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retirement of the employee by the employer from operating as a determination of the employment while the employee is enjoying a pension; and the effect of pars. (c) and (d), which define the demanded pension rights otherwise than in the case of a widow, is to provide for a pension, not after the cesser of the employment, but during the employment. The only qualifications required are a particular period of service and either the attainment of sixty-five or infirmity creating inability to render the agreed service. Thus the claim is that an employee having the prescribed qualifications shall receive a pension equal to a proportion of his salary of the last preceding year, but shall not be required to work for it and shall not be retired by the employer while receiving it.

But even if the pensions claimed were pensions to accrue after the cesser of the employment, as indeed is the case with respect to pensions to employees' widows, I should still think it clear that the claims concern an industrial matter. In truth the argument to the contrary is not materially different from that which has already been considered in relation to compensation for injuries. The fact that a claim is such that an award granting it will not produce payments until after the termination of the employment does not justify the conclusion that the subject matter of the claim is not an industrial matter, nor does the fact that the claim is for payments to be made to a person other than the employee. A claim for pensions after the termination of employment is a claim that the rewards of the employment shall include not only immediate remuneration but also, in certain events, a pension either for the employee alone, or for him in the first instance and for his widow after him. It is a claim that a characteristic of the employment shall be that it will carry a pension if it continues until prescribed events occur. It relates to a matter which in my opinion, for reasons similar to those which have been stated with respect to compensation for injuries, is within both the general definition of industrial matters in s. 4 of the Act and the particular categories referred to in pars. (*b*) and (*h*) of that definition.

I turn, finally, to the question whether s. 48 so limits the authority of the conciliation commissioner that he cannot validly include in his award a provision for pensions or for compensation for injury, notwithstanding that each of these matters is an industrial matter. It is not necessary to set out more of s. 48 than its first three subsections: "(1) An award shall, subject to the next succeeding section, continue in force for a period to be specified in the award, not exceeding five years from the date upon which the award comes into force. (2) After the expiration of the period so specified,

the award shall, subject to the next succeeding section, and unless the Court, in the case of an award made by the Court, or a Conciliation Commissioner, in the case of an award made by a Conciliation Commissioner, otherwise orders, continue in force until a new award has been made. (2A) Nothing in sub-section (1) of this section prevents the inclusion in an award of provisions in relation to long service leave with pay notwithstanding that those provisions are so expressed as not to be capable of operating, or of operating fully, during the period specified in the award in pursuance of sub-section (1) of this section ".

The conciliation commissioner's authority to settle the dispute by an award (s. 38) is clearly restricted by s. 48 (1) to settling the dispute by an award which specifies a period not exceeding five years as the period for which it is to continue in force. No doubt it follows that if a matter, although it is an industrial matter, is inherently incapable of being the subject of a provision limited in duration to a period of five years, that matter cannot be validly dealt with by the conciliation commissioner.

The effect of s. 48 (1) and (2) is that after (a) the expiration of the period specified in an award, which must not exceed five years from the date upon which the award comes into force, and (b) the making either of an order determining the award or of a new award, the award no longer requires compliance with its provisions. Remedies for breaches already committed doubtless remain, but no further breach can occur. Consequently, if a provision for compensation or for pensions were inserted in an award, a person becoming entitled under that provision could not receive the full benefit intended for him unless, in the case of a pensioner, he were to die during the currency of the award, or, in the case of a person receiving compensation, he were to receive a lump sum or recover from his incapacity or die during the currency of the award. Thus some persons would receive the full benefit contemplated, and others only a greater or less portion of it according as their rights accrued early or late in the life of the award. The obvious conclusion would seem to be that an award is a completely unsuitable instrument for the establishment of a scheme for pensions or compensation. But all this falls far short of saying that the character of pensions or compensation is such as to preclude the possibility of dealing with the subject at all in an award of limited duration. It clearly is possible to make a provision on these matters which will be enforceable in respect of all moneys becoming payable under it during the life of the award. That life may prove to be a very long life, by

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virtue of s. 48 (2); equally it may be a very short life. For that reason a conciliation commissioner may very well decide that it would be ridiculous to make a provision which must inevitably produce inequalities and must prove highly unsatisfactory in a great proportion of cases falling within it. But what we have to say, if we are to grant prohibition, is that s. 48, by imposing a time limit upon the operation of an award, deprives the commissioner of power even to consider these matters. I can see no warrant for saying that. I may add that I find no assistance in sub-s. (2A) which was inserted in s. 48 by the Act No. 18 of 1951. That sub-section does not suggest that sub-s. (1) prevents the inclusion in an award of a provision in relation to long service leave with pay because there is something essentially incompatible between such leave and a time limit upon the award. What it does suggest is that sub-s. (1), standing alone, would prevent the inclusion in an award of a provision for such leave if it were so expressed as not to be capable of operating, or of operating fully, during the period which the award specifies for its own continuance in force, the reason doubtless being that the term of the provision, not the nature of its subject-matter, would be inconsistent with the specification of a time limit for the award as a whole. The precise effect of sub-s. (2A) is not a matter which need be considered in this case; the only material question is whether it has a relevant implication, and in my opinion it has not.

For these reasons I am of opinion that the order nisi should be discharged.

Order absolute for a writ of prohibition prohibiting further proceedings in respect of the matters raised by cl. 34 of the log of claims delivered by the Merchant Service Guild of Australasia and by cl. 39 of the log of claims delivered by the Australian Institute of Marine and Power Engineers. No order as to costs.

Solicitors for the prosecutor, *Allen, Allen & Hemsley*, Sydney, by *Malleson, Stewart & Co.*

Solicitors for the respondents, *A. E. Mackey*, Sydney, by *Maurice Blackburn & Co.*

R. D. B.

[IN THE HIGH COURT OF AUSTRALIA.]

DALGETY DOWNS PASTORAL COMPANY PTY. LIMITED . . . . . } APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

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PERTH, *Sept.* 5.

MELBOURNE, *Oct.* 27.

Webb, Fullagar and Kitto JJ.

Income Tax (Cth.)—Assessable income—Deductions—Private company—Accumulated losses—Claim to deduct losses—Statutory requirement—Shares carrying twenty-five per cent of voting power to be beneficially held on last day of year of income by persons who beneficially held shares carrying not less than twenty-five per cent of voting power on last day of year in which loss incurred—Shares transferred by way of security—"Beneficially held"—Income Tax Assessment Act 1936-1948 (*No.* 27 *of* 1936—*No.* 44 *of* 1948), *s.* 80 (2) (5)*.

Shares are not "beneficially held" by a person within the meaning of s. 80 (5) of the *Income Tax Assessment Act* 1936-1948 unless the name of that person is entered in the register of members in respect of those shares and that person holds the shares for his own exclusive benefit.

Avon Downs Pty. Ltd. v. *Federal Commissioner of Taxation*, (1949) 78 C.L.R. 353, approved.

CASE STATED.

On an appeal to the High Court by Dalgety Downs Pastoral Company Pty. Ltd. against an assessment of tax under Pt. III. of the *Income Tax Assessment Act* 1936-1948, *Dixon* C.J. stated for

* Section 80 (5) of the Income Tax Assessment Act 1936-1948 provides:—"Notwithstanding any other provision of this section, in the case of a taxpayer which is a private company within the meaning of Division 7 of this Part, no loss incurred by the company in any year prior to the year of income shall be an allowable deduction unless the company establishes to the satisfaction of the Commissioner that, on the last day of the year of income, shares of the company carrying not less than twenty-five per centum of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than twenty-five per centum of the voting power on the last day of the year in which the loss was incurred."

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the opinion of the Full Court a case which was substantially as follows :—

1. The appellant is a duly incorporated company having its principal place of business in Western Australia at Pastoral House, St. George's Terrace, Perth, and is and at all relevant times has been a private company within the meaning of Div. 7 of Pt. III. of the said Act.

2. At all material times the issued capital of the company comprised 20,305 shares of £1 each and members were entitled to one vote per share.

3. The company incurred losses in the years ended 30.h June 1942 to 1945 inclusive, some of which were allowed by the Deputy Commissioner of Taxation in the State of Western Australia as deductions from assessable income of the company in the years ended 30th June 1946 and 1948 pursuant to s. 80 (2) of the said Act.

4. Losses incurred in the said years 1942-1945 inclusive which had not been allowed as deductions prior to the year of income ended 30th June 1949 pursuant to the said section were—

Year ended 30th June 1944 (balance of loss) . .	£3,550
Year ended 30th June 1945	£1,582
	£5,132

5. In the year of income ended 30th June 1949 the company made a profit of £24,906, which amount was its assessable income for that year, and, apart from the provisions of s. 80 (5) of the said Act, would have been entitled to a deduction of the said sum of £5,132 from the said assessable income pursuant to s. 80 (2) of the said Act.

6. As at 30th June 1944 and 30th June 1945 the undermentioned persons were owners of the numbers of shares indicated opposite their respective names and registered as such in the company's register of members.

Murray Julius Gerloff	9,151 shares
Mrs. Catherine Gerloff	1 share
Rudolph Barr Goyder	9,001 shares
The estate of David John Goyder deceased	500 shares
David Bruce Goyder	500 shares
The estate of Mrs. Margaret Goyder deceased	150 shares
Thomas Nankivell	1,001 shares
James Lewis Berkeley Weir	1 share

7. In the month of June 1948 Murray Julius Gerloff mortgaged 9,000 of his shares to Kathleen Fitzpatrick to secure payment of the sum of £2,750 0s. 0d. and interest. The said transaction is evidenced by a transfer of the said shares and a deed both dated 15th June 1948.

8. The said transfer was approved at a meeting of directors of the company on 1st July 1948 whereupon the name of Kathleen Fitzpatrick was entered in the company's register of members in respect of the said shares.

9. At all material times the sole business of the company has been that of a grazier carried on at Dalgety Downs Station.

10. The said deputy commissioner did not treat the loss of £5,132 0s. 0d. mentioned in par. 5 hereof as an allowable deduction and by notice of assessment dated 20th April 1950 notified the company of his assessment of the income tax payable by it in respect of the said assessable income of £24,906 0s. 0d. derived by it during the year ended on 30th June 1949.

11. On 11th May 1950 the company being dissatisfied with the said assessment duly lodged with the said deputy commissioner an objection in writing against the same.

12. The company did not succeed in establishing to the satisfaction of the deputy commissioner that on 30th June 1949 shares of the company carrying not less than twenty-five per centum of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than twenty-five per centum of the voting power on 30th June 1944 or on 30th June 1945.

13. By an undated letter despatched on or before 12th September 1950 the company requested the said deputy commissioner to treat the objection as an appeal and forward it to the High Court for determination.

14. On 29th January 1952 the said deputy commissioner duly caused the objection to be forwarded to the High Court accordingly.

The questions for the opinion of the Full Court were as follows :— (1) On 30th June 1949 were the 9,000 shares of the company in respect of which Kathleen Fitzpatrick was registered as a member in the company's register beneficially held by Murray Julius Gerloff ? (2) If yes, was the fact that the said deputy commissioner was not satisfied upon that issue due to any such misapprehension, mistake, misconception, unreasonableness, or miscarriage of judgment as would justify me in interfering and setting aside his conclusion ?

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O. J. Negus Q.C. (with him *G. W. Gwynne*), for the appellant. *Avon Downs Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) was wrongly decided. The phrase "shares beneficially held" should be construed as a whole. The phrase has no technical legal meaning. It means, primarily, "owned" or "to be in possession of" or "enjoyment of with all attendant benefits". Shares are "beneficially held" by the owner of them and this is so whether or not the owner is the registered holder. If the phrase is capable of bearing more than one meaning, then that meaning which is more favourable to the taxpayer should be adopted: *Inland Revenue Commissioners* v. *Ross and Coulter* (*Bladnock Distillery Co. Ltd.* (2). The intention of s. 80 (2) is to prevent the evasion of tax. This intention would not be defeated if the phrase "beneficially held" were construed to include an unregistered owner. The commissioner can go behind the register to ascertain whether shares are, in fact, beneficially held. The taxpayer should be permitted to go behind the register for the same purpose. *In re Walla Wynaad Indian Gold Mining Co.* (3) is no authority for the proposition that shares can only be held by a person whose name is on the register. That case was decided upon the interpretation of various sections appearing in *The Companies Act*, 1862 (Imp.) (25 & 26 Vict. c. 59) and the sections are not reproduced in the *Companies Act* 1943-1951 (W.A.).

T. S. Louch Q.C. (with him *W. H. Johnston*), for the respondent. The word "held" has a technical meaning when applied to shares in a limited liability company. [He referred to *Avon Downs Pty. Ltd.* v. *Federal Commissioner of Taxation* (1); *In re Walla Wynaad Indian Gold Mining Co.* (3).] The word "beneficially" appearing in s. 80 (6) (*a*) is not used in the technical sense as is evident from the expression "beneficially held by the trustee of his estate". As the shares were not "held" by Gerloff it is not material to inquire whether he was beneficially interested in them.

Cur. adv. vult.

Oct. 27. THE COURT delivered the following judgment:—

This is a case stated by the Chief Justice in an appeal against the assessment by the Deputy Commissioner of Taxation in Western Australia of the income tax payable by the appellant under the

(1) (1949) 78 C.L.R. 353.
(2) (1948) 1 All E.R. 616, at pp. 624, 625.
(3) (1882) 21 Ch.D. 849.

provisions of the *Income Tax Assessment Act* 1936-1948 in respect of income derived during the year which ended on 30th June 1949.

The appeal followed upon the disallowance of an objection by which the appellant complained that in making the assessment the deputy commissioner had not treated as an allowable deduction certain losses of previous years totalling £5,356, which the appellant contended were allowable as a deduction by virtue of s. 80 of the Act. That section first defines (in sub-s. (1)) the circumstances in which a loss is deemed to be incurred in any year for the purposes of the section ; and it then provides (in sub-s. (2)) that so much of the losses incurred by a taxpayer in any of the seven years next preceding the year of income as has not been allowed as a deduction from his income of any of those years shall be allowable as a deduction in accordance with certain provisions not presently material.

In the case of the appellant the circumstances had arisen in which losses were deemed by virtue of s. 80 (1) to have been incurred for the purposes of the section in certain years including the years ended 30th June 1944 and 30th June 1945 respectively, and the amounts of £3,550, being part of the loss incurred in the former of those years, and £1,582, being the whole of the loss incurred in the latter of those years, were not allowed as a deduction from the appellant's income of any year prior to the year of income now in question. In that year of income the appellant had an assessable income of £24,906. From that assessable income the appellant would have been entitled, by virtue of sub-s. (2) of s. 80, to a deduction of the aggregate of the abovementioned amounts of £3,550 and £1,582, namely £5,132, apart from the provisions of sub-s. (5) of that section. But the appellant was at all material times a private company within the meaning of Div. 7 of Pt. III. of the Act ; and in the case of such a company sub-s. (5) provides that, notwithstanding any other provision of the section, no loss incurred in any year prior to the year of income shall be an allowable deduction, unless the company establishes to the satisfaction of the commissioner that, on the last day of the year of income, shares of the company carrying not less than twenty-five per centum of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than twenty-five per centum of the voting power on the last day of the year in which the loss was incurred.

According to the case stated, the appellant did not succeed in establishing to the satisfaction of the commissioner that on 30th June 1949 shares of the appellant carrying not less than

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twenty-five per centum of the voting power were beneficially held by persons who beneficially held shares of the appellant carrying not less than twenty-five per centum of the voting power on 30th June 1944 or on 30th June 1945. It is not suggested that, at the time when the assessment was made, the information before the deputy commissioner was such that he ought to have been satisfied that the prescribed condition was fulfilled. The issued share capital of the appellant consisted of £20,305 divided into 20,305 shares of £1 each, and each share carried one vote. The deputy commissioner had been furnished by the appellant with the names of the registered shareholders and the numbers of the shares standing in their respective names as at 30th June 1949 and (presumably) as at 30th June 1944 and 1945. But this information by itself was insufficient for the appellant's purposes under s. 80 (5), for between 30th June 1945 and 30th June 1949 such changes had occurred in the registered shareholding that no person or group of persons registered on the latter date as the holder or holders of shares carrying twenty-five per centum of the voting power had been registered on the former date as the holder or holders of shares carrying that percentage of the voting power.

After having issued to the appellant a notice of assessment on 20th April 1950 on the basis that no losses of previous years were allowable deductions, the deputy commissioner received further information in a letter written to him by one M. J. Gerloff on 26th April 1950, accompanied by a statutory declaration made by Gerloff on the same date and a mortgage deed made on 15th June 1948 between Gerloff and a Mrs. Fitzpatrick. These documents established that Gerloff, who was the registered proprietor of 9,151 of the appellant's shares, both on 30th June 1944 and on 30th June 1945, had transferred 9,000 of those shares to Mrs. Fitzpatrick in 1948 by way of security for a sum of £2,750 to be paid on 15th June 1951 and interest thereon to be paid monthly in the meantime, and that on 30th June 1949, the mortgage being still in force, the 9,000 shares stood in the name of Mrs. Fitzpatrick and the remaining 151 stood in the name of Gerloff. On 11th May 1950 the appellant lodged its notice of objection. The notice referred to the documents submitted by Gerloff and asserted that the 9,000 shares standing in the name of Mrs. Fitzpatrick were held by her as security only and were beneficially owned by Gerloff.

The deputy commissioner, though admittedly satisfied of the truth of the facts thus placed before him, nevertheless disallowed the objection. The ground upon which the disallowance was

supported in argument before this Court was that, on the true construction of s. 80 (5), shares cannot be said to be " beneficially held " by a person unless two conditions are fulfilled, first, that he is the holder of the shares, in the sense that his name is entered in the register of members in respect of them ; and, secondly, that he holds the shares for his own exclusive benefit. The appellant answers that if the expression " beneficially held " were to be construed in this sense there would arise in the application of the section serious inequities which the legislature cannot be supposed to have intended. It is said that those inequities would be avoided by construing " beneficially held " as referring only to the ownership of the beneficial interest, and that this construction is to be preferred because it accepts what is the natural meaning of the expression considered as a whole, and avoids the error of interpreting each of its component words as if divorced from the other. The remaining steps in the appellant's argument are these : Because the transfer from Gerloff to Mrs. Fitzpatrick was by way of security only, Gerloff remained at all material times the beneficial owner of the shares transferred : *English Sewing Cotton Co. Ltd.* v. *Inland Revenue Commissioners* (1). In other words, the whole of the 9,151 shares which on any view were beneficially held by Gerloff on 30th June 1944 and 30th June 1945 were, on the construction contended for, beneficially held by him on 30th June 1949 also. Therefore, it is said, the appellant should be held to have established to the satisfaction of the deputy commissioner the facts necessary to entitle it to the deduction it claimed, since he must necessarily have been so satisfied if he had correctly understood the section.

What have been described as the remaining steps in the appellant's argument need not be further considered, because we are of opinion that the construction of s. 80 (5) upon which the deputy commissioner acted is correct. *Dixon* J. so held in *Avon Downs Pty. Ltd.* v. *Federal Commissioner of Taxation* (2), basing his conclusion upon the view that in the terminology of company law shares are said to be " held " by the person who is registered as a shareholder in respect thereof, and that s. 80 (5), being concerned with voting power, should be treated as using that terminology. We share this view. Indeed it is not too much to say that the verb " hold " and its variants, when used in relation to shares in companies, normally refers to the legal ownership of the shares according to the register of members. The Companies Acts of the United Kingdom and of the several States of the Commonwealth have uniformly used the word in this sense, and common usage has

(1) (1947) 1 All E.R. 679.

(2) (1949) 78 C.L.R. 353.