[HIGH COURT OF AUSTRALIA.]

COMMISSIONERS OF STAMPS . . . APPELLANTS;
DEFENDANTS,

AND

PARBURY ESTATES LIMITED . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *April* 22, 23, 28.

Isaacs, Gavan Duffy, Powers and Rich JJ.

Stamp duty—Conveyance on sale—Property transferred to company not in existence—Company subsequently formed—Consideration—Shares in company allotted to grantor and his sons—Value of shares—Memorandum and articles of association—Stamp Act 1894 (*Qd.*) (58 *Vict. No.* 8), *sec.* 49—*Companies Act* 1863 (*Qd.*) (27 *Vict. No.* 4), *sec.* 15—*Companies Act Amendment Act* 1889 (*Qd.*) (53 *Vict. No.* 18), *sec.* 28.

Sec. 49 of the *Stamp Act* 1894 (Qd.) provides that, for the purposes of the Act, "'Conveyance on sale' includes every instrument . . . whereby any property, or any estate or interest in any property, upon the sale thereof, is transferred to or vested in a purchaser or any other person on his behalf."

P., who was the owner of certain lands under the general law and under the Real Property Acts (Qd)., executed four instruments with respect to such lands, namely, an indenture, dated 27th June 1911, purporting to grant the land under the general law, valued at £41,860, to a company not then in existence, "freely and voluntarily and without any valuable consideration;" and on the same day a memorandum of transfer to the company of a portion of the land under the Real Property Acts "in consideration of the sum of 5s. sterling paid" to him by the company, such portion being of the value of £6,000, and on 18th August 1911 two similar memorandums of transfer to the company of two other portions of such land, valued at £246 and £200 respectively. On 29th June 1911 the company were registered under the Companies Acts (Qd.)—the memorandum and articles of association being

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signed by P., his five sons and T. (the manager of his Queensland property), each as the holder of one share. The memorandum of association set out, as one of the objects, that the company were to distribute the property of the company *in specie* among the members, and provided that the capital of the company was £50,000 divided into 50,000 shares of £1 each, of which 45,000 were to be deemed for all purposes fully paid and were to be allotted thus: to P., 19,999; to each of his sons, 5,000, and to T., 1. One of the articles of association provided that the company should forthwith enter into, and the directors should carry into effect, an agreement to allot the 45,000 shares as specified in the memorandum of association, which agreement was subsequently duly executed by the seven persons above mentioned and by the company, and the specified allotment was made of the 45,000 shares. The indenture and the first mentioned memorandum of transfer were lodged for registration on the 29th June 1911 and duly registered, and the company went into possession and retained possession of the lands comprised therein, as owner.

Held, that as between the company and P. there was a sale of the lands within the meaning of the *Stamp Act* 1894, and that each of the four instruments was chargeable with duty as a conveyance on sale within the meaning of sec. 49 of that Act.

Sec. 28 of the *Companies Act Amendment Act* 1889 (Qd.) provides that "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by the memorandum of association or by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

No contract had been filed under that section.

Held, that, whether the section had or had not been complied with, the circumstances were such that the shares should be valued as fully paid.

Decision of the Supreme Court of Queensland: *In re Parbury Estates Limited*, (1912) S.R. (Qd.), 268, reversed.

APPEAL from the Supreme Court of Queensland.

Charles Parbury, of London, England, was the owner in fee simple (subject to certain leases and encumbrances) of certain lands, of which portion was under the *Real Property Acts* 1861 to 1887 (Qd.), and other portions were under the general law. By an indenture dated 27th June 1911, and expressed to be made between the said Charles Parbury of the one part and Parbury Estates Limited of the other part, he purported freely and voluntarily, and without any valuable consideration, to grant, convey and assure unto the Parbury Estates Limited the land not under

the Real Property Acts, which was of the value of £41,860, to have and to hold unto and to the use of the Parbury Estates Limited in fee simple. By memorandum of transfer, also dated 27th June 1911, Charles Parbury, in purported consideration of the sum of 5s. thereby expressed to be paid to him by Parbury Estates Limited, the receipt whereof he thereby acknowledged, purported to transfer to the Parbury Estates Limited all his estate and interest in certain portions of the lands under the Real Property Acts valued at £6,000.

On 29th June 1911, a company was registered in the office of the Registrar of Joint Stock Companies at Brisbane, under the name of Parbury Estates Limited as a company with limited liability under the *Companies Acts* 1863 to 1896.

On 29th June 1911, the indenture above mentioned was lodged for registration for and on behalf of the company in the office for the registration of deeds at Brisbane, and was duly registered, and on the same day the memorandum of transfer above mentioned was lodged for registration in the Real Property Office at Brisbane. On or about the same day Charles Parbury delivered over and quit possession of the land mentioned in the indenture to the company; and the company thereupon accepted and took, and thereafter continued to retain, possession thereof as owner, and have been in receipt of the rents and profits thereof. The memorandum of transfer was subsequently registered in the Real Property Office at Brisbane in the name of the company, and the company were now the registered proprietor of the land transferred thereby, and have since 29th June 1911 been in possession thereof as owner and in receipt of the rents and profits thereof.

The only subscribers of the memorandum and articles of association of the company (the material provisions of which sufficiently appear in the judgment of the High Court, *infra*) were Charles Parbury, his five sons and one Tremearne (the manager of Charles Parbury's Queensland estates and property), each of whom subscribed the same as the holder of one share.

By the terms of a draft agreement referred to in article 3 of the articles of association, the company were to forthwith enter into an agreement with Charles Parbury, his five sons and Tremearne to allot 45,000 fully paid up shares of £1 each in the

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capital of the company, as follows:—19,999 to Charles Parbury, 5,000 to each of his sons, and 1 to Tremearne; and the company were also to pay all the costs of and incidental to the preparation and execution of the agreement and of the memorandum and articles of association and of the registration thereof, and of all stamps, fees and legal expenses incident to the formation of the company, and generally all preliminary expenses whatever incurred in relation to the company; and the company were, in respect of the shares to be allotted to the said persons, to cause the agreement to be duly filed with the Registrar of Joint Stock Companies. No consideration was mentioned or expressed in the draft agreement as passing from the said persons, or any of them, or to the company, in respect of the allotment of such shares by the company or the undertakings given by the company as to payment of the costs and expenses or otherwise.

On 18th August 1911, an agreement under seal in the words and to the effect of the draft agreement was duly executed by or on behalf of each of the seven persons above mentioned and by the company, and on 29th August 1911 that agreement was duly filed by the company with the Registrar of Joint Stock Companies at Brisbane.

By two memorandums of transfer dated 18th August 1911, Charles Parbury transferred to the company all his estate and interest in two other pieces of land under the Real Property Acts, valued at £246 and £200 respectively—the consideration being expressed in each instrument to be the sum of 5s. paid to him by the company. These instruments have not been lodged for registration.

Since 29th August 1911 the company allotted and issued 45,000 shares of £1 each, expressed to be fully paid, to the seven persons above mentioned, and also allotted and issued to each of them one other share, being the shares in respect of which they subscribed the memorandum of association. No other shares in the capital of the company were allotted or issued, and no other person held any shares in the company.

The company never had any property or assets other than the lands hereinbefore referred to and the rents and profits therefrom derived. None of the sons of Charles Parbury were, nor was

Tremearne, at any material time in any way entitled to any estate or interest in any of the lands above referred to except as such shareholders. No consideration of any kind was at any time given or paid, or intended or agreed to be given or paid, to the company by any of Charles Parbury's sons or by Tremearne in respect of any of the shares in the capital of the company allotted and issued to them.

The Commissioners, being of opinion that each of the instruments was chargeable with duty as a conveyance on sale, and that the consideration or part of the consideration for such conveyance consisted in the allotment and issue of the 45,000 fully paid £1 shares in the capital of the company to Charles Parbury, and to his sons and to Tremearne as his nominees, assessed each such instrument with *ad valorem* duty in respect of the value of the said shares as follows:—The indenture, £314 5s.; the first mentioned memorandum of transfer, £45; and the other two memorandums of transfer, £2 5s. and £1 10s. respectively.

As the company, which contended that each of the instruments was chargeable with duty not exceeding the amount of 10s., were dissatisfied with such assessment, a case was stated by the Commissioners, under the provisions of the *Stamp Act* 1894 (Qd.), setting out the matters above referred to, and asking the opinion of the Supreme Court upon the following questions:—

(1) Are the said instruments respectively chargeable with duty in accordance with the assessment of the Commissioners?

(2) If not, with what amount of duty is each respective instrument chargeable?

The Supreme Court answered the questions as follows:—(1) No; and (2) As a "conveyance or transfer of any kind not hereinbefore described" where so mentioned in the Schedule to the Act: *In re Parbury Estates Limited* (1).

From this decision the Commissioners now appealed to the High Court.

O'Sullivan A.-G. for Queensland and *Henchman*, for appellants. The sections of the *Stamp Act* 1894 (Qd.) (58 Vict. No. 8) that must be particularly referred to are secs. 4, 16, 49 and 50.

(1) (1912) S.R. (Qd.), 268.

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A conveyance for fully paid up shares is a conveyance on sale within the meaning of the Act: *John Foster & Sons Ltd.* v. *Commissioners of Inland Revenue* (1). In this case the use of the word consideration was purposely avoided in the documents. The difference between this case and the case of *In re Taylor's Transfer* (2) is that in the latter the shares were transferred after they were fully paid up, and there was also an express agreement. But it is not necessary that there should be an express or implied agreement: *Great Western Railway Co.* v. *Commissioners of Inland Revenue* (3).

Stumm K.C. and *Hart*, for the respondents. The appellants are really assuming that there was a sale or a conveyance on sale by Charles Parbury to the company, and to do that they must assume an agreement. Charles Parbury wished to give an interest in these lands to his sons. He could, had he wished to do so, have assigned to himself and his sons in certain proportions; but, instead of doing so, he formed a company and voluntarily gave his sons certain shares in that company. The agreement stating that the shares are to be fully paid up is certainly not sufficient: sec. 28 of the *Companies Act Amendment Act* 1889 (Qd.) (53 Vict. No. 18) is different from the English Act in that the words "by the memorandum of association or" do not appear in the latter, and although no authority on the point can be found, it is submitted that, by analogy, the memorandum must also show it: *In re Caribbean Co.—Crickmer's Case* (4); *In re Kharaskhoma Exploring and Prospecting Syndicate* (5).

[RICH J. Is there any statutory provision in Queensland similar to 61 & 62 Vict. c. 26?]

No.

The filed contract in this case does not show any consideration because there was none. There is no evidence of a contract of sale by Parbury to the company. It is true that he made a voluntary conveyance.

[ISAACS J. referred to *Maxwell on Statutes*, 5th ed., pp. 184, 185.]

(1) (1894) 1 Q.B., 516.
(2) 8 Q.L.J., 24.
(3) (1894) 1 Q.B., 507 at p. 512.
(4) L.R., 10 Ch. 614.
(5) (1897) 2 Ch. 451, at pp. 464, 466.

The respondents' position is supported by *Bullivant* v. *Attorney-General of Victoria* (1) and *Commissioner of Stamp Duties* v. *Byrnes* (2). There is no contract by which Parbury could be compelled to convey to the company, or upon which the company could sue him. As there is no such contract, it cannot be alleged that there was a sale. There must be a conveyance on sale before the Court can hold that stamp duty is payable.

[ISAACS J. referred to *Marquess of Bristol* v. *Commissioners of Inland Revenue* (3).]

The intention of the legislature is that the value shown in the contract must be the same as that shown in the memorandum: *Ooregum Gold Mining Co. of India* v. *Roper* (4). There is not here a conveyance on sale, and there is nothing to prevent a man from making a gift to a company. Notwithstanding the forms of the documents, the Court must not of necessity infer that any of them was a conveyance on sale, for at the time of the execution of the material documents there were no parties able to be contracted with: *Attorney-General* v. *Felixstowe Gas Light Co.* (5). It was perfectly open for the company to receive a gift, and to allot shares without there being a conveyance on sale: *In re Northumberland Avenue Hotel Co.* (6); *Hire Purchase Furnishing Co. Ltd.* v. *Richens* (7).

O'Sullivan A.-G., in reply.

Cur. adv. vult.

April 28.

The judgment of the Court was read by

ISAACS J. In this case the Commissioner of Stamps claims that four documents—a conveyance of land under the general law, and three transfers of other land under the *Real Property Act*—are chargeable with duty under the provisions of the *Stamp Act* 1894, as conveyances on sale, and that the amount of duty assessed on each respectively is correct.

On the face of the documents they appear to be voluntary.

(1) (1901) A.C., 196, at p. 202.
(2) (1911) A.C., 386.
(3) 1901) 2 K.B., 336.
(4) (1892) A.C., 125, at p. 137.
(5) (1907) 2 K.B., 984.
(6) 33 Ch. D., 16.
(7) 20 Q.B.D., 387, at p. 389.

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The first states that the grantor Charles Parbury "doth hereby freely and voluntarily and without any valuable consideration grant" the land to the respondents. The others respectively state that they are "in consideration of the sum of five shillings."

The question is whether, in truth, the documents were executed without valuable consideration, and, if not, what the consideration must in fact and in law be taken to be.

As far as what may be termed the external circumstances are concerned, no dispute arises. Charles Parbury, formerly of Sydney, but now of London, was the sole owner in fee simple of all the land referred to, and its clear value was £48,306.

He has five sons—Charles Harold, of Sydney; Frederick, of Scone, New South Wales; Keith, of Shorncliffe, England; Colin, of Sydney; and Hugh, of Sialkot, India.

On 29th June 1911 a series of events took place, which, according as they are to be regarded as isolated and independent transactions, or as different but connected parts of the one transaction, will determine the questions now in issue.

On that day Messrs Flower & Hart, solicitors, of Brisbane, carried in for registration under the Companies Acts, the memorandum and articles of association of a company called "Parbury Estates Limited." The objects of the company are of a very usual character. They are to purchase or otherwise acquire in any manner whatever for investment or re-sale, and to traffic in land and house property, and to deal in any property real or personal, and this is followed by other objects for the most part of an ordinary business nature. The memorandum and articles were respectively signed by the father and sons, and one other person, Tremearne, described as a merchant, who is now, it is said, the manager of the company.

Each subscriber takes one share. The memorandum and articles bear date 29th June, but that must be the date of Tremearne's signature in Brisbane, the other signatures having been appended in Sydney, and, as it is to be gathered, on 27th June. Now, it is an important circumstance that the signatures of Charles (the father), of Keith, Colin and Hugh, were written by Charles Harold as their attorney under power; Frederick and Charles

Harold signed personally, and so did Tremearne. Out of the six Parburys, therefore, all but Frederick acted by Charles Harold.

Among the clauses of the memorandum are two that may be referred to:—Clause 3, sub-clause (9) reads: "To distribute any of the property of the company *in specie* among the members;" and clause 5 provides: "The capital of the company is £50,000 divided into 50,000 shares of £1 each, whereof 45,000 shares shall be deemed for all purposes fully paid and shall be allotted as follows"—and then it is provided that Charles (the father) is to have 19,999 shares, each of the sons 5,000, and Tremearne 1.

Article 3 provides that "The company shall forthwith enter into an agreement with" the father, the sons, and Tremearne, in terms of a draft, identified by the subscription of Mr. Flower, and that "the directors shall carry the said agreement into effect," with full power, nevertheless, at any time and from time to time either before or after the adoption thereof, to agree to any modification of such agreement."

Article 5 says that the shares shall be under the control of the directors "subject nevertheless to the stipulations contained in the said agreement with reference to the shares to be allotted in pursuance thereof."

Article 76 appoints Charles Harold, Frederick, and Tremearne the first directors.

Now, it is of the utmost importance, in view of the judgment appealed against, and the argument addressed to us, to bear in mind the provisions of sec. 15 of the *Companies Act* 1863. That section declares that "The articles of association . . . when registered . . . shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto and there were in such articles contained a covenant on the part of himself his heirs executors and administrators to conform to all the regulations contained in such articles subject to the provisions of this Act."

Without inquiring very closely as to the exact effect of that section, it is sufficient to say that it has considerable binding force in regulating the rights of members.

One case only may be referred to—*Salmon* v. *Quin & Axtens*

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Ltd. (1). In the Court of Appeal (2) *Farwell* L.J. (*Cozens-Hardy* M.R. concurring), said:—"The Act does not say with whom that covenant is entered into, and there have no doubt been varying statements by learned Judges, some of them saying it is with the company, some of them saying it is both with the company and with the shareholders. *Stirling* J. in *Wood* v. *Odessa Waterworks Co.* (3) says:—'The articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other.'" Then adds *Farwell* L.J.:—"I think that that is accurate subject to this observation, that it may well be that the Court would not enforce the covenant as between individual shareholders in most cases." Further on, he refers to the articles as "forming this contract;" and ultimately the Court acts on that view to the extent even of restraining the company in general meeting from controlling the directors' discretion, because the regulations vested it in them. The House of Lords (4) affirmed the decision, Lord *Loreburn* L.C. referring to the provision in the articles as "the bargain made between the shareholders."

We have, therefore, a method adopted by which, to the fullest extent possible consistent with law, and with very great legal assurance, the company when created—the father and the members of it—are bound to carry out the settled scheme of allotment of shares.

No reason or actuating motive or idea for the creation of the company is apparent, or suggested, except as an instrument for carrying out the desire of Charles Parbury to transfer the proprietorship in the land, from one of sole ownership by him, to an ownership by which its benefits would be distributed among himself and his children.

All the individuals named necessarily acted in concert in creating the company, and assumedly for the sole immediate purpose mentioned, and then the new *persona* which was thus brought into existence stood ready to play its destined part.

Before referring to the next step in the transaction, it is desirable to read a few words of Lord *Halsbury* in *In re Johannes-*

(1) (1909) 1 Ch., 311; (1909) A.C., 442.
(2) (1909) 1 Ch., 311, at p. 318.
(3) 42 Ch. D., 636, at p. 642.
(4) (1909) A.C., 442.

burg Hotel Co.; *Ex parte Zoutpansberg Prospecting Co.* (1). The Lord Chancellor, sitting then in the Court of Appeal, said :—"It may be (indeed, it certainly is so) that the companies were but nominees—puppets—only intended to move as their manufacturers intended they should move . . . But persons who engage in such transactions must at least make their puppets move in a legal manner. The knowledge of and intention of the individual persons is nothing to the purpose. It is the abstraction, the ideal legal personage, which is sought to be bound." And we would here add: It is the acts of the abstraction, the ideal legal personage, of which advantage is taken, and those acts must be adopted with all their legal consequences.

The company being, then, a live and actual person, distinct from all the individuals composing it, Messrs. Flower & Hart, who, as the case states, at all times material acted as solicitors for the said Charles Parbury and for his sons and for Tremearne and for the company, on the same date, 29th June 1911, lodged the conveyance and transfer for registration in the respective appropriate ways. On or about the same day, Charles Parbury—of course, by Charles Harold his attorney under power—delivered possession of the land to the company, and the company—no doubt by Charles Harold alone or in conjunction with his co-directors—assumed and still retains possession as owner. The instruments of title as registered were executed by Charles Parbury, by his attorney Charles Harold. Subsequently, on 18th August 1911, the other two transfers were similarly executed, and the agreement referred to in the articles was executed by all the required parties — Charles, Keith, Colin and Hugh signing by their attorney Charles Harold, the last-named signing for himself, Frederick and Tremearne signing for themselves.

It would, in our opinion, be doing violence to common-sense to regard these various events as other than successive steps in carrying out the one transaction.

Charles Parbury did not bring the company into existence to make it the recipient of his bounty. And he did not create it as a trustee; to do that would have made the scheme impossible. The company, therefore, is an independent personage receiving

(1) (1891) 1 Ch., 119, at p. 128.

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and retaining the full ownership, legal and equitable, in the land—the constituent members having no estate or interest whatever in the land which the law will recognize; none, except so far as their membership, which involves their recognition that the company is the owner, may enable them to profit by the changed ownership. If, then, Charles Parbury did not intend to make the company, as such, a gift, what was the legal quality of his transfers to the company? Learned counsel for the respondents strenuously contended that he did, in fact, make a gift to the company, that is, he transferred his property to the corporation without any consideration being stipulated for or required or asked; and that this gift was real, and not unnatural, because the father had no doubt in his mind that the directors, having the power to make the desired allocation of shares and the knowledge that the father desired it, would in fact do it. But that is contrary to the substance and reality of the matter. In the first place, as already indicated, the precautions taken in framing the memorandum and articles show that nothing was left to voluntary action or uncontrolled discretion that could be avoided, and very little, if anything, was suffered so to rest. Then the concert of the parties in placing the attorneyship of all absent persons in Charles Harold's hands, in making him and the parties here present directors, in the employment of the same firm of solicitors to act for all parties, is convincing proof that every step of every one of the parties was pursuant to a well-defined plan, and was, as it was intended to be, the accompaniment and complement of every other. That all the individuals agreed to form the company, the signatures attest; and when the company was formed there was in law, unmistakably deducible from acts and conduct, a tripartite agreement between Charles Parbury and the company and all the individuals: that Charles should transfer his land to the company; that the company should in return, and as required by him, allot the 45,000 fully paid shares representing approximately the value of the property to the individuals as his nominees in the proportions mentioned, and, lastly, that the individuals should accept these shares from the company.

As between the company and Charles Parbury, that is a sale

within the meaning of the *Stamp Act*, which recognizes as a sale the case where the consideration is in shares. Once that position is reached, the rest is covered by authority, of which the most important illustrations are *John Foster & Sons Ltd.* v. *Commissioners of Inland Revenue* (1) and *John Wilson & Son* v. *Commissioner of Inland Revenue* (2). *Wilson's Case* is a decision of the Court of Session in 1895, the late Lord *Robertson* presiding. There a private partnership conveyed its whole assets to a joint stock company, limited by shares, consisting exclusively of the same partners, in consideration of each partner getting shares in the new company equal in value to his holding in the old partnership, and it was held that the conveyance was a conveyance on sale under the *Stamp Act* 1891 (54 & 55 Vict. c. 39), secs. 54 and 55, and that the disposition was chargeable with *ad valorem* stamp duty on the value of the stock transferred. *John Foster & Sons Ltd.* v. *Commissioners of Inland Revenue* (1) was approved. It was argued that the identity of the parties, property and interests, took the transaction outside the notion of a sale. "But," said Lord *Robertson* (3), "the legal effect of what was done was that the private company parted with their rights in the specific articles of property, land, tubes, stock in hand and the like, handed them over to the limited liability company, and got in exchange merely shares in the limited liability company." Lord *McLaren* said (4):—"I am unable to adopt the view that a case of substantial identity between sellers and purchasers who are theoretically distinct can be regarded as an exception to the scope of the Statute."

In short, then, the parties, no doubt with the desire to distribute the father's property in certain proportions between him and his sons, have adopted a course which offers considerable collateral and incidental advantages for the purposes of division and alienation, but at the same time is impressed by law with certain legal attributes; and among them are the distinctiveness of the artificial *persona* and the necessity of regarding it as a real entity both in receiving the property and distributing in return, and as the consideration for it, its own shares, and so becoming the purchaser of the land.

(1) (1894) 1 Q.B., 516.
(2) 23 Rettie, 18.
(3) 23 Rettie, 18, at p. 22.
(4) 23 Rettie, 18, at p. 24.

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The same principle also prevents the application of the doctrine of family arrangement, according to the class of decisions of which *Denn dem. of Manifold* v. *Diamond* (1) is a leading case. In that case *Holroyd* J. said (2):—"A sale imports a *quid pro quo*, in some way or other enuring to the benefit of the party selling." But in that, and in every other case of the kind, the gift was direct to the object of the bounty, or a trustee for him, and though that object undertook to do something else for the benefit of another, it represented really an indirect gift to that other by the original donor. But when a third person not an object of bounty is interposed, not as a trustee, *but as having independent rights*, and the property is transferred to him both in law and in equity, it cannot be supposed to be as a gift to the persons ultimately intended to be benefited; and if, as a condition of the transfer, or as an intended reciprocal act, the third person pays over his own money (or, if a company, hands over its own shares) to a person designated by the transferor, and by his direction, the natural inference is, that this is done by way of consideration and in discharge of a contractual obligation at the instance of the transferor.

The first question, then, should, in our opinion, be answered in the affirmative.

The second question is as to the proper amount of duty. To begin with, the shares must be valued as at or about 29th June 1911, when the company accepted the transfer and conveyance, took possession of the land, and became bound to issue the shares, the subsequent actual issue being a formal act. It is common ground that all parties intended that fully paid up shares should be allotted.

But a contention has been raised as to whether the shares in fact allotted should be regarded as fully paid up, or as wholly unpaid. A very serious question is thus involved in the interpretation of sec. 28 of the *Companies Act Amendment Act of* 1889. That section provides that "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by the memorandum of association or by a contract duly made in

(1) 4 B. & C., 243.

(2) 4 B. & C., 243, at p. 246.

writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

It is argued, on the one hand, that, as no contract was filed, the mere statement in the memorandum that the "shares shall be deemed for all purposes fully paid" is not a compliance with the section, and therefore the shares are in law unpaid, because they were not paid in cash; and, on the other hand, it is urged that the statement in the memorandum is sufficient, and therefore they must be valued as fully paid.

In the circumstances it is unnecessary to determine the point for the following reasons. If the matter depended solely on the new provision as to the memorandum, then, on the assumption that it had not been complied with, the only remedy would probably be reconstruction. But it does not depend upon that; there was and is a contract which, apart altogether from the memorandum provision, could have been registered so as to support the shares as fully paid.

A distinct line of authorities, beginning with *In re New Zealand Kapanga Gold Mining Co.* (1) and including *In re Darlington Forge Co.* (2), *In re Preservation Syndicate* (3) and *Smith* v. *Brown* (4), establishes this: that if by some *bonâ fide* mistake, or in ignorance either of legal requirements or that they had not been complied with, a shareholder is struck by that section, he may apply under the rectification section (sec. 34 of the Act of 1863) and be removed from the register, with the view of restoration by a new issue after the contract is filed. The contract, if there is one, may then be registered, and the shares re-issued. The Statute is then complied with; it requiring, as *Fry* L.J. said in *In re New Eberhardt Co.*; *Ex parte Menzies* (5), the following conditions:—"First, there must be at or before the date of the issue of these shares, a contract; secondly, that contract must be duly made in writing; and thirdly, that contract must be filed with the Registrar. Now, all these things must be done or must be in existence at or before the date of the issue. You cannot have a contract filed before the issue of the shares if it is not a contract till after the issue of the shares."

On that is grafted a saving principle now well established, and

(1) L.R. 18 Eq., 17, *n.*
(2) 34 Ch. D., 522.
(3) (1895) 2 Ch., 768.
(4) (1896) A.C., 614 at p. 622.
(5) 43 Ch. D., 118, at p. 129.

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exemplified in the case of *In re S. Frost & Co. Ltd.* (1). It is this: a confirmatory contract which leaves the original contract standing and fairly sets out the terms of the original is as good for this purpose as the original, because it fulfils all the purposes of giving the required information. *Rigby* L.J. (2) points that out, and adds:—"My experience is that the practice is to file such confirmatory contracts. It is said that some text-writers doubt whether that is the right course to take; but I do not think their doubts can be taken to outweigh the practice of the profession."

Naturally, and as established by the cases, the course indicated cannot be permitted except on the terms of avoiding injustice to others—as, for instance, creditors.

Assuming then, but offering no judicial opinion upon the point, that the shares are to be regarded as unpaid for want of compliance with sec. 28, we entertain no doubt the circumstances here are such as to induce a Court to permit rectification of the register. There are no creditors or others to be prejudiced; and there was —taking, as we do, the statements in the various documents to be honest—an evident misapprehension as to the required formalities.

If such an application should be made, it may be decided that the provisions of the section are already satisfied, and that rectification is unnecessary. So that *quacunque viâ* the shareholders will be protected.

In these circumstances, it being practically in the power of the shareholders to obtain either a declaration that their shares (other than the subscription shares—see *Dalton Time Lock Co.* v. *Dalton* (3)) are now fully paid, or to obtain the necessary relief, we think the shares should be valued as fully paid.

The appeal will therefore be allowed, with £20 costs in the Supreme Court, and with the costs of this appeal.

Appeal allowed with £20 costs in the Supreme Court, and with the costs of this appeal.

Solicitor, for appellant, *T. W. McCawley*, Crown Solicitor, Brisbane.

Solicitors, for respondents, *Flower & Hart*, Brisbane.

N. McG.

(1) (1899) 2 Ch., 207.

(2) (1899) 2 Ch., 207, at p. 214.

(3) 66 L.T., 704.