CANADA CHINA CLAY, LIMITED (DEFENDANT) ..... APPELLANT;

AND

MITCHELL F. HEPBURN, TREASURER OF THE PROVINCE OF ONTARIO, FOR HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO (PLAINTIFF) ..... RESPONDENT.

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*Nov. 13
*Dec. 20

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Taxation—Companies—Company selling its assets to another company —Payment by latter by allotment and issue of shares in it to trustee for shareholders of the vendor company—Liability of vendor company to tax under The Security Transfer Tax Act, 1939, Ont. (1939, c. 45)—Secs. 1 (b), 2 (a), 5 (1) (b), 19 (c) of the Act, and Regulation 26 made under the Act.

*PRESENT:—Kerwin, Hudson, Taschereau, Rand and Kellock JJ.

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The Security Transfer Tax Act, 1939, Ont. (1939, c. 45), imposes a tax, payable by the vendor, transferer or assignor, "upon every change of ownership consequent upon the sale, transfer or assignment" of a "security" (defined by the Act to include any share of capital stock issued by any company), and authorizes regulations "determining what constitutes a sale, transfer or assignment within the meaning of this Act." By regulation 26, "if any company * * * makes distribution of or assigns to its shareholders assets consisting of taxable securities such distribution or assignment shall be deemed to constitute a sale, transfer or assignment of such securities within the meaning of the Act". By s. 5 (1) (*b*) of the Act, the allotment by a company "of its shares in order to effect an issue thereof" shall not be subject to the tax.

Appellant, a company, by an agreement sold its assets to another company, part of the consideration being payment by the latter of a sum to be satisfied by the allotment and issue by the purchasing company of 144,950 shares of its capital stock to shareholders of appellant pro rata. Appellant was to surrender its charter as soon as possible. In accordance with the agreement, the directors of the purchasing company allotted the shares to a trustee for the shareholders of appellant to be distributed among such shareholders, delivery of certificates of shares in the purchasing company to be made on surrender for cancellation of certificates of shares in appellant.

Held: Appellant was liable to the tax imposed by said Act. (Rand and Kellock JJ. dissented).

Per Kerwin J.: The effect in law of the agreement and other proceedings (keeping in mind the distinction between a share and the certificate of the share) was that appellant became owner of the shares and (within the meaning of the Act and regulation 26) transferred or assigned them to its shareholders, and consequent upon that transfer or assignment there was a change of ownership from appellant to its shareholders. In contemplation of law there were two transactions, one between the two companies and the other between appellant and its shareholders.

Per Hudson J.: The shares went to appellant's shareholders because, as such shareholders, they were entitled by law to the proceeds of the sale of appellant's assets. Under all the circumstances, it should be held that the purchasing company in making the distribution of shares did so on behalf of appellant, and that this in fact amounted to a distribution of taxable assets by appellant within the meaning of regulation 26.

Per Taschereau J.: In determining whether appellant was liable for the tax, the substance and not the form of the transaction must be considered. In substance what was done was, issue of the shares in fulfilment of the purchasing company's obligation to appellant, and distribution, out of those shares, of appellant's assets (in contemplation of its voluntary liquidation) in fulfilment of appellant's obligation to its shareholders. That was what was covered by the procedure followed, and the direction to the purchasing company to issue the shares to appellant's shareholders did not change what was done in substance; this mere delegation did not affect or alter the legal rela-

tions existing between the parties. The absence of actual delivery and change of possession of certificates of shares by the purchasing company to appellant and by appellant to its shareholders—a purely physical formality, which is merely the evidence, and not a constituting factor of the rights of the shareholders—is irrelevant and has no bearing on the ownership of the shares; there was a legal change of ownership of the shares, which is what is taxable under the Act.

Per Rand and Kellock JJ. (dissenting): The shares were never "issued" prior to their issue to the shareholders of appellant or to the trustee for them, and, therefore, there was no transfer or assignment or change of ownership thereafter to which the tax could attach. Appellant was never a shareholder of the purchasing company in respect to these shares; its only right under the agreement was to call for issue to third persons, namely, its own shareholders. Once given that the agreement constituted a real transaction, as to which no question was raised, its contents determined the legal rights of the parties thereto, and they were entitled to have the transaction take the form which it did take (*Partington* v. *Attorney-General,* L.R. 4 H.L. 100, at 122; *Maclay* v. *Dixon,* [1944] 1 All E.R. 22, at 23; *Inland Revenue Commissioners* v. *Duke of Westminster,* [1936] A.C. 1, at 19, 24 *et seq.,* 28, 31, cited. *Swan Brewery Co. Ltd.* v. *The King,* [1914] A.C. 231, discussed and distinguished).

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario dismissing the defendant's appeal from the judgment of Mackay J. against it for a tax claimed by the plaintiff under *The Security Transfer Tax Act, 1939,* Ontario (1939, c. 45).

By an agreement between the defendant and another company, both incorporated under the *Companies Act* of Canada, the defendant sold all its assets to the other company (hereinafter sometimes called the purchasing company). The purchasing company, besides assuming two existing hypothecs, was to pay a net amount of $1,220,479, to be satisfied by the allotment and issue by the purchasing company of 144,950 shares of its capital stock to the shareholders of the defendant pro rata. The directors of the purchasing company passed a by-law (subject to confirmation by its shareholders) authorizing the execution and carrying out of the agreement and directing allotment and issue of the 144,950 shares to the shareholders of the defendant or to the trustees for said shareholders, and subsequently passed a resolution allotting the shares to a certain trust company as trustee for the shareholders of the defendant to be distributed by said trustee among the shareholders of the defendant so that

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each shareholder of the defendant would receive one share of the capital stock of the purchasing company for each two shares of the capital stock of the defendant held by such shareholder, and authorizing and directing the said trust company upon surrender up for cancellation by any shareholder of the defendant of his share certificate or certificates representing shares of the capital stock of the defendant, to deliver to such shareholder a certificate or certificates representing one share of the capital stock of the purchasing company for each two shares represented by the certificate or certificates so surrendered. Further details of the agreement, etc., appear in the reasons for judgment now reported.

The plaintiff, as Treasurer of the Province of Ontario and suing on behalf of His Majesty the King in right of the Province of Ontario, sued the defendant, claiming a declaration by the Court that the said issue and allotment of shares to the shareholders of the defendant was a change of ownership under *The Security Transfer Tax Act, 1939,* Ontario (1939, c. 45), a declaration that the said allotment and issue of shares was subject to tax under said Act, and an order directing the defendant to pay to the plaintiff the sum of $1,449.50 plus the penalties provided by the Act. The defendant denied that there was any tax imposed by the Act on the transaction.

The matter came before the Court by way of special case on the following question or questions: (1) Was the said allotment of 144,950 shares of its capital stock by the purchasing company an allotment in order to effect an issue thereof within the meaning of s. 5 of said Act? If the Court should be of opinion in the affirmative, then judgment should be for defendant, dismissing the action with costs; but if the Court should be of opinion in the negative, then there was the further question, (2) Was the said allotment and issue of 144,950 shares of its capital stock by the purchasing company a transfer of shares within the meaning of s. 2 of said Act and Regulation 26 of the Regulations passed pursuant to said Act and as such subject to transfer tax? If the Court should be of opinion in the affirmative, then there should be judgment for the

plaintiff for $1,499.50 with costs; if the Court should be of opinion in the negative, then there should be judgment for defendant, dismissing the action with costs.

The relevant provisions of the Act and the said Regulation 26 are sufficiently set out in the reasons for judgment now reported.

The case was heard by Mackay J. who, at conclusion of the hearing, gave judgment for the plaintiff, holding that there was "in substance, in effect a transfer within the contemplation of" the Act. An appeal to the Court of Appeal for Ontario was dismissed (no written reasons being given). Special leave to appeal to this Court was granted by the Court of Appeal for Ontario.

S. H. Robinson for the appellant.

C. R. Magone K.C. for the respondent.

KERWIN J.—The sole point for determination raised by the parties to this litigation is whether the appellant, Canada China Clay, Limited, is liable to the respondent, the Treasurer of the Province of Ontario, for a tax and penalties under the provisions of the Ontario *Security Transfer Tax Act, 1939,* and No. 26 of the regulations made by the Lieutenant-Governor in Council in pursuance thereof. So far the appellant has met with no success, as the action of the plaintiff, respondent, was sustained by the trial judge and an appeal therefrom was dismissed by the Court of Appeal for Ontario. In my opinion, the Courts below were right in so deciding.

By section 2 of the Act:—

There shall be imposed, levied, collected and paid to His Majesty for the uses of Ontario, a tax,—

(*a*) upon every change of ownership consequent upon the sale, transfer or assignment of a security made or carried into effect in Ontario;

By section 1 (*b*):—

Security shall include,—

(i) any share of capital stock or debenture stock and any bond or debenture issued by any association, company, corporation or government;

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Section 19 (*c*) enacts:—

The Lieutenant-Governor in Council may make regulations,—

(*c*) determining what constitutes a sale, transfer or assignment within the meaning of this Act;

Regulation 26 reads as follows:—

If any company, corporation, association or syndicate for any reason, makes distribution of or assigns to its shareholders assets consisting of taxable securities such distribution or assignment shall be deemed to constitute a sale, transfer or assignment of such securities within the meaning of the Act.

By a written agreement, the appellant sold and Canada China Clay and Silica, Limited, purchased all the business, undertaking, goodwill and corporate franchise of the vendor, and all of its movable and immovable property, cash on hand and accounts receivable. In consideration of the transfer, the purchaser agreed, in addition to assuming two hypothecs, to pay the vendor certain specified sums of money, less the vendor's liabilities, other than its capital stock,

leaving a net amount of one million two hundred and twenty thousand four hundred and seventy-nine dollars ($1,220,479.00), the whole to be satisfied by the allotment and issue by the purchaser of one hundred and forty-four thousand nine hundred and fifty (144,950) shares without nominal or par value of the capital stock of the purchaser as fully paid and non-assessable shares to the shareholders of the vendor pro rata to the number of shares of the vendor held by each of its shareholders.

This agreement was authorized by a by-law of the directors of Canada China Clay and Silica, Limited, which also authorized and directed its directors to allot and issue the 144,950 shares to the shareholders of Canada China Clay, Limited, or to the trustees for those shareholders. Pursuant to the by-law and agreement the directors of Canada China Clay and Silica, Limited, allotted the shares to Chartered Trust and Executor Company as trustee for the shareholders of the appellant, to be distributed by the trustee among such shareholders so that each would receive one share of the capital stock of Canada China Clay and Silica, Limited, for each two shares of the capital stock of the appellant held by such shareholder.

What was the effect in law of these proceedings? The appellant sold its assets and the consideration therefor was the 144,950 shares of the capital stock of Canada China

Clay and Silica, Limited. Having been allotted and issued by the directors of the latter company, these shares are a "security" as defined by section 1 (*b*) of the Act. Although allotted and issued direct to a trustee for the shareholders of the appellant, once the distinction between a share of capital stock of a company and the certificate of such share is borne in mind, I am unable to agree with the contention that the appellant did not become the owner of these shares. Whatever question might have arisen as to whether the distribution by the appellant to its shareholders of assets consisting of taxable securities was a transfer or assignment under section 2 (*a*) of the Act, appears to me to be set at rest by regulation 26 which did not go beyond the terms of section 19 (*c*) of the Act. This being so, there was a change of ownership from the appellant to its shareholders consequent upon the transfer or assignment of the shares of the purchasing company. In one sense while there was but one transaction, in contemplation of law there were two transactions, one between the two companies and the other between the appellant and its shareholders.

It was argued that the appellant was not subject to the tax in view of the provisions of section 5 (1) (*b*) of the Act, which so far as is material reads as follows:—

> The following transactions shall not be subject to the tax imposed by this Act,—
>
> (*b*) the allotment by an association, company or corporation of its shares in order to effect an issue thereof.

The short answer to that contention, in my view, is that no claim is made to a tax upon the allotment by Canada China Clay and Silica, Limited, of its shares.

The appeal should be dismissed with costs.

HUDSON J.—I agree that this appeal should be dismissed with costs and have very little to add to what has been said by my brothers Kerwin and Taschereau.

The appellant company sold its undertaking and entire assets to Canada China Clay and Silica Ltd. The consideration for this sale was the assumption by the purchaser of the outstanding obligations of the appellant and a sum of $1,220,479 which was to be satisfied by

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the allotment and issue by the purchaser of 144,950 shares of its capital stock to the shareholders of the appellant pro rata. The appellant agreed to surrender its charter as soon as possible and, in order to insure the fulfilment of the agreement notwithstanding the dissolution, the appellant appointed the purchaser "its true and lawful attorney for it and in its name, place and stead to execute and deliver all" deeds, transfers, etc., of the undertaking, property and assets of the appellant in favour of the purchaser, etc.

The assets were duly conveyed by the appellant to the purchaser and thereupon the directors of the purchasing company allotted the shares in question to the Chartered Trust and Executor Company as trustee for the shareholders of the appellant, to be distributed by said trustee among the said shareholders, one share of the capital stock of the purchaser for each two shares held by such shareholder for the appellant company. It further provided that the certificates should be issued to such shareholders upon surrender for cancellation of the shares which were held in the appellant company.

In the result, the entire proceeds of the sale by the appellant came to its shareholders in the form of share certificates in the purchasing company.

To fulfill its undertaking in the agreement for sale the appellant was bound to surrender its charter as soon as possible. In order to effect a legal surrender it was necessary for it to comply with the provisions of section 29 (1) (*a*) of the Dominion *Companies Act, 1934,* which provides as follows:

> 29. (1) The charter of a company may be surrendered if the company proves to the satisfaction of the Secretary of State
>
> (*a*) that it has no assets and that any assets owned by it immediately prior to the application for leave to surrender its charter have been divided rateably amongst its shareholders or members; * * *

The delivery of share certificates in the purchasing company was made conditional on surrender for cancellation of the certificates in the appellant company.

All these proceedings appear from the record to have been almost contemporaneous and to be merely steps in a single transaction.

The shares in question went to the shareholders of the appellant because they were shareholders of that company and as such entitled by law to the proceeds of the sale of that company's assets.

Under all of these circumstances, in my opinion it should be held that the purchasing company in making the distribution of shares did so on behalf of the appellant, and that this in fact amounted to a distribution of taxable assets by the appellant within the meaning of Regulation 26.

TASCHEREAU J.—On the 17th of September, 1941, the appellant, Canada China Clay, Limited, sold all its assets to Canada China Clay and Silica, Limited.

In consideration of this sale, the purchaser agreed to pay to the vendor $504,426.89 for the mine buildings, plant and equipment; $195,868.88 in respect of the amount spent by the vendor in the exploration and development of its mine properties; $31,211.44 for current assets; $1,000,000 for mine properties, less $511,028.21, amount of liabilities, making a grand total of $1,220,479. This sum was payable by the allotment and issue by the purchaser of 144,950 shares without nominal or par value of its capital stock, as fully paid and non-assessable, to the *shareholders of the vendor.*

The agreement entered into was ratified by the directors and shareholders of the respective companies, and, at a later date, the directors of the Canada China Clay and Silica, Limited, were authorized and directed to issue 144,950 shares of its capital stock to the shareholders of the Canada China Clay, Limited, or to the trustees for said shareholders.

No tax was paid by the vendor company under *The Security Transfer Tax Act, 1939,* in respect of the allotment and issue of these shares, and the Treasurer of the Province of Ontario, therefore, brought action against the appellant in which he claimed a declaration by the Court that the said issue and allotment of shares direct to the shareholders of Canada China Clay, Limited, is a change of ownership under the Act, that said allotment and issue of shares is subject to tax under the *Security Transfer Tax*

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Act, and an order directing the defendant-appellant to pay the sum of $1,449.50, plus the penalties provided by the Act.

The contention of the defendant is that the agreement entered into with the Canada China Clay and Silica, Limited, to allot and issue 144,950 shares of its capital stock, did not in any way constitute a change of ownership within the meaning of the *Security Transfer Tax Act,* and that the transaction is not subject to any tax imposed by the Act.

The action was maintained and the judgment of Mr. Justice Mackay was unanimously confirmed by the Court of Appeal.

The relevant sections of the *Security Transfer Tax Act* are the following:—

1. In this Act,—

(*b*) "Security" shall include,—

(i) any share of capital stock or debenture stock and any bond or debenture issued by any association, company, corporation or government;

2. There shall be imposed, levied, collected and paid to His Majesty for the uses of Ontario, a tax,—

(*a*) upon every change of ownership consequent upon the sale, transfer or assignment of a security made or carried into effect in Ontario;

4. The tax imposed by this Act shall be payable in security transfer tax stamps or cash by the vendor, transferor, assignor or, in the case of transfers and deliveries referred to in clauses *c* and *d* of section 2, by the person, company, corporation, bank or trust company making delivery.

5. (1) The following transactions shall not be subject to the tax imposed by this Act,—

(*b*) the allotment by an association, company or corporation of its shares in order to effect an issue thereof.

19. The Lieutenant-Governor in Council may make regulations,—

(*c*) determining what constitutes a sale, transfer or assignment within the meaning of this Act;

REGULATION 26.

If any company, corporation, association or syndicate for any reason, makes distribution of or assigns to its shareholders assets consisting of taxable securities *such distribution* or assignment shall be deemed to constitute a sale, transfer or assignment of such securities within the meaning of the Act.

In order to determine if the appellant is bound to pay the amount of tax which is claimed, the substance and not the form of the transaction must be considered. It

is quite true that under the Act (section 5, paragraph (*b*)), the allotment of shares by a company, in order to effect an issue thereof, is exempt from taxation, and the form with which the transaction has been clothed would at first sight create the impression that there has been no transfer of shares.

But I do not think that this is the situation. In selling its assets to the Canada China Clay and Silica, Limited, the appellant was entitled to receive 144,950 shares without nominal or par value. That was the consideration for the sale, as these shares represented the purchase price paid for the property of the appellant company. If the Canada China Clay and Silica, Limited, had not fulfilled its obligation to allot, issue and deliver such shares, the appellant would have been entitled to bring action to compel it to do so.

Normally, the shares should have been issued to the appellant, which was the party entitled to them, and they would have become a part of its assets, available for distribution to its shareholders, in the event of a voluntary liquidation, which was then contemplated. These operations really involved two transactions, the first between the two companies, and the second, between the appellant and its shareholders.

The direction given to the purchaser to issue these shares to appellant's shareholders did not change the substance of these two independent transactions, and this mere delegation of payment did not affect or alter the legal relations existing between both parties. The procedure followed, in reality covered these two transactions, and as a result of the single operation that has taken place, two different obligations have been fulfilled. The Canada China Clay and Silica, Limited, has paid its debt to the appellant, and the latter, out of these shares, has distributed its assets to its shareholders.

There was no actual delivery and change of possession of a certificate of shares by the Canada China Clay and Silica, Limited, to the appellant and by the latter to its shareholders; but the absence of this purely physical formality, which is merely the evidence, and not a constituting factor of the rights of the shareholders, is irre-

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levant, and has no bearing whatever on the ownership of these shares. In fact, there was no transfer of a certificate of shares, but there was a legal *change of ownership,* and this is precisely what is taxable under the Act (section 2, paragraph *a*).

I believe that the appellant cannot escape the payment of the tax, and that the appeal should be dismissed with costs.

The judgment of Rand and Kellock JJ., dissenting, was delivered by

KELLOCK J.—This is an appeal from an order of the Court of Appeal for Ontario affirming the judgment at trial in favour of the respondent in an action brought by the latter for a declaration that a certain transaction fell within the provisions of *The Security Transfer Tax Act, 1939* (chapter 45), and for the recovery of certain taxes consequent thereon. The parties submitted a special case for the opinion of the Court from which it appears that by an agreement dated the 17th of September, 1941, between the appellant as vendor and Canada China Clay and Silica, Limited, as purchaser, it was provided that the latter should purchase the assets of the former upon certain terms. The important clause in the agreement is 3 (*a*), which reads as follows:

3 (*a*) To pay to the Vendor the sum of Five Hundred and Four Thousand Four Hundred and Twenty-Six Dollars and Eighty-nine Cents ($504,426.89) for the mine buildings, plant and equipment of the Vendor and One Hundred and Ninety-five Thousand Eight Hundred and Sixty-eight Dollars and Eighty-eight Cents ($195,868.88) in respect of the amount spent by the Vendor in the exploration and development of its mining properties and Thirty-one Thousand Two Hundred and Eleven Dollars and Forty-four Cents ($31,211.44) for current assets of the Vendor and in addition the sum of One Million Dollars ($1,000,000.00) for the mining properties and all other assets of the Vendor less Five Hundred and Eleven Thousand and Twenty-eight Dollars and Twenty-one Cents ($511,028.21) being the amount of the liabilities of the Vendor other than its Capital Stock, leaving a net amount of One Million Two Hundred and Twenty Thousand Four Hundred and Seventy-nine Dollars ($1,200,479.00), the whole to be satisfied by the allotment and issue by the Purchaser of One Hundred and Forty-four Thousand Nine Hundred and Fifty (144,950) shares without nominal or par value of the Capital Stock of the Purchaser as fully paid and non-assessable shares to the Shareholders of the Vendor pro rata to the number of shares of the Vendor held by each of its Shareholders;

The execution of this agreement by the purchasing company was authorized by by-law of the directors of the company, paragraph 2 of which provided as follows:

> 2. That under and pursuant to the terms of such Agreement upon the approval of this By-law by the Shareholders, the Directors be and are hereby authorized and directed to allot and issue One Hundred and Forty-four Thousand Nine Hundred and Fifty (144,950) shares without nominal or par value of the Capital Stock of this Company as fully paid and non-assessable shares to the Shareholders of Canada China Clay, Limited, or to the Trustees for said Shareholders.

Subsequent to the execution of the agreement, a resolution was passed by the directors of the purchasing company allotting the shares to a trust company as trustee for the shareholders of the appellant company to be distributed pro rata in accordance with their shareholdings in the appellant.

The learned trial judge held that the transaction was subject to tax as being a transfer within the Act. The appeal to the Court of Appeal was dismissed, no written reasons being given.

By section 1 (*b*) of the Act, it is provided that " 'security' shall include (i) any share of capital stock or debenture stock and any bond or debenture *issued* by any * * * company". Section 2 (*a*) is the taxing section. It provides for a tax upon "every change of ownership consequent upon the sale, transfer or assignment of a security made or carried into effect in Ontario". By section 4, it is provided that the tax is payable by the vendor, transferor or assignor. By section 19, the Lieutenant-Governor in Council is authorized to make regulations determining what shall constitute a sale, transfer or assignment within the meaning of the Act. Under the authority of this section, regulations were passed including regulation 26 as follows:

> If any company * * * for any reason, makes distribution of or assigns to its shareholders assets consisting of taxable securities such distribution or assignment shall be deemed to constitute a sale, transfer or assignment of such securities within the meaning of the Act.

For the appellant, it is contended that there was no "change of ownership" of any "issued" shares at all and that section 2, by reason of the definition of "security", applies only to a change of ownership of shares already issued. Appellant argues that, upon well settled principles, unless

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the transaction can be brought within the fair intendment of the legislation, having regard to the language employed, the respondent must fail. Counsel for the respondent admits, as perforce he must, that in the form in which the transaction is found, it is not caught by the language of the statute, but he argues that it is the substance of the transaction which must be looked at and he contends that the substance of the transaction here in question is a sale by the appellant of its assets for shares in the purchasing company and a distribution by the appellant of those shares to its shareholders. In his factum, he says: "It is submitted that a company cannot by the mere expedient of changing the form but not the substance of a transaction escape taxation".

It may be granted at once that had the transaction now in question taken a form other than that which it did take, namely the issue of the shares to the vendor, the appellant company, and the distribution of such shares to the shareholders of the appellant, it would clearly have fallen within the provisions of regulation 26 and, even without that regulation, within the language of section 2 (*a*) itself. The transaction, however, did not assume that form.

Lord Cairns in his oft quoted judgment in *Partington* v. *Attorney General* (1) said:

> I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the leter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

In giving the judgment of the Court in *Maclay* v. *Dixon* (2) Scott L.J. said at page 23:

> In my opinion, they were both entitled so to arrange the matter, as not to attract the control of the Acts, or, putting it positively, as to prevent the Acts from applying. If the actual transaction was not within the Acts, it made no legal difference that the parties had intentionally kept it out of the Acts.

(1) (1869) L.R. 4 H.L. 100 at 122.
(2) [1944] 1 All E.R. 22.

In the case at bar then, the Crown must show a transfer involving a change of ownership of a "security" within the meaning of the *Security Transfer Tax Act*. Having regard to what the Act states is a security, the burden upon the Crown is to show in the first place that the shares in question were issued, and in the second place that *subsequently* there was a transfer of the shares to a new owner.

The first question which arises, then, is as to when the shares in question became "issued" shares within the meaning of the Act. In order that a share may be issued, it must be issued to somebody who is a shareholder. In my opinion, the shares in question were never "issued" at any time prior to their issue to the shareholders of the appellant company or to the trustee for them, and, therefore, there was no transfer or assignment or change of ownership thereafter to which the tax could attach. The respondent does not seek to make any point with respect to any question of transfer as between the trustee for the shareholders and the shareholders themselves no doubt because there would be no change of ownership as between such trustee and the shareholders who would be the beneficial owners.

The appellant company was never at any time a shareholder of the purchasing company in respect to these shares. It never had any right under the agreement in question except the right to call for the issue of these shares to third persons, namely, its own shareholders. Once given that the agreement constituted a real transaction, and there is no question raised with regard to this, its contents determine the legal rights of the parties thereto and the only legal right of the appellant, as above pointed out, on the document was the right already mentioned.

In *Inland Revenue Commissioners* v. *Duke of Westminster* (1), Lord Russell of Killowen said:

> The Commissioners and Finlay J. took the opposite view on the ground that (as they said) looking at the substance of the thing the payments were payments of wages. This simply means that the true legal position is disregarded, and a different legal right and lia-

(1) [1936] A.C. 1 at 24.

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bility substituted in the place of the legal right and liability which the parties have created. I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if, in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case.

Lord Russell then referred to what was said by Lord Cairns in *Partington* v. *Attorney General* already cited above, and proceeded:

> If all that is meant by the doctrine is that, having once ascertained the legal rights of the parties, you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights, well and good. That is what this House did in the case of *Secretary of State in Council of India* v. *Scoble* (1); that and no more. If, on the other hand, the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing of the rights and liabilties of the parties being different from what in law they are, then I entirely dissent from such a doctrine.
>
> The substance of the transaction between Allman and the Duke is, in my opinion, to be found, and to be found only, by ascertaining their respective rights and liabilities under the deed, the legal effect of which is what I have already stated.

Lord Tomlin dealt with the same point at page 19 as follows:

> Apart, however, from the question of contract with which I have dealt, it is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter," and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages, and that therefore, while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting "the incertain and crooked cord of discretion" for "the golden and streight metwand of the law." Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable.

(1) [1903] A.C. 299.

I refer also to the judgment of Lord MacMillan at page 28, as well as to the judgment of Lord Wright at page 31 as follows:

> And once it is admitted that the deed is a genuine document, there is in my opinion no room for the phrase "in substance." Or, more correctly, the true nature of the legal obligation and nothing else is "the substance." I need not develop this point, as I agree with what has been said by my noble and learned friends, Lord Tomlin and Lord Russell of Killowen.

The shares in question herein were issued pursuant to the resolution of the directors, Exhibit C, which allotted the shares to the trustee for the shareholders of the appellant company to be distributed among them in a certain proportion. Whether a shareholder in the appellant company could be made a shareholder in the purchasing company against his will, or whether he does not become such until he has taken effective steps to accept the shares to which he is entitled, need not be decided on this appeal. In my view, the appellant company at least, never became a shareholder and never had any shares issued to it. It was, therefore, never in a position to distribute or transfer or assign the shares to its shareholders. The agreement between the two companies might have been drawn in such a way as to come within the provisions of the Act and the regulations, but the parties provided otherwise, as they were entitled, in my view on the basis of the above authorities, to do.

I do not think that the authorities to which we were referred by counsel for the respondent are in point. They arose in other circumstances and under other statutory provisions and I do not find any principle in them applicable to the case at bar. I desire to refer to one only, namely, *Swan Brewery Company, Limited* v. *The King* (1), and to the judgment of Lord Sumner, particularly at page 235. What was in question in the case was whether or not certain bonus shares were to be considered a dividend within the meaning of a statute of Western Australia defining dividend as including "every dividend, profit, advantage or gain intended to be paid or credited to or distributed among any members or directors of any company." In that case the company, having certain accumu-

(1) [1914] A.C. 231.

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lated profits, passed resolutions providing for the transfer of a portion thereof to share capital account and issued to the existing shareholders new shares as fully paid up for the same amount. It was held that these shares fell within this definition as being advantages to the shareholders. Lord Sumner, however, went on to say that what was done was, in a sense, all one transaction, but that there were really two transactions, namely the creation and issue of the new shares on the company's part and on the shareholders' part the satisfaction of the liability to pay for them by acquiescing in the transfer from the reserve to share capital. He held in effect that what had taken place was the distribution among shareholders of the profits in question and the repayment by the shareholders to the company of the same amount as the price of the new shares. This judgment has been considered in *Commissioners of Inland Revenue* v. *Blot* (1) and *Commissioner of Income Tax, Bengal* v. *Mercantile Bank of India, Limited* (2). Whatever may have been the facts of the transaction dealt with in the *Swan Brewery* case (3), the question there involved was quite different from that in the case at bar. I do not read the opinion of Lord Sumner as expressed in the latter part of his judgment as laying down a principle of general application opposed to the principle affirmed by the judgments in the *Duke of Westminster* case (4) already mentioned.

For these reasons, I would allow the appeal with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Holden, Murdoch, Walton, Finlay & Robinson.*

Solicitor for the respondent: *C. R. Magone.*

(1) [1921] 2 A.C. 171.
(2) [1936] A.C. 478.
(3) [1914] A.C. 231.
(4) [1936] A.C. 1.