxes instruments and not transactions. But the *Gift Duty Act* 1941 taxes transactions, and the *Gift Duty Assessment Act* 1941-1947 defines gift to mean any disposition of property which is made otherwise than by will without consideration in money or money's worth passing from the disponee to the disponor, or with such consideration so passing if the consideration is not, or, in the opinion of the Commissioner, is not, fully adequate.

(1) (1945) 1 All E.R. 392.

H. C. OF A. 1948.

ARCHIBALD HOWIE PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

For these reasons I would allow the appeal, set aside the order of the Supreme Court, and answer the questions asked in the case stated by saying that the transfers of shares were liable to be assessed for duty under the provisions of s. 66 (3B) of the *Stamp Duties Act* 1920-1940. The respondent should pay the costs of the appellant in the Supreme Court and of this appeal.

Appeal allowed. Order of the Supreme Court set aside. Questions asked in the case stated answered by saying that the transfers of shares were liable to be assessed for duty under the provisions of s. 66 (3B) *of the Stamp Duties Act* 1920-1940. *Respondent to pay the costs of the appellants of this appeal and in the Supreme Court.*

Solicitors for the appellants, *Bernard Samuelson & Co.*

Solicitor for the respondent, *F. P. McRae,* Crown Solicitor for New South Wales.

J. B.