[HIGH COURT OF AUSTRALIA.]

GOLDSMITH . . . . . APPELLANT;
DEFENDANT,

AND

THE COLONIAL FINANCE, MORTGAGE, INVESTMENT AND GUARANTEE CORPORATION LIMITED . . . } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1908-9.

SYDNEY, *Dec.* 17, 18; *April* 23.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Company—Action for calls—Forfeiture of shares—Liability of shareholder for prior calls—Continuance of liability by articles of association—Power of company to release shareholder—Composition deed.

A shareholder in a limited company made a composition deed with his creditors, and the company executed the deed. By it the creditors released and discharged the debtor from all debts, actions, claims and demands whatsoever which they then had or thereafter might have against him for and in respect of any debt, transaction, matter or thing up to the date of the deed. Subsequently calls were made by the company, and finally the directors forfeited the shares for non-payment of calls. One of the articles of association provided that a shareholder notwithstanding forfeiture of his shares should be liable for calls made and not paid at the date of forfeiture in the same manner as if the shares had not been forfeited. The directors were empowered by the articles to exercise all such powers as might be exercised by the company "subject to the regulations," and in particular to discontinue, compromise or abandon any action, &c., between the company and other persons whether shareholders or not; to compound, accede to or execute any deed of composition or conveyance or assignment for the benefit of creditors, and to give time for or abandon any debts which they might deem bad.

In an action by the liquidator of the company against the shareholder for calls due at the date of forfeiture:

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Held, that, whatever might have been the position if there had been no special provision in the articles as to the effect of forfeiture, the liability to pay calls due at the date of forfeiture was expressly continued by the articles, and was not covered by the terms of the composition deed. If the deed was intended to discharge the shareholder from that liability, it was beyond the power of the directors.

Oorequm Gold Mining Co. of India v. *Roper*, (1892) A.C., 125, applied.

Per Griffith C.J. and *Barton* J.—The effect of the articles dealing with forfeiture was not to create a new liability dependent only upon the articles, but to continue the original statutory liability to pay the full amount due upon the shares. It was, therefore, no more in the power of the directors to discharge the shareholder from the liability so continued than from the liability which existed before forfeiture. Even if the liability after forfeiture were new and could be released by the directors, it came into existence by virtue of matter arising after the date of the deed and consequently was not covered by the deed.

Semble, *per Griffith* C.J. and *Barton* J., that without express provision in the articles the liability for calls accrued before forfeiture would continue after forfeiture. The dictum of Lord *Cairns* L.J. in *Stocken's Case*, L.R. 3 Ch., 412, apparently to the contrary, should be read as applying only to the terms of the article there in question.

Per Isaacs J.—If there had been no express provision to the contrary in the articles the liability for calls accrued before forfeiture would have ceased upon forfeiture, which, as stated by Lord *Cairns* L.J. in *Stocken's Case*, L.R. 3 Ch., 412, at p. 414, does away with the mutual relations and liabilities between shareholder and company. The liability after forfeiture was, therefore, dependent upon the articles, and was such as under the Statute might have been released by the company by an appropriate instrument, but was not covered by the terms of the deed of composition, and the directors had no power under the articles to release it.

Per Higgins J.—The liability for calls before forfeiture was expressly continued by the articles; and the composition deed, if it was intended to release the shareholder from that liability, was, so far as it related to that liability, an agreement for reduction of capital and, therefore, void.

Decision of the Supreme Court (*Colonial Finance, Mortgage, Investment and Guarantee Corporation Ltd.* v. *Goldsmith*, (1908) 8 S.R. (N.S.W.), 164), affirmed.

APPEAL from a decision of the Supreme Court of New South Wales on a demurrer and cross demurrer in an action by the liquidator of a company against a former shareholder for calls due at the date of his ceasing to be a member of the company.

The pleadings are set out sufficiently for the purpose of this report in the judgment of *Griffith* C.J. The only articles of association that require to be more fully stated are the following. It was provided that the management of the company should be vested in the board of directors who were empowered to exercise all such powers and do all such acts and things as might be done by the company and were not by the articles or by Statute expressly required to be done by the company in general meeting, and were also empowered without prejudice to the general powers, *inter alia*, to commence, prosecute, conduct and defend any action, suit or proceeding in any Court against any persons whether shareholders or not for recovering any debts or enforcing any claims or demands due to or for any other matter relating to the concerns of the company, and to compromise or abandon the same, and to compound and accede to and execute any deed of composition or conveyance or assignment for the benefit of creditors, and to give time for the payment of any debt, and to abandon any debt which might seem to them bad. It was also provided that a shareholder whose shares should have been forfeited should notwithstanding be liable to pay to the corporation all calls made and not paid on such shares at the time of forfeiture with interest in the same manner as if the shares had not been forfeited, and to satisfy all claims and demands which the corporation might have enforced in respect of the shares at the time of forfeiture without any further deduction or allowance for the value of the shares at the time of forfeiture than such as the directors should in their absolute discretion think fit.

The Supreme Court, after argument, decided in favour of the plaintiffs and ordered judgment to be entered for them on the demurrer: *Colonial Finance, Mortgage, Investment and Guarantee Corporation Ltd.* v. *Goldsmith* (1).

From that decision the present appeal was brought by leave of the High Court.

Rich, for the appellant. The liability of the shareholder for calls depends partly upon Statute and partly upon contract. The

(1) (1908) 8 S.R. (N.S.W.), 164.

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statutory liability is, (1) by sec. 55 of the *Companies Act* 1899 a liability to pay the whole amount of the share in cash as it is called up, and (2) a liability to be placed on the list of contributories in the event of winding up, under sec. 33. The liability by contract is that which depends upon the articles of association. But in the absence of an article which makes the liability permanent, the liability is purely statutory, and only continues as long as the shareholder falls within the class upon whom the Statute imposes the liability. As soon as a person ceases to be a member of the company his statutory liability as a member to be sued for calls ceases. The only statutory liability that continues to attach to him is the liability under sec. 33. [He referred to sec. 20, sub-secs. (9) (*b*); Table A, art. 17.] In *Stocken's Case* (1), Lord *Cairns* L.J. said that no action lay against a shareholder for calls if his shares had been forfeited, that, apart from the articles, the only liability remaining was that of being placed on the B. list of contributories. The shareholder was held liable only because the article expressly provided that he should be liable notwithstanding forfeiture. In *Aaron's Reefs Ltd.* v. *Twiss* (2) Lord *Watson* pointed out that the result of forfeiture was to remit the shareholder and the company to the position of debtor and creditor at common law, that is to say, the rights of the parties then depended upon the contract between them. Forfeiture extinguished the rights and liabilities of the shareholder as such. [He referred also on this point to *In re Exchange Trust Ltd.*; *Larkworthy's Case* (3); *Ladies' Dress Association Ltd.* v. *Pulbrook* (4); *Randt Gold Mining Co. Ltd.* v. *Wainwright* (5); *In re Randt Gold Mining Co.* (6).] The legislature, by inserting in the statutory model for articles a provision which would prevent the liability coming to an end on forfeiture, have impliedly recognized that but for some such provision the liability would cease. It would be strange if the liability were to continue, for the forfeited shares might be sold again, and the new shareholder also would be liable for the amount unpaid on them: *New Balkis*

(1) L.R. 3 Ch., 412, at p. 415.
(2) (1896) A.C. 273, at p. 290.
(3) (1903) 1 Ch., 711, at p. 713, *per Buckley* J.
(4) (1900) 2 Q.B., 376, at p. 381, *per Vaughan Williams* L.J.
(5) (1901) 1 Ch., 184.
(6) (1904) 2 Ch., 468.

Eersteling Ltd. v. *Randt Gold Mining Co. Ltd.* (1). By forfeiting the shares the company must be taken to have elected that particular remedy to the exclusion of the others open to it, and to have appropriated the shares in satisfaction of their claim. If the company can both forfeit and sue it gets the value of the shares twice over. [He referred to *Chadwick-Healy, Company Law and Practice*, 3rd ed., p. 118; *Palmer, Company Precedents*, 9th ed., p. 546; *Lindley on Companies*, 6th ed., p. 593.]

[HIGGINS J. referred to *Trevor* v. *Whitworth* (2).]

The forfeiture having put an end to the statutory liability, the remaining liability being purely contractual can be put an end to by contract. The deed of composition put an end to that liability in respect of past as well as future calls. The liability for calls arises out of a matter before the date of the deed, that is, the contract contained in the articles. The forfeiture did not create the liability. It was the occasion for bringing the article into operation. The dates on which the calls were actually made is immaterial. They all arose out of the original liability to pay full value for the shares. The directors had full power to release the shareholder from the claim for calls, under the powers of compromise conferred by the article set out in the pleadings. It is not necessary to contend that they had power to release from the statutory liability which continued while the appellant was a shareholder.

[ISAACS J. referred to *Ocregum Gold Mining Co. of India* v. *Roper* (3); *Bellerby* v. *Rowland and Marwood's Steamship Co. Ltd.* (4).]

Ferguson (*Monahan* with him), for the respondents. The argument for the appellant depends on the dictum of Lord *Cairns* L.J. in *Stocken's Case* (5). There the only question was as to the construction of a particular clause in the articles which does not exist here. Moreover, Lord *Cairns* was not expresssing a definite opinion, but a mere inclination of opinion. In all the authorities cited in support of the contention the point has been really imma-

(1) (1904) A.C., 165.
(2) 12 App. Cas., 409.
(3) (1892) A.C., 125.
(4) (1902) 2 Ch., 14, at p. 25.
(5) L.R. 3 Ch., 412.

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terial because there was an article preserving the liability. The legislature inserted the article in the model as a precaution against doubts. At any rate the presence of a specific provision in Table A is not sufficient to ground an inference that without it there would be no liability. The fact that two persons may be liable for the calls is no bar to the claim of the company. A transfer of shares in a company subject to the *Companies Clauses Act* (Eng.) on which calls are due does not get rid of the former shareholder's liability to the company for the calls, though it removes him from the contributories: *In re Hoylake Railway Co.*; *Ex parte Littledale* (1). [He referred also to *Great Northern Railway Co.* v. *Kennedy* (2); *Companies Act* 1899 (N.S.W.), sec. 14, sub-sec. (3).]

The liability to pay the full value of the shares is statutory. There is nothing in the Statute which suggests that the indebtedness of a shareholder can be got rid of by his ceasing to be a member of the company, or in any way other than by satisfaction. Forfeiture can have no effect on the liability for past calls: *Bullen and Leake, Precedents of Pleadings*, 6th ed., p. 637; *Lindley on Companies*, 6th ed., p. 728.] The directors have no power to release a shareholder from any liability arising out of the articles of association: *Stanhope's Case* (3); *Spackman* v. *Evans* (4); *Ashbury* v. *Watson* (5); *Taylor, Phillips and Rickards' Cases* (6). If the contention of the appellant is correct, that this liability to pay the amount of past calls notwithstanding forfeiture is purely contractual, it depends upon forfeiture taking place, and only comes into existence on forfeiture, and, therefore, is not, within the terms of the deed of composition, "in respect of any debt, transaction, matter or thing up to the date of the deed."

Rich, in reply.

Cur. adv. vult.

The following judgments were read:—

April 23rd.

GRIFFITH C.J. The pleadings in this case, which is an action for calls, have pursued a somewhat erratic course. The declara-

(1) L.R. 9 Ch., 257.
(2) 4 Ex., 417, at p. 420.
(3) L.R. 1 Ch., 161.
(4) L.R. 3 H.L., 171, at p. 190.
(5) 30 Ch. D., 376.
(6) (1897) 1 Ch., 298, at p. 305.

tion is in the usual form, alleging that the defendant was a member of the plaintiff company and as such member became indebted to the plaintiffs in respect of six calls. The plea sets up a deed executed before the accruing of the causes of action, by which the plaintiffs released the defendant from all claims "in respect of any debt transaction matter or thing up to the date of the deed." The plaintiff, instead of demurring to the plea, replied specifically that the calls were made after the date of the release, which fact already appeared on the plea itself. The defendant rejoined, alleging (with other matters not necessary to be mentioned), that the liability of the defendant to pay the balance uncalled upon his shares in the plaintiff company was mentioned in the schedule to the deed as a contingent liability, and that the calls sued for were in respect of such uncalled balance. I suppose the rejoinder was intended to be in confession and avoidance, but it appears to be a departure. The plaintiffs surrejoined, setting out provisions of their articles of association which in my view are quite irrelevant. They also demurred to the rejoinder, and raised the question that the plaintiffs' directors had no power to release future calls. The defendant demurred to the surrejoinder, and attacked the validity of the replication. The plaintiffs joined in demurrer, and for the first time attacked the validity of the plea. During the argument before the Supreme Court the pleadings were allowed to be amended by what were called additions to the rejoinder and surrejoinder. The addition to the rejoinder alleged that after the calls were payable the defendant's shares were forfeited by the company under a power in the articles of association. This was apparently set up either as a new defence, or as an additional fact enlarging the operation of the release. The plaintiffs' addition to the surrejoinder set up that under the articles a member whose shares were forfeited continued liable for calls already made.

The substantial point argued before the Supreme Court was whether a release of future calls, the member still continuing a member in respect of the shares on which they are made, is valid. The Court held, on the authority of *Ooregum Gold Mining Co. of India* v. *Roper* (1), that it was not. The appellant

(1) (1892) A.C., 125.

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did not before this Court impeach the correctness of that decision, which was clearly right. The *Ooregum Case* (1) involves, as pointed out by *Cozens-Hardy* L.J. in *Bellerby* v. *Rowland and Marwood's Steamship Co.* (2), the principle that a joint stock company of limited liability cannot by any device relieve a shareholder from the liability to pay the full amount due on his shares.

Mr. *Rich*, however, in a very ingenious argument sought to set up another defence, which can perhaps be spelled out from the pleadings. First, he contended that an action for calls, *quâ* calls, will not lie against a member after forfeiture of the shares. In support of this proposition he relied upon a dictum of Lord *Cairns* L.J. in *Stocken's Case* (3). The article under consideration in that case was as follows. "The forfeiture of any share shall involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against, the company in respect of the share, and all other rights incident to the share." The learned Lord Justice is reported to have said (4):—"Now, suppose the clause had stopped there, and there had been nothing more in the articles. I apprehend that clearly no action could, after forfeiture, have been maintained for the recovery of the calls previously due, and that for two reasons. First, I think so in consequence of the words used, namely, that all rights incident to the share are extinguished, which words cannot, in my opinion, be confined to rights against the company, but must extend to all rights incident to the share. In addition to that, I am strongly disposed to think that the mere fact of a duly authorized forfeiture of shares without anything in the articles defining the effect of forfeiture, would of itself, in the very nature of things, render any proceedings at law for past calls incompetent, because such proceedings must, I apprehend, be on the footing that the person sued was a shareholder in the company; and if his interest in the company had been destroyed, it is by no means clear that the action could be maintained." He went on to say that the provision in the article seemed to him to be "in substance and in words the creation of a new right."

This would not, however, of itself be an answer to the present

(1) (1892) A.C., 125.
(2) (1902) 2 Ch., 14, at pp. 31, 32.
(3) L.R. 3 Ch., 412.
(4) L.R. 3 Ch., 412, at p. 415.

action, since the article pleaded by addition to the surrejoinder expressly continues the old liability. But Mr. *Rich* contends that, although the liability is, in one sense, the old one, the right sought to be enforced is a new one, created by this article and not by the statutory contract created by becoming a member of the company, and that the liability arising under the new right is not obnoxious to the rule established by the *Ooregum Case* (1).

Anything said by Lord *Cairns* is worthy of respectful attention, but it is to be observed, in the first place, that his dictum was founded upon the particular words of the article then in question, so that it is no authority for the construction of an article differently worded, such as that set out in the pleadings in the present case. In the second place, the point was not necessary for the decision of the case (which related to interest on the calls), and it was not argued. It was suggested by the Lord Justice himself during counsel's reply. If the dictum is taken in its widest sense as meaning that an action will not lie for calls after forfeiture, it is inconsistent with the earlier cases of *Belfast and County Down Railway Co.* v. *Strange* (2), in which it was held that an action for calls will lie although the member has since ceased to be a member of the company, and *Great Northern Railway Co.* v. *Kennedy* (3), in which it was held that such an action will lie although the cessation of membership arises from forfeiture of the shares. *Parke* B. put the case on what I conceive to be the true principle in a few words :—"Until satisfaction there is no bar to an action for the amount of calls."

Apart from this point the present case is not distinguishable from the recent case of *Ladies' Dress Association* v. *Pulbrook* (4). *Vaughan Williams* L.J. said :—"The articles of association provide that, notwithstanding the forfeiture of shares, there shall remain a liability for calls accrued due before the forfeiture. It is not material, as it appears to me, to consider whether, technically speaking, that provision imports a continuance of the old liability or the creation of a new one. The effect of it was that there was a right of action for these calls vested in the company at the time when it went into liquidation, and there can, in my

(1) (1892) A.C., 125.
(2) 1 Ex., 739.
(3) 4 Ex., 417.
(4) (1900) 2 Q.B., 376, at p. 381.

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opinion, be no doubt that that right of action continued to exist afterwards."

Can, then, the obligation to pay past calls notwithstanding forfeiture be regarded as a new and distinct obligation? The foundation of the argument is that the old liability is extinguished. Now it is a general rule both of law and common sense that an obligation once incurred continues until it is discharged by some means recognized by law. If the old liability is extinguished by the forfeiture, it must be by something in the nature of accord and satisfaction implied by law as the result of the forfeiture. But the law never implies a bargain contrary to the expressed intention of the parties. The article pleaded provides that upon forfeiture the shareholders "shall notwithstanding be liable to pay to the company all calls made and not paid at the time of forfeiture in the same manner in all respects as if the shares had not been forfeited."

It is, to my mind, impossible to construe this as an agreement that the old liability shall be deemed to be extinguished and a new one created.

There is, in truth, only one contract between the company and member, which is created by his agreeing to become a member, and the nature of which is declared by sec. 14 of the *Companies Act* (No. 40 of 1899), which corresponds substantially with sec. 16 of the English *Companies Act*. The obligation with respect to calls is a single obligation, and cannot be divided into two, one to pay calls *quâ* calls, and the other to pay a sum of money of the same amount and upon precisely the same conditions.

I think, therefore, that this argument fails. If, however, it succeeded, it would follow that the liability sued upon was one which came into existence by virtue of a new contract between the parties arising after the date of the release, and consequently not covered by it, which would be equally fatal to the defendant's case. Thus regarded, the whole of the pleadings before amendment would have had no application to the actual facts of the case, and the amendment to the rejoinder would have to be read as setting up a new cause of action to which the plea would afford no answer. In substance, therefore, as well as in form, the plaintiffs are entitled to succeed.

BARTON J. The declaration is the only pleading not impeached, and the question is whether the subsequent pleadings disclose a defence. The defendant relies on the release pleaded. In the Supreme Court judgment was given against him, and *Pring* J. in delivering the opinion of the Court, cited a passage from the judgment of Lord *Halsbury* L.C. in *Ooregum Gold Mining Co. of India* v. *Roper* (1), and a passage from the judgment of Lord *Davey* in *Welton* v. *Saffrey* (2), both stating in unequivocal terms the principle on which the House of Lords acted in the first mentioned case, and which it followed in the second. Later in *Bellerby* v. *Rowland and Marwood Steamship Co. Ltd.* (3), *Collins* M.R. (now Lord Collins) affirmed that the *Ooregum Case* "establishes that to release a shareholder from any part of his obligation to pay the uncalled-up balance on his shares is an *ultra vires* act on the part of the company," meaning an act in contravention of the statutory constitution of a company: and *Cozens-Hardy* L.J. (now Master of the Rolls) said in the same case (4): "The decision of the House of Lords in the *Ooregum Case* (5), that shares in a limited company cannot be issued at a discount, involves the principle, that the company cannot by any device relieve a shareholder from the liability to pay the full amount due on his shares. . . . Uncalled capital is part of the assets of the company." No one who reads the report of the *Ooregum Case* can doubt that these interpretations of it are unchallengeable. In that case itself Lord *Macnaghten* (6) summarized the matter in the words used by Mr. Justice (now L.J.) *Buckley* in speaking of the provisions of the Statutes as to the liability of shareholders in limited companies: "The dominant and cardinal principle of these Acts is that the investor shall purchase immunity from liability beyond a certain limit, on the terms that there shall be and remain a liability up to that limit."

I am clearly of opinion that even if the release of 1895 purports to discharge the then shareholder from liability to pay calls which might be made in the future, the expedient, however just it might be in the abstract or under the circumstances, will not avail to relieve him, and his liability remains. Mr. *Rich* argues

(1) (1892) A.C., 125, at p. 134.
(2) (1897) A.C., 299, at p. 328.
(3) (1902) 2 Ch., 14, at p. 25.
(4) (1902) 2 Ch., 14, at pp. 31, 32.
(5) (1892) A.C., 125.
(6) (1892) A.C., 125, at p. 145.

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that, after a person has ceased by forfeiture to be a member, an action for calls, as such, does not lie against him; and, where there is no article dealing with that case, the liability is extinguished; and that at any rate, where there exists, as there does here, an article sufficiently declaring liability after forfeiture, though an action lies against him, it is as "a mere debtor" to the company under a new contract, and hence that his liability, even in its prospective or contingent form, may be validly released, notwithstanding the *Ooregum Case* (1) and the other authorities cited by the Supreme Court. In my view it is a liability undertaken at the inception of the statutory contract, for good and all, up to the prescribed limit, at the call of the company, so long as the company observes on its part the original conditions. It is a fruit of the relation of company and shareholder, and once it matures it does not cease to be such if the relation ceases. It is a liability which endures as to things done under and during the contract, for instance, the making of calls, albeit the contract may have been determined (as by forfeiture) after such things have been done. In the case of forfeiture, indeed, the liability is in the present case preserved by the articles as a liability "to pay to the company all calls made and not paid on such shares at the time of forfeiture and interest to the date of payment in the same manner in all respects as if the shares had not been forfeited." It is thus in terms made a liability in respect of the shares. True, the company by the forfeiture "severed the relation between themselves and the . . . . shareholders," and he "became a mere debtor to the company"—See *per* Lord *Davey* in *Aaron's Reefs, Ltd.* v. *Twiss* (2), a case in which there was a similar article. And for that reason, where a shareholder whose shares had been forfeited had paid all calls and interest accrued up to the date of forfeiture (there being a similar article), it was held in *In re Exchange Trust Ltd.*; *Larkworthy's Case* (3) by *Buckley* J. that under another article, wide enough perhaps to be construed to give the company the power claimed, it could not afterwards, unless the ex-shareholder were minded to make a new contract to that effect, revoke the forfeiture, and restore him to the position of holder of the forfeited shares. In *In re Randt Gold Mining Co.* (4)

(1) (1892) A.C., 125.
(2) (1896) A.C., 273, at p. 295.
(3) (1903) 1 Ch., 711.
(4) (1904) 2 Ch., 468.

a purchaser of shares from a company after forfeiture was held to be liable only for the whole amount uncalled on each share he had bought. *Buckley* J. held that under an article like that now in question the previous holder, who had forfeited, was under a liability to pay the call *upon or in respect of the shares* at the time of forfeiture. The liability had reference to the shares, which, when it accrued, were those of the prior owner, and it was referable purely to that ownership and to its statutory contractual incidents. In addition to the three last mentioned cases, that of the *Ladies' Dress Association* v. *Pulbrook* (1) was cited for the appellant. None of these cases seems to me to better his position. It is nothing to the purpose to say that the appellant became "merely a debtor" to the company. That is only another way of saying that he ceased to be a shareholder upon forfeiture. The question is, what was the contract he made as a shareholder, did he break it as and being a shareholder, and is he being sued for that breach of that contract? In my opinion the liability to pay the calls is exactly the same liability that existed while the appellant was still a shareholder. Although after forfeiture the relation between him and the company was that of debtor and creditor, so it was previously, albeit there was also the relation of company and shareholder. The contract and the breach, and therefore the debt, originated out of that previous relationship. In respect of the cause of action neither of these altered upon the cessation of the relationship, though the contract had been broken meanwhile, and though the forfeiture had terminated its operation upon future transactions. If necessary, I should probably be prepared to hold that the liability for calls, accrued before forfeiture, survived the forfeiture even in the absence of any express article such as we find here; and I agree with all that the Chief Justice has said as to the dictum—for it is but a dictum—of Lord *Cairns*, then L.J., in *Stocken's Case* (2). No such opinion as that eminent Judge there expressed has been judicially hinted since, so far as I can discover. In the earlier case of *Belfast and County Down Railway Co.* v. *Strange* (3), it appears to have been held sufficient to allege, in a declaration in a company's action for

(1) (1900) 2 Q.B., 376.

(2) L.R. 3 Ch., 412, at p. 416.

(3) 1 Ex., 739.

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calls, that the defendant was the holder at the time the calls were made; and it would not be a defence to set up that the power of forfeiture had been exercised after the calls had become payable. The case of the *Great Northern Railway Co.* v. *Kennedy* (1) was decided under sec. 29 of the *Companies Clauses Consolidation Act* (8 & 9 Vict. c. 16). That section gave the company power to forfeit for non-payment of calls whether it had sued for them or not. It was held that the power to forfeit was not a mere alternative to the right of action, and that the forfeiture could not, therefore, be pleaded to such an action. *Parke* B. said that looking at the section it was clear that the power was only a further security for the calls; and he concluded with these words:—"Until satisfaction there is no bar to an action for the amount of calls." This case is not, perhaps, so strong for the respondents as Mr. *Ferguson* seemed to think it. But there is a plain difference between a provision such as is found in the section there in question and the article on which the appellant here relies as a new contract. The view that the power to forfeit is only given to strengthen the company's security for calls has been suggested in later cases.

But whatever might be the effect of failure to provide in the articles for liability after forfeiture for previously accrued calls, I am of opinion that in the present case the matter is put beyond question by the terms of the article itself, which I have quoted. It would be hard to frame words clearer in their express intention to keep alive the very liability once accrued just as if the contracting party had continued to be a shareholder. I cannot, therefore, accept the contention that the liability to pay this debt is a different liability from, or relieved of the same consequences as attended, the liability which existed a moment before the forfeiture. It was by the defendant's own contract that his shares were held subject to forfeiture, if he failed to pay. I do not see how that contract can carry with it any implication that his debt to the company shall after forfeiture be for anything but unpaid calls, or be in respect of anything but the shares. It may be as well to refer to the case, cited for the company, of *In re Hoylake Railway Co.*; *Ex parte Littledale* (2). There A., a shareholder

(1) 4 Ex., 417.

(2) L.R. 9 Ch., 257.

owing calls, transferred to B. The company registered the transferee in A's place, so that he was no longer a shareholder, though he still owed the calls. *James* L.J., discussing A.'s position, said (1): "He was the shareholder at the time when the calls were made, and he would still be liable in respect of the calls then due. . . . If the calls have not been paid, *the liability still continues.*" And further: "He was, to all intents and purposes, in exactly the same position as if his shares had been forfeited; that is, he would be a debtor *for the call due at the time*, if anything were due."

As to *Bath's Case* (2), cited for the appellant, I am of opinion that if it were given the effect attributed to it by Mr. *Rich*, it would conflict with the principle underlying the decisions of the House of Lords in this connection, of which the chief is the *Ooregum Case* (3).

My conclusions, then, are these: (1) That the release set up would not, even if it purported to do so, avail to relieve a continuing shareholder of his liability to pay calls made after the release: (2) That the article pleaded in the amendment to the second surrejoinder does not upon forfeiture so alter that liability as to bring it outside the principle of the *Ooregum Case* (3); and therefore that the release does not for any such reason operate to extinguish the liability.

It follows that the decision of the Supreme Court to enter judgment for the plaintiffs was right, and must be affirmed.

ISAACS J. The ultimate contention of Mr. *Rich*, who put his case well, was this—he admitted that the company could not lawfully release the appellant's liability to pay calls as far as it was imposed by Statute, but he contended that the articles, as set out in the addition to the second surrejoinder imposed a new obligation by way of contract, and therefore the company's contract could release it, and the company did release it by the deed of 26th September 1895.

The appellant was, until forfeiture on 17th July 1899, the holder of 1,000 shares, on which the calls now sued for had been

(1) L.R. 9 Ch., 257, at pp. 259, 260. (2) 8 Ch. D., 334.
(3) (1892) A.C., 125.

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made, at various times in 1896, 1897, 1898 and 1899, all between the date of the deed and the date of forfeiture.

Apart from the articles imposing the new obligation, I am of opinion that, after the forfeiture, appellant would not have been liable. This is I think established by the observations of Lord *Cairns* L.J. in *Stocken's Case* (1); *Romer* L.J. in *Ladies' Dress Association* v. *Pulbrook* (2); and *Kekewich* J. in *Randt Gold Mining Co.* v. *Wainwright* (3). It was urged that Lord *Cairns'* view was only a dictum, and is wrong. It is true he does not speak finally, but it is the opinion of a very great Judge, and I think it is right. As he observes, the shareholder's interest in the company is destroyed by forfeiture, and we have to consider what that interest is. In *Borland's Trustee* v. *Steel Bros. & Co. Ltd.* (4), *Farwell* J. says:—"A share is the interest of a shareholder in the company measured by sum of money, for the purpose of liability in the first place, and of the interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with sec. 16 of the *Companies Act* 1862."

In *Randt Gold Mining Co.* v. *New Balkis Eersteling Ltd.* (5), Lord *Halsbury* L.C. said:—"The share makes the holder of it a member of a trading partnership, and, as such, subject to all those liabilities of the partnership which the legislature has imposed upon it by what I may call the statutory deed of partnership." He then says what is very important to this branch of the case: —"It (the legislature) has provided means by which the capital shall be subscribed, and the partners compelled to pay what they by taking the shares have agreed to pay. It has also provided that the governing body shall be at liberty either to call up the whole of the agreed sum, or portions of the agreed sum, at such times and in such ways as they think proper by their rules to determine. It gives specimen rules, but does not bind the company to adopt those rules. Among the things which the company can do is this—they can say 'If you do not pay at such and such a time the money which you have agreed by taking the shares to subscribe, your rights in the company shall go, you

(1) L.R. 3 Ch., 412, at p. 414.
(2) (1900) 2 K.B., 376, at p. 381.
(3) (1901) 1 Ch., 184, at p. 187.
(4) (1901) 1 Ch., 279, at p. 288.
(5) (1903) 1 K.B., 461, at p. 465.

shall cease to be a member of it, and your shares shall be forfeited, but you shall nevertheless remain liable to pay what you have been called on to pay, and shall be charged with interest upon that sum while it is unpaid.'"

In *Taylor, Phillips and Rickards' Cases* (1), *Lindley* L.J. says:—"The word 'share' does not denote rights only—it denotes obligations also."

If then we regard a share as a unity, an interest consisting partly of rights and partly of liabilities, it becomes apparent that forfeiture of the share, involving extinction of the whole interest, carries with it the liabilities as well as the rights. It would hardly be contended that after forfeiture the former shareholder could claim dividends previously declared, but not actually distributed—they are accessory to the interest lost; and it would be extraordinary if nevertheless he could be made liable for calls, which are nothing more than his promised contribution as a partner to the enterprise from which he has been evicted.

Forfeiture is a penalty for non-payment of calls (*per Holroyd* J. in *Gray* v. *L. Stevenson and Sons Ltd.* (2)). Forfeiture "is a punishment" says *Blackstone*, Book 2, p. 267, "whereby he (the owner) loses all his interest therein, and they go to the party injured, as a recompense for the wrong . . . he hath sustained."

The result of the forfeiture of a partnership interest said Lord *Cranworth* in *Clarke & Chapman* v. *Hart* (3) is, as the word imports, that the "whole property which the partner, whose interest is forfeited, holds in the concern, goes to the other people engaged in the partnership."

I therefore think that, from the nature of the case as well as from the weighty opinions quoted, a valid forfeiture of shares in a company *primâ facie* involves extinction of all liability. The other parties have done with the ejected one, and all his benefits and burdens cease together.

Forfeiture is quite different from transfer. Transfer is a parting by the shareholder with portion of his interest, that is as from the date of transfer, and a retention of his interest up to that date; but forfeiture is an annihilation of all interest, a cesser of

(1) (1897) 1 Ch., 298, at p. 305. (2) 25 V.L.R., 476, at p. 485.
(3) 6 H.L.C., 633, at p. 664.

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recognition of the former partner henceforth as a partner for any purpose.

Belfast and County Down Railway Co. v. *Strange* (1) was not a case of forfeiture, and that case, *Great Northern Railway Co.* v. *Kennedy* (2), and *In re Hoylake Railway Co.*; *Ex parte Littledale* (3), were all decisions on the special words of one particular Statute different from the *Companies Act* here, and do not govern this case.

But the articles here do exactly what Lord *Halsbury* pointed out the Statute enables the company to do, viz., provide that, notwithstanding the forfeiture of shares, past calls shall be recoverable. That statutory permission is meaningless unless Lord *Cairns'* view is correct. I think the argument is sound that such a stipulation is matter which may be released by a company, Still the question arises has the company released it? That depends in this case upon two separate considerations. The first is whether the terms of the deed extend to these calls. The only words which it can be suggested touch them at all are "which the (plaintiffs) then had or thereafter might have against the (defendant) for or in respect of any debt, transaction, matter or thing up to the date of (the said) deed." It is true that, as appears from the second rejoinder, the liability to pay the uncalled capital was specifically entered as a contingent liability in the schedule to the deed. But I pass that by with the observation that it was illegal on the ground stated by *Collins* M.R. in *Bellerby* v. *Rowland and Marwood's Steamship Co. Ltd.* (4), that "the reasoning in *Ooregum Gold Mining Co. of India* v. *Roper* (5) establishes that to release a shareholder from any part of his obligation to pay the uncalled-up balance on his shares is an *ultra vires* act on the part of the company."

There was no call then made and no forfeiture had accrued; no call might ever be made; and if it were, forfeiture might not ensue. How, then, can it be said that the parties contemplated these general words to extend to a possible non-statutory obligation, and so intended to release in advance this non-statutory obligation? If the release had the effect which its words plainly

(1) 1 Ex., 379.
(2) 4 Ex., 417.
(3) L.R. 9 Ch., 257.
(4) (1902) 2 Ch., 14, at p. 25.
(5) (1892) A.C., 125.

indicate it was intended to have, the appellant was not to be liable to pay future calls, and was therefore not to have his shares forfeited for non-payment, and was consequently not to be under any obligation at all under the articles, and as a matter of inevitable result was not to be released from any such liability. Lord *Westbury* said in *Directors &c. of London and South Western Railway Co.* v. *Blackmore* (1):—"The general words in a release are limited always to that thing or those things which are specially in the contemplation of the parties at the time the release was given."

That is sufficient to end the matter, but there was an argument raised on the demurrer to the second rejoinder which is of general importance. It was on the question whether, even if the general words of release did extend to the case, the deed was *ultrâ vires* of the directors.

I think it was, because, if the directors did execute a release as wide as is suggested, they exceeded the authority given by the articles. They were empowered to exercise all such powers as might be exercised by the company itself, and not necessarily in general meeting, but with this important qualification to the authority, that it was "subject to any regulations." That was the general authority. The specific authority afterwards stated does not include such a case as this. It is confined to four classes of cases: (1) Actions between the company and other persons, whether shareholders or not; (2) arbitrations; (3) compositions or assignments for the benefit of creditors; and (4) giving time for or abandoning "debts" which seem bad. The possible and contingent obligations after forfeiture were not a "debt" in 1895. See *Whittaker* v. *Kershaw* (2). Now the regulations provided that the shareholder whose shares are forfeited shall, notwithstanding, be liable to pay to the corporation all calls made and not paid at the time of forfeiture, and interest thereon to the date of payment in the same manner as if the shares had not been forfeited; and to satisfy all (if any) the claims and demands which the corporation might have enforced in respect of the shares at the time of forfeiture, &c.

Although the directors had very large general powers, those

(1) L.R. 4 H.L., 610, at p. 633. (2) 45 Ch. D., 320.

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powers were, as I have said, only granted subject to the company's existing regulations, of which that just quoted was one. That regulation, like all others, was "prescribed for the company" (sec. 13 of the Act of 1874) and was declared by sec. 15 to "bind the company." Lord *Selborne* L.C. observed in *Oakbank Oil Co.* v. *Crum* (1) that "directors and general meetings of companies of this sort can have no powers by implication except such as are incident to, or properly to be inferred from the powers expressed in the memorandum and articles of association. Their powers are entirely created by the law and by the contract founded upon the law which enables such companies to be constituted." In other words, the directors could not, and I am strongly inclined to think the company could not, by releasing the appellant act in violation of the explicit regulation which declared as part of the "agreement *inter socios*" (*per* Lord *Cairns* L.C. in *Eley* v. *Positive Government Security Life Assurance Co.* (2)), and as a contract between each member of the company (*per* Lord *Herschell*, *Welton* v. *Saffery* (3)), that past calls should be fully paid up in the event of forfeiture. It is enough for present purposes, however, to say the directors could not do so, and their delegated power was made expressly subject to the regulations, and therefore, whatever the construction of the deed, may be the defence fails; the demurrer to the second plea and to the second rejoinder should succeed, and the appeal be dismissed.

HIGGINS J.—We have been invited to overlook the irregularities of the pleadings, and to consider this appeal on its merits. The material facts on which the demurrer rests are few. A shareholder in a limited company makes a composition deed with his creditors in 1895, and the company executes the deed. By this deed the company "acquitted released and for ever discharged the defendant from all debts actions claims and demands whatsoever which the company then had or thereafter might have against the defendant for or in respect of any debt transaction matter or thing up to the date of the said deed." These are the words of the deed as averred in the plea. But the shareholder retained his shares. Calls were made in 1896, 1897, 1898 and 1899; and

(1) 8 App. Cas., 65, at p. 71. (2) 1 Ex. D., 88 at p. 89.
(3) (1897) A.C., 299, at p. 315.

subsequently on 17th July 1899 the company's directors forfeited the shares for non-payment of the calls. On 12th August 1904 the company went into liquidation; and this action is brought by the liquidators for the unpaid calls.

By the articles it is provided that shareholders whose shares shall have been forfeited shall notwithstanding be liable to pay to the company all calls made and not paid on such shares at the time of forfeiture (with interest). Therefore the forfeiture does not prevent an action for the amount of these calls: *Aaron's Reefs Ltd.* v. *Twiss* (1); *Ladies' Dress Association* v. *Pulbrook* (2); and it is unnecessary to consider what would have been the the position if there had not been such a provision in the articles.

But what about the release? How far does it operate? Wide though its words are, I should be strongly inclined to think that they ought not by themselves to be construed as extending to debts and liabilities created after the date of the deed: *Lindo* v. *Lindo* (3). It appears, however, that in the schedule to the deed the liability of the defendant to pay the balance uncalled upon his shares was entered as a contingent liability; and I am prepared to assume that the directors meant to release the shareholder from his liability for future calls. But they had no power to do so. The law as to companies in New South Wales is the same, in all essential points, as the law of England; and it is to my mind clear that any agreement relieving a shareholder of his liability to pay calls thereafter to be made would be an agreement for reduction of capital, and therefore void: *Trevor* v. *Whitworth* (4); *Ooregum Gold Mining Co. of India* v. *Roper* (5); *Randt Gold Mining Co. Ltd.* v. *New Balkis Eersteling Ltd.* (6); *Bellerby* v. *Rowland and Marwood's Steamship Co. Ltd.* (7).

Appeal dismissed with costs.

Solicitor, for the appellant, *E. R. Cohen.*

Solicitor, for the respondents, *G. Crichton Smith.*

C. A. W.

(1) (1896) A.C., 273.
(2) (1900) 2 Q.B., 376.
(3) 1 Beav., 496.
(4) 12 App. Cas., 409.
(5) (1892) A.C., 125.
(6) (1903) 1 K.B., 461; (1904) A.C., 165.
(7) (1902) 2 Ch., 14, at p. 33.