

Privy Council Appeal No. 33 of 1913.

The Swan Brewery Company, Limited - *Appellant,*

v.

The King - - - - - *Respondent.*

FROM

THE SUPREME COURT OF THE STATE OF WESTERN AUSTRALIA.

REASONS FOR THE REPORT OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED
THE 16TH DECEMBER 1913.

Present at the Hearing.

LORD MOULTON.

LORD PARKER OF WADDINGTON.

LORD SUMNER.

[*Delivered by* LORD SUMNER.]

This is an Appeal from a Judgment of the Full Court of the Supreme Court of Western Australia, by leave of that Court. The Judgment was pronounced in favour of the Crown. A Special Case was stated by consent for the opinion of the Court, and it sets out the few facts that are relevant.

The Appellant Company carries on business in Western Australia and not elsewhere, and does so with success. It has not in the past distributed its profits up to the hilt. On the contrary, it accumulated a reserve fund, which in 1911 amounted to more than 101,450*l.* In the latter part of that year it passed the necessary resolutions to increase its capital by 81,160 new shares of 25*s.* each. These new shares were duly allotted to the then shareholders as fully paid *pro rata* according to their holdings of old

shares. No money passed, but 101,450*l.* was transferred from the Reserve Fund to the credit of the share capital account. Previously this money had been used in the Company's business. After such transfer it continued to be used in the Company's business, but it no longer represented part of the general Reserve Fund; it represented the capital value of the new shares. No dividend duty was paid by the Company in respect of this sum.

It is evident that by this operation what had been floating capital to the amount of 101,450*l.* became fixed, and the Company, which had not been bound to pay anything for the use of this money, now became bound, if it paid dividends at all, to pay dividends on 81,160 new shares as well as upon the old ones. To this extent at least there was more than a mere change in book-keeping.

The Dividend Duties Act of 1902 of Western Australia taxes dividends. When a Company such as the Appellant Company is, namely, one "carrying on business in Western Australia "and not elsewhere," declares a dividend, it becomes bound within seven days to pay a duty of 5 per cent. on the amount or value of the dividend before distributing any dividend or profits.

In ordinary language the new shares would not be called a dividend, nor would the allotment of them be a distribution of a dividend. The question in issue here is, whether or not the new shares were a dividend under the Act above mentioned. If they were, dividend duty was and is payable and the judgment appealed against was right.

Section 2 of the Act defines, or rather describes, the word "dividend," as used in the Act, as including "every profit, advantage, or "gain intended to be paid or credited to or

“distributed among the members of any Company.” The new shares were intended to be and were distributed among the shareholders; they were intended to be and doubtless are advantages to the allottees. The Supreme Court of Western Australia held that they were dividends within the meaning of the Act, and that duty was payable on their amount or value accordingly. What is there wrong in this?

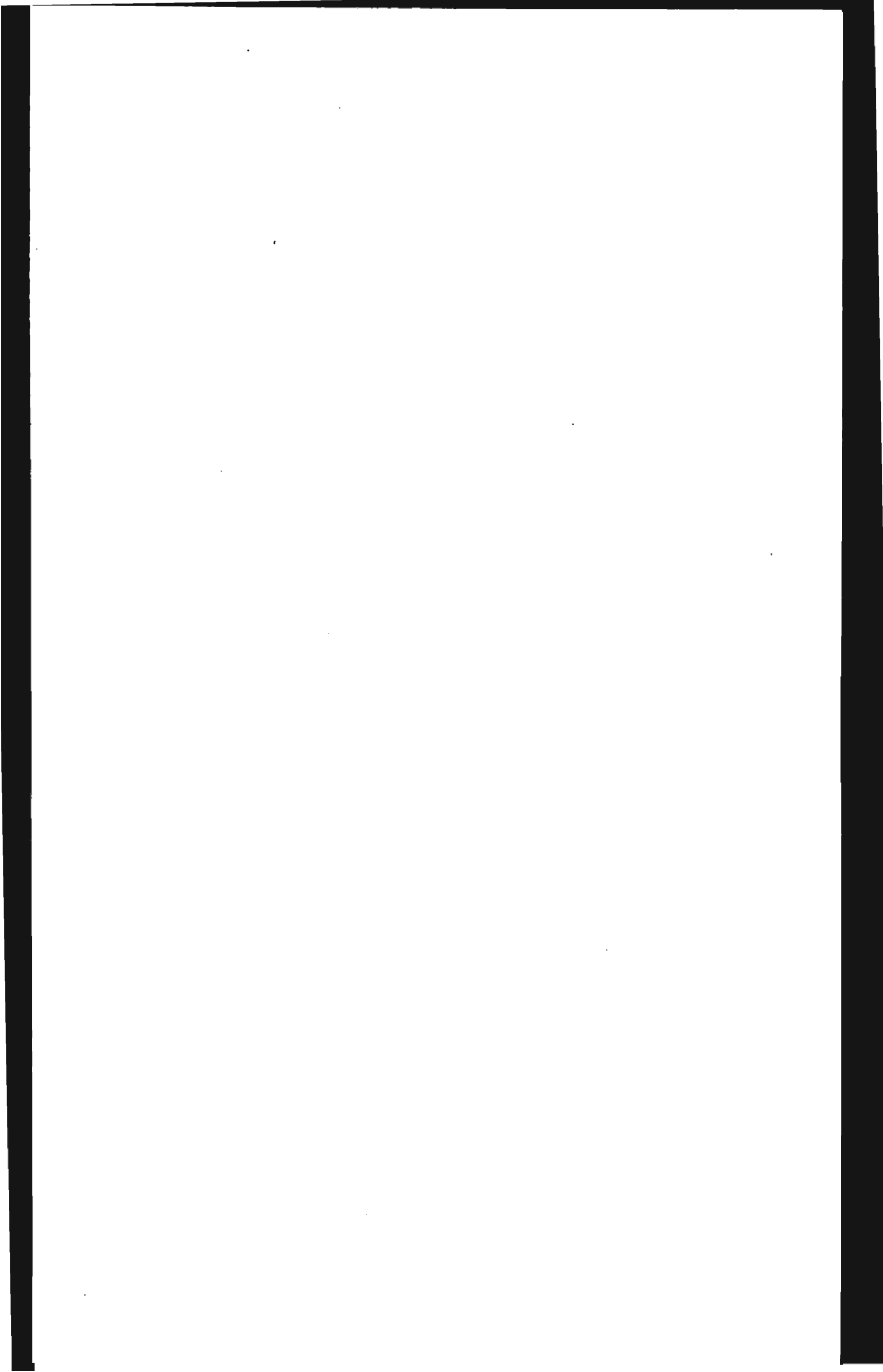
The argument is that there has been no dividend and no distribution, because nothing has been divided and nothing changed. Where formerly there was one share, enhanced in value by its right to participate in the reserve fund, if the Company, being solvent, should be wound up voluntarily, now there are two, possessed of the same right of participation, but for that very reason worth no more and no less together than the one share was worth before. Formerly the Company had a certain amount of capital; now it has the same without diminution or increase either temporary or permanent. The change is but one of name. Formerly its funds were so much share capital and so much reserve all invested in the business, now they are so much more share capital and so much less reserve, all invested in the business still, and still unchanged in total amount. The duty claimed is not, it is said, a duty on or in proportion to any advantage either to the Company or the shareholder measured by the increased stability of the Company's own position or the increased facility to the shareholder in marketing his shares: it is measured by and is levied upon the whole nominal value of the new shares allotted, which is not the same thing as the value of the advantage distributed. Is this argument sound?

Their Lordships agree with the Supreme Court of Western Australia in thinking that it is not. There can be no doubt that the new shares

were distributed and were not the same things as the old ones. They certainly were supposed to be advantages to the members of the Company, none the less that the making of the issue was probably an advantage to the Company also. In so flourishing a business doubtless they really were advantages. The new shares were credited as fully paid, and, what is more, they were fully paid, for after the allotment the Company held 101,450*l.* as [capital produced by the issue of those shares and for that consideration, and no longer as an undivided part of its accumulated Reserve Fund. True, that in a sense it was all one transaction, but that is an ambiguous expression. In business, as in contemplation of law, there were two transactions, the creation and issue of new shares on the Company's part, and on the allottees' part the satisfaction of the liability to pay for them by acquiescing in such a transfer from reserve to share capital as put an end to any participation in the sum of 101,450*l.* in right of the old shares, and created instead a right of general participation in the Company's profits and assets in right of the new shares, without any further liability to make a cash contribution in respect of them. In the words of Chief Justice Parker :—

“ Had the Company distributed the 101,450*l.* among the shareholders and had the shareholders repaid such sums to the Company as the price of the 81,160 new shares, the duty on the 101,450*l.* would clearly have been payable. Is not this virtually the effect of what was actually done ? I think it is.”

Their Lordships have therefore humbly advised His Majesty that the Judgment of the Supreme Court of Western Australia was right, and that the Appeal should be dismissed with costs.



In the Privy Council.

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v.

THE KING.

DELIVERED BY LORD SUMNER.

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