Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Golden Horseshoe Estates Company, Limited, v. The Crown, from the Supreme Court of the State of Western Australia; delivered the 19th May 1911.

PRESENT AT THE HEARING:

LORD ATKINSON.
LORD ROBSON.
SIR ARTHUR WILSON.
SIR SAMUEL EVANS.

[DELIVERED BY LORD ATKINSON.]

This is an Appeal from a judgment of the Supreme Court of Western Australia, composed of two Judges, Mr. Justice McMillan and Mr. Justice Rooth, dated the 19th of May 1910, confirming a judgment of the Court of First Instance dated the 14th of December 1909, whereby it was ordered that the Appellant Company should pay to the Crown, the Plaintiff in the suit, a sum of 4,275*l.*, no order being made as to costs.

This sum represented the amount of the duties claimed to be payable by the Appellants to the Crown under The Dividend Duties Act, 1902, of Western Australia (2 Ed. V., No. 32), on that portion of their profits which they had devoted from the year 1903 to the year 1909, both inclusive, to paying the duties which they were under that Statute bound to pay to the Crown in respect of the dividends they declared to be payable, and subsequently paid to their shareholders without deduction.

[36.] J. 54. 100.—5/1911. E. & S.

Mr. Justice Rooth differed from Mr. Justice McMillan, holding that, on the construction of this Statute, the Crown was not entitled to recover the sum sued for, but being the junior Judge he withdrew his judgment, stating that he did so in order that the judgment against the present Appellants might, if these latter so desired, " go to a higher Court."

The facts are few and undisputed, and in their Lordships' view the matter for decision, namely, the proper construction of Sections 5 and 6 of the above-mentioned Statute, the only taxing sections it contains, plain and clear.

The Act is entitled " An Act to impose duties " in respect of Dividends or Profits of Incorpo- " rated Companies."

For some reason known to its authors, but not disclosed on the face of the Statute, duties are not imposed upon the profits earned by companies, which, like the Appellant Company, carry on their business in Western Australia exclusively. These companies are not put under any obligation to pay duties in respect of any portion of their profits save that which they devote to the payment of the dividends they declare to be payable to their shareholders Sections 5 and 6 run as follows :—

" Section 5. There shall be levied and paid to the Minister " [being the Colonial Treasurer or other Minister charged " with the administration of the Act] for the use of His " Majesty the duties hereinafter provided.

" Section 6.—(1) Within seven days from the time any " dividend is declared by a company carrying on business " in Western Australia, and not elsewhere, such company " shall—

" (A) Forward to the Minister a return in the prescribed " form, containing the prescribed particulars verified " by a statutory declaration ;

" (B) Forward to the Minister a copy of the company's " balance-sheets for the period during which the " dividend was earned ; and

" (c) Pay to the Minister a duty equal to one shilling " for every twenty shillings of the amount or value of " such dividend.

" (2.) If the Minister is not satisfied with the declared " value of any dividend, not being money, he may assess " such value, and the excess duty on such valuation shall be " paid within fourteen days thereafter.

" (3.) This section shall not apply to any company " which comes within the operation of section eight.

" (4.) A company having a registered office outside " Western Australia shall not, for that reason only, be " deemed to be carrying on business elsewhere than in " Western Australia."

The sum to be paid is under Sub-section (c) measured by the amount of "such dividend," *i.e.*, of the dividend mentioned in the earlier part of the Section, namely, the dividend which they have declared.

By the word dividend is ordinarily meant " that share of a company's profits which is pay- " able to its members in respect of their shares " . . . ." And the power of settling and deciding what that share in any given year is to be, is generally entrusted to the directors of the company with or without the sanction of the shareholders (Lindley on Companies, 6th Ed., Vol. 1, p. 598). The declaring of a dividend can only mean therefore the authoritative announcement of the decision of the directors on this matter sanctioned, where necessary, by the shareholders.

Owing to the definition of the word dividend contained in this Act as including " every profit, " advantage, or gain, intended to be paid or " credited to or distributed among any members " of any company," the directors would have been entitled to decide and declare that things other than and different from money, such as shares in some company, for instance, should have been given to their shareholders as dividends. Sub-section 2 of Section 6 provides for such a case ; but in the present case they have

not done that. The resolution declaring the dividend has not been printed. All that appears is that certain dividends were declared in certain years and paid by the Company to their shareholders. It is beside the point therefore to argue as to what the Company were empowered to declare, or what they might have declared as dividends payable or assignable to their shareholders. The point is what they have in fact declared as dividends; for it is in respect of these, and these alone, that they or any other body or persons are required to pay duty.

The measure of the duties has been supplied and the obligation to pay imposed by Section 6. The rights and interests of the Revenue are safeguarded by Sections 11, 12, and 18. The first of these latter provides that the duties imposed by the Act are debts due by the Companies to His Majesty, and become due and payable at the times when the returns, *i.e.*, the returns mentioned in Section 6, ought respectively to be made. The second provides that no company shall distribute its dividends until the duties payable in respect thereof have been paid. And the third imposes heavy penalties upon a company which, contrary to the Act, distributes any dividend before the duty payable in respect of it has been paid. It is not suggested that this Company has failed in any respect to discharge the duties imposed upon them by these sections. They must presumably have during the six years duly forwarded to the Minister copies of their balance sheets, and also forwarded the particulars required to be furnished duly verified under Section 6. They have admittedly during these six years paid the duties on the dividends declared by them to be payable to their shareholders. In what then does their default consist? In this, it is urged, that Section 13 enacts that the company may deduct and retain for their

own use the sums payable in discharge of these duties from the dividends in respect of which the duties were imposed, and this the Company, admittedly, has not done.

The words of the Section, it is argued, are no doubt permissive in form, the word used being "may" not "must," but they, it is said, give a power to do a certain thing; and, to use the words of Lord Cairns, in *Julius* v. *The Bishop of Oxford*, 5 A.C. 214 at p. 222, "there may be "something in the nature of the thing em- "powered to be done . . . . something in "the title of the person or persons for whose "benefit the power is to be exercised, which "may couple the power with a duty, and make "it the duty of the person in whom the power is "reposed to exercise that power when called "upon to do so." But when it is asked what, in the present case, is this "something" connected with the power to deduct the duties from the dividends declared which imposes a duty upon the Company to exercise their power in that respect, and makes the deduction compulsory in its nature, the reply, as understood by their Lordships, is: "If this be not done, the share- "holders will, to the amount of the duties which "might have been deducted from their dividends, "but were not, gain a benefit or advantage out "of the profits of the company upon which no "duties will have been paid." This gain, it is urged is in fact an augmentation of, or accretion to, the dividends, and should be treated as part of them, inasmuch as it was "intended to be paid "or credited to, or distributed amongst, the "shareholders," and therefore comes within the definition of "dividend" in the Act. The reply to this contention is (1) that this benefit or advantage is not part of the dividends which the Company have, in fact, declared, and in respect of which alone is duty payable; and

(2) that if the shareholders derive this benefit out of the profits of the Company in such a case, there is no reason why they should not. The profits are not taxed. The surplus profits of any year may be carried forward to swell the dividends of next year, or they may be employed in many ways, quite legitimate in themselves, to increase the credit and stability of the Company, and thereby enhance the value of the shares to the direct gain and advantage of the shareholders. Yet this increment in value is not taxed, nor are the profits expended to create it taxed. What then it may be asked is the special vice which distinguishes the gain or advantage derived by shareholders out of surplus profits in this case, from gains and advantages of the above character. There might possibly be some strength in the contention put forward if the object of Section 13 was to collect the duties at the source; but it is not so, since the sums deducted are not handed over to the Revenue, but retained by the Company for its own use. Reliance is also placed by the Respondent on the clumsily worded Section number 15. That Section runs as follows: "When a divi- "dend is distributed before the duty payable in "respect thereof is deducted and paid, the duty "shall be a debt due by the person receiving the "dividend to His Majesty." This cannot mean that the shareholder receiving dividends the duty upon which has been paid and the debt to the Crown in respect of them thereby discharged, remains a debtor to His Majesty if no deduction from these dividends has, in fact, been made; else the Crown would be enabled to recover the same duty twice over. To make sense of Section 15 the word "and" must be read as "or," and the words "deducted and paid" as "deducted or paid." The Section will then mean what it is reasonable and just that it should mean, namely, that where the duties have been paid by the Company and the debt due

to the Crown thereby discharged, or where the duties though not paid by the Company to the Crown have in fact been deducted by the Company from the dividends, the shareholders are not to be liable as debtors to the Crown in respect of them.

Even in this latter case the interests of the Revenue would be amply protected through its remedies against the Company for the recovery of the duties.

It is lastly urged on behalf of the Respondent that the whole scheme of the Statute is that the burden of these duties should be borne by the shareholders. That is true, no doubt, in the sense that every pecuniary burden thrown upon a limited company is intended to be borne by the shareholders, inasmuch as it must be discharged out of the earnings of the Company, thereby diminishing the sum available for distribution as dividends, or out of the reserves of the Company, or out of the calls which the shareholders may be obliged to pay; but in no other sense is it true. The hand to pay under this Act is that of the Company. The duty to pay is primarily cast upon the Company. If it makes default the shareholders become responsible, but, according to what appears to their Lordships to be the correct construction of Section 15, only in this latter case when the duties have not been deducted from their dividends. It may be desirable that the advantage the shareholders gain by having the duties paid by the Company out of their profits without deduction should be taxed, but in their Lordships view the words of Section 6 are plain and clear. They do not provide for such a case, and it is not permissible to twist its words from their ordinary meaning and construe them in a strained or unnatural sense in order to extend the liability of the subject to

taxation not imposed upon him by plain and unambiguous enactment however beneficial in the interest of the Revenue such a course might be.

Their Lordships are therefore of opinion this Appeal should be allowed, and they will humbly advise His Majesty accordingly.

In the Privy Council.

THE GOLDEN HORSESHOE ESTATES COMPANY, LIMITED,

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