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(3) that they were, as in England, voidable, but, owing to the circumstances of the country, there was no immediate available means open to persons seeking to have such a marriage declared void. The third view is the one that has always been accepted, and, I think, is the sound one.

The fact, therefore, remains that the marriage between these parties was in its inception voidable, and would be void as soon as either party took proceedings in the lifetime of the other to have it declared void. That has been done, and the Supreme Court has made the only decree that it could make.

I do not think it necessary to add anything to the reasons which have been given by *Walker* J. The appeal therefore must be dismissed, but, as it was made *in formâ pauperis*, no costs should be allowed.

BARTON and O'CONNOR JJ. concurred.

Appeal dismissed.

Proctors, for the respondent, *Fisher & Macansh.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

GREAT FINGALL ASSOCIATED GOLD MINING CO. AND ANOTHER . . } APPELLANTS;

AND

HARNESS AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Nov.* 5, 6.

Griffith C.J., Barton and Higgins JJ.

Voluntary and Compulsory Winding-up — Companies Act 1893 (*W.A.*), (56 *Vict. No.* 8), *secs.* 26, 107, 150, 152—*Right of creditors to demand compulsory winding-up.*

Where a company is in voluntary liquidation the petitioning creditors for a compulsory liquidation must show a *primâ facie* case that they would be prejudiced by a voluntary winding up.

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Upon an application for compulsory winding-up at the instance of creditors, in lieu of a voluntary winding-up already in progress, a *primâ facie* case was made that certain shareholders, whose shares were nominally fully paid, were nevertheless liable to make contribution, and that the matter would not be properly investigated in the voluntary winding-up. Under sec. 152 of the *Companies Act* 1893 (W.A.), it required that regard should be had to the wishes of the creditors, members, and contributories of the company in the appointment of a liquidator. A large majority of the creditors of the appellant company desired that the voluntary liquidation should be continued, but nearly all were in some degree holders of shares in respect of which a liability was asserted; on the other hand a substantial body of creditors desired a compulsory winding-up order.

Held, that the discretion of the Judge in ordering a compulsory winding-up was properly exercised and should not be disturbed.

APPEAL from the Supreme Court of Western Australia.

M. agreed to sell to D., as trustee for a projected company, certain mining leases for the consideration of cash and shares. The company was to be floated with a capital of 250,000 shares at 10s. each; 150,000 fully paid-up shares were to be issued to M., namely, 125,000 to be credited as fully paid up, and 25,000 to be credited as paid up to 6s. each. These 25,000 shares were to be handed by M. to the company, and offered to the public subject to a liability of 4s. only. About 19,000 of these were taken up, and the company was formed and registered and carried out some development work on the mine; but, after an extension of time granted by M., it proved unable to pay the purchase money under the agreement, and went into voluntary liquidation. B., the secretary of the company, and holder of over 6,000 of the shares issued to M. as paid up to 6s., was appointed liquidator. The total debts of the company amounted to £4,120. Some creditors, for about £200, petitioned the Supreme Court to order compulsory winding up; this was opposed by creditors amounting to about £3,000, some of whom were also shareholders. An order for compulsory winding up was made by *McMillan* J., and affirmed by the Full Court on appeal. The company appealed to the High Court.

Pilkington K.C. (with him *Marsland*), for the appellants. The compulsory winding-up was ordered expressly for the purpose of having the question of the liability of the shares

issued at a discount determined, although that question would have been inquired into in exactly the same manner under a voluntary winding-up. Voluntary liquidation cannot possibly prejudice the petitioning creditors; a creditor has exactly the same powers in a voluntary winding-up as in a compulsory under the Western Australian *Companies Act* 1893, which differs widely in this respect from the English *Companies Act* 1862.

Under voluntary liquidation the creditors are not protected in England, but in Western Australia they are fully protected. They have the power under sec. 147 to apply for removal of an improper voluntary liquidator; and the Court in appointing a voluntary liquidator is bound to take into consideration the interests and wishes of the creditors, exactly the same as in a compulsory liquidation. If B., as a large probable contributory, is an improper person to have as a voluntary liquidator, the creditors can have him removed and a proper one substituted; but that is no ground to support the order for compulsory liquidation.

Under sec. 157, the Court can control the voluntary liquidator in the exercise of any power or discretion vested in him, which includes settling the list of contributories.

[GRIFFITH C.J.—Settling the list of contributories is not a matter for a Court to undertake; it would be prejudging the dispute as to the liability of the several contributories.]

Under sec. 159, the Court may, at the instance of a creditor as well as of a shareholder, summon before it the voluntary liquidator or any other person known or suspected to have property of the company. This is a power more extensive than that in England, where it only applies to compulsory winding-up. Compulsory liquidation is much more expensive than voluntary. The creditors are in no way prejudiced by voluntary winding-up, and unless the prejudice is proved, the Court cannot interfere under sec. 150 and order a compulsory winding-up: *In re New York Exchange* (1). The 19,000 shares were not liable to contribution; they were properly issued as fully paid up: *In re Innes & Co.* (2). In the present case M., vendor of the mining leases, received the 25,000 shares in order that he should be

(1) 39 Ch. D., 415. (2) (1903) 2 Ch., 254.

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able to control the raising of the money for the company, to pay M. the cash purchase money due under the agreement. There can be no suggestion that this was a sham device to issue shares at a discount; it was a vital part of the consideration in the agreement. M. or his nominee could not at any time have been called upon to pay up the 6s., and his transferees therefore cannot now be made contributories. The agreement was registered before the allotment of the shares. The mere statement therein that the shares belonged to M. is admittedly not conclusive; the test is that the real nature of the agreement must be looked into, but it will bear that scrutiny completely. It need not be shown that M. was getting the 25,000 shares in lieu of other consideration. The shares were an integral part of the consideration to M. as vendor.

[HIGGINS J.—Was that agreement binding on the company? It was made before the company was formed, and it does not even appear to have been filed before the issue of the shares: *Companies Act* (W.A.), sec. 26; *Buckley on Companies*, 7th ed., pp. 569, 605; *Smith* v. *Brown* (1).]

The agreement was made with a trustee for the company; the agreement and the incorporation took place the same day; the articles expressly provide that the company shall adopt the agreement; this is also in the memorandum; and a subsequent deed under the company's seal recites that the agreement had been adopted. Sec. 26 requires only such registration as shall give information to persons searching the register. Further, the company has bound itself by a course of conduct to observe the agreement. A majority of the creditors are in favour of voluntary liquidation.

[GRIFFITH C.J.—But most of these are shareholders. You have only £500 worth out of £4,000 who are disinterested.]

Regard should be had to the value of the debts of the creditors; the wish of the majority should be most carefully considered: *Re Crigglestone Coal Co.* (2); *In re West Hartlepool Iron Works Co.* (3); *In re Langley Mill Steel and Ironworks Co.* (4).

Northmore, for respondents. There is a great difference

(1) (1896) A.C., 614.
(2) (1906) 2 Ch., 327.
(3) L.R. 10 Ch., 618.
(4) L.R. 12 Eq., 26.

between voluntary and compulsory liquidation. The Court has much greater control over a compulsory liquidation than over voluntary: sec. 159. If voluntary liquidation is the same as compulsory liquidation in effect, sec. 150 was really unnecessary, and also futile, because then the creditors could not show that voluntary winding-up prejudiced their rights. But it is of the essence of voluntary liquidation that it shall be left in the hands of the shareholders. In any event, it is too much to impose upon the creditors the necessity of coming to Court to make complaints against the voluntary liquidator at the risk of losing costs. The liquidator should be the nominee of the creditors appointed by the Court, to relieve them of otherwise endless meddling. The creditors should not be required to act as a vigilance committee. The power to apply under sec. 147 to remove an improper voluntary liquidator is valueless unless the Court has a very liberal discretion to order compulsory liquidation. Under sec. 148 the voluntary liquidator reports only to the shareholders at the end of the winding-up proceedings; whereas the compulsory liquidator has to report to the creditors. Compulsory liquidation being so much more beneficial to creditors than voluntary, and having been granted by the Judge, should not be set aside except for very strong reasons. Even if there is no difference between the two modes of liquidation, yet it makes a substantial difference in the liquidation proceedings according as they are carried out by an interested shareholder or a vigilant creditor. The facts show a substantial case for compulsory liquidation. *In re Innes & Co.* (1) is clearly distinguishable. The 25,000 shares issued to M. were never given as part of the consideration; M. was used as a mere conduit-pipe through whom the shares were to be passed on to the public at a discount. The 25,000 shares may have been expressed in the deed of agreement as part of the consideration, but that is only colourable, and the Court is entitled to look behind it. The case is not only arguable as regards the 25,000 shares, but probably also as regards the 125,000 shares, which themselves appear to have been issued at a valuation which was not genuine: *Buckley on Companies*, 7th ed., p. 607. This winding-up order should not be reversed unless

(1) (1903) 2 Ch., 254.

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the appellants can show that there can be no prejudice to the creditors in having a voluntary liquidator, who would not be a *bonâ fide* plaintiff. The alleged majority of creditors is only nominal, as most of them are shareholders, and two of them were guarantors of an overdraft of the company. Even a majority of creditors may be overbalanced by the danger of inefficient liquidation : *Re Littlehampton, Havre and Honfleur Steamship Co.*; *Ex parte Ellis* (1).

Pilkington K.C., in reply. Voluntary liquidation cannot in itself prejudice the creditors; their only real objection is to B. personally as an interested shareholder. The appellants do not object to the creditors having their own nominee appointed to be voluntary liquidator under sec. 147.

The accounting to shareholders either is, or is not, prejudicial to creditors. If it is, without special reason, then it is so always, which is absurd, as that would cut away the foundation from every voluntary winding-up.

The agreement would be open to objection, if the shares were stated as at a discount in the bargain; but not if the sale is stated as for a certain number of shares. The sole test of the genuineness of the sale is whether the condition in the agreement is one which the vendor could reasonably be expected to insist upon as part of his bargain.

Nov. 6.

GRIFFITH C.J. This is an appeal from a decision of the Full Court of Western Australia dismissing an appeal against an order of *McMillan* J. for the compulsory winding-up of the appellant company, which, when application was made for the order, was already in voluntary liquidation. Sec. 150 of the *Companies Act* 1893 provides:—"The voluntary winding-up of a company shall not be a bar to the right of any creditor of such company to have the same wound up under order of the Court if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding-up." It is contended, and the contention is borne out by the case *In re New York Exchange Limited* (2), that the petitioning creditors must show a *primâ facie* case that

(1) 34 L.J. Ch., 237. (2) 39 Ch. D., 415.

they would be prejudiced by a voluntary winding-up. The petitioning creditors in the present case say that under the peculiar circumstances attending the formation of this company there is reason to contend that a great number of the shares in the company are not fully paid up. Nominally the shares are all fully paid up, but the petitioning creditors contend that there is a further liability in respect of some, at least, of the shares, and they say they are entitled to have the question investigated at the suit of a proper plaintiff or actor. The present liquidator, who is the late secretary of the company, is himself the holder of 5,000 or 6,000 shares, as to which it is plausibly maintained that they are not fully paid up. He obviously could not be regarded as an independent actor in a suit or proceeding to enforce payment of calls on those shares. It is not desirable to refer in detail to all the points which were taken to show that the shares were not in fact fully paid up. It is sufficient to say that the shares were all issued to the vendor to the company under an agreement containing some provisions of a very remarkable character. In the case of *Ooregum Gold Mining Co. of India* v. *Roper* (1), Lord *Watson* said: "It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may overestimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The Court would doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined." Under the peculiar terms of the agreement under which the shares in this company were

(1) (1892) A.C., 125, at p. 136.

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issued it is contended, with regard to some of them at any rate, that it appears on the face of the agreement that the company did not regard the consideration given as fairly representing the nominal value of the shares. Can then the matter be properly investigated in the voluntary winding-up? Mr. Pilkington contends that under the law of Western Australia the liquidator in a voluntary winding-up has practically the same powers as an official liquidator. So he has in one sense, but not the same incentive to exercise them. He is appointed in the first instance by the shareholders. It is true that under the Western Australian Act he can be removed, and the Court may appoint another in his place. Mr. Pilkington admits that if this compulsory winding-up order does not stand there would be a good case for the removal of this liquidator and the appointment of another. On what principle the Court would act in appointing another liquidator in a voluntary winding-up I do not know. The object of the appellants is that this matter may be thoroughly investigated. It is not disputed that it is the practice of the Courts in England, where matters cannot be impartially and fully investigated under a voluntary winding-up, to make a compulsory order or supervision order. Notwithstanding the additional powers a voluntary liquidator has in Western Australia, it is impossible to say that the two modes afford equal facilities for investigation. It is objected that the Court must have regard to the wishes of the creditors. It is provided by the Act that the Court must have regard to the wishes of creditors, but not that it is to be bound by them. It is said that in this case there is a large preponderance of creditors who desire the company to be wound up voluntarily. That is true, but the great majority in value are directors who knew the circumstances under which the shares were issued, while another was the guarantor of the company. If these are left out of consideration there is a considerable majority in value who desire that there should be an order for the compulsory winding-up of the company. I think that the order made by the Supreme Court was properly made and should not be disturbed.

BARTON J. I am of the same opinion.

HIGGINS J. I agree. I have been impressed by the argument of the appellants, as to the extensive powers given to voluntary liquidators, and over voluntary liquidators, by the Western Australian *Companies Act* 1893. But looking at the issue put before us under sec. 150 of the *Companies Act* 1893, the question remains whether the rights of the creditors would be prejudiced by the voluntary winding-up. I think they would be for the reasons stated by the Chief Justice. In matters like this each case has to be looked at in the light of its own facts. I know very well that these applications for compulsory winding-up orders are very much abused, and are frequently made use of for wrong purposes. But here I see a real and substantial case of doubt as to the shares, whether they should be treated as fully paid up. Sec. 26 of the Act states that every share in a company, excepting a no-liability company, shall be deemed to have been issued and be held subject to the payment of the whole amount thereof in cash unless it shall have been otherwise determined by the memorandum or articles, or by a contract duly made in writing and filed with the Registrar at or before the issue of such shares. This section has not been fully discussed; and it seems to me that, on the allegations in the affidavit the appellants have not been relieved of the burden of showing that the agreement had been registered at or before the issue of the shares. This section puts a further restriction on the validity of transactions whereby shares are treated as paid up for the amount represented. *Primâ facie*, if a man holds a share, he must show that he has paid cash for it; and if he cannot do so, he must show that the shares were issued as fully paid up in pursuance of a real contract, value for value. But even if value was given, the shares could not be treated as paid up to that value, under the English *Companies Act* of 1867, unless it be so determined by a contract in writing filed with the Registrar at or before the issue of the shares. Then, in the Western Australian Act there is the additional phrase, "unless it shall have been otherwise determined by the memorandum or articles," so that the exemption from payment in cash may be permitted, either by the constitution of the company (memorandum or articles) or by a contract duly made in writing and filed with the Registrar at or before the issue of such shares. I

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do not see anything in the memorandum or articles of this company determining that the shares shall be paid for otherwise than in cash; and I do not find any evidence that there was a contract duly filed at or before the issue of such shares. Even if there was such a contract registered, I do not at all wish to be taken at present as accepting the position that that would have been sufficient to enable those who took those shares to treat them as paid up to 6/- if they were not in fact so paid up in cash or in kind—"in meal or in malt." The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor, for the appellants, *L. W. Marsland.*
Solicitor, for the respondents, *H. C. Keall.*

N. G. P.

[HIGH COURT OF AUSTRALIA.]

WILLIAM HARDGRAVE . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

H. C. OF A. 1906.

SYDNEY, *Aug.* 8.

Griffith C.J. and O'Connor J.

Criminal law—Offence against laws of Commonwealth—Misappropriation of public moneys by public accountant—Evidence of deficiency in State moneys—Admissibility to negative plea of accident—Audit Act (*No.* 4 *of* 1901), *sec.* 64, *sub-sec.* (1) (*a*).*

The prisoner, a clerk in the post office, having failed to account for moneys received by him in the course of his duty as a servant of the Commonwealth, was charged under sec. 64, sub-sec. (1) (*a*), of the *Audit Act* 1901 with misappropriation of public moneys. At the trial evidence was admitted that a few months before the discovery of the deficiency the prisoner had received moneys on behalf of the State Savings Bank, for which he failed to account. It was his

* Sec. 64, sub-sec. (1) (*a*) of the *Commonwealth Audit Act* 1901 is as follows:—"Any public accountant or person subject to the provisions of this Act who—(*a*) misapplies or improperly disposes of or makes use of otherwise than is provided by this Act or the regulations any public moneys or stores which come into his possession or control; . . . shall be deemed to have fraudulently converted such moneys or stores to his own private use and shall be guilty of an indictable offence, and shall be liable to imprisonment with or without hard labour for any period not exceeding five years."