RICH J. I also assent to it.

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SIBLEY v. GROSVENOR.

Appeal allowed. Order appealed from discharged. Order as stated in judgment of Griffith C.J.

Solicitor for the appellants, *J. Birtwistle.*

Solicitors for the respondents, *Blake & Riggall*; *F. J. Hamilton Rowan.*

B. L.

Foll Brown v Panga Pty Ltd (1995) 17 ACSR 75
Foll Brown v Panga Pty Ltd (1995) 120 FLR 34
Appl/Cons Brown v Panga Pty Ltd (1995) 14 WAR 393

[HIGH COURT OF AUSTRALIA.]

RYAN . . . . . APPELLANT;
PLAINTIFF,

AND

EDNA MAY JUNCTION GOLD MINING COMPANY NO LIABILITY . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *May* 25, 26. MELBOURNE, *June* 8.

Barton, Isaacs and Gavan Duffy JJ.

Company—Voluntary liquidation—Meeting—Resolution—Notice—Distribution of assets—Companies Act 1892 (*S.A.*) (*No.* 557), *secs.* 134, 152.

By an article of association of a company, the capital of which consisted partly of vendor's paid up shares and partly of contributing shares, it was provided that if the company should be wound up the assets remaining after paying the costs and expenses of and attending the liquidation and the debts of the company should be applied in the first place towards repaying to the members *pro rata* the amounts paid up, or deemed to be paid up, on their shares, and that the surplus (if any) should be distributed between all the members *pro rata* according to the number of shares held by them respectively, "provided, however, that if the company shall go into voluntary liquidation at any time within six calendar months after its incorporation by reason of the non-return

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of any profit to the company, then and in any such case the vendor's shares shall not confer upon the proprietors thereof any rights to participate in the surplus assets until the capital actually paid up on the contributing shares shall have been fully repaid." It was also provided that notices of general meetings of shareholders should specify the general nature of any special business. A notice was given that an extraordinary meeting of shareholders would be held on a specified day, which was within six months after the incorporation of the company, for the purpose of considering and, if thought advisable, passing a resolution that the company be wound up voluntarily. On the specified day the meeting was held and a resolution was passed that the company be wound up voluntarily.

Held, that the notice was not sufficient to justify a resolution for a liquidation which would have the effect of postponing the right of the holders of vendor's shares to participate in the assets until the capital actually paid up on the contributing shares had been fully repaid, and that under the resolution which was in fact passed the surplus assets should be distributed among all the shareholders in proportion to the amounts paid up or deemed to be paid up on their shares.

Decision of the Supreme Court of South Australia (*Buchanan* J.), reversed.

APPEAL from the Supreme Court of South Australia.

An action was brought in the Supreme Court by Thomas Ryan, on behalf of himself and all other holders of vendor's shares in the Edna May Junction Gold Mining Co. No Liability, against that Company, claiming (par. 8)—(*a*) a declaration that the assets remaining after payment of the costs and expenses of and attending the liquidation and the debts and liabilities of the defendant Company should be applied in the first place in or towards repaying to the members (including the holders of vendor's shares, Nos. 1 to 30,000 inclusive) *pro rata* the amounts paid up or deemed so to be on their shares, and the surplus (if any) should be distributed among all the members *pro rata* according to the number of shares held by them respectively; and (*b*) an injunction to restrain the defendant Company from proceeding with the liquidation of the defendant Company otherwise than in accordance with the declaration. Alternatively the plaintiff claimed (par. 9)—(*a*) a declaration that a special resolution passed at an extraordinary general meeting of the defendant Company held on 1st October 1915 was *ultra vires* and illegal; (*b*) an injunction to restrain the defendant Company from acting on such resolution and proceeding with the liquidation of

the defendant Company; and (c) an order that the defendant Company should be wound up by the Supreme Court under the provisions of the *Companies Act* 1892. By counterclaim the defendant Company claimed a declaration that the plaintiff and all other holders of vendor's shares were not entitled to participate in the surplus assets of the defendant Company remaining after payment of the costs and expenses of and attending liquidation and the debts and liabilities of the Company until the capital actually paid up on the contributing shares should have been fully repaid.

The action was heard before *Buchanan* J., who gave judgment for defendant Company on the claim and on the counterclaim, and declared that the plaintiff and all other holders of vendor's shares were not entitled to participate in the surplus assets of the defendant Company remaining after payment of the costs and expenses of and attending the liquidation and the debts and liabilities of the Company until the capital actually paid up on the contributing shares should have been fully repaid.

From that decision the plaintiff now appealed to the High Court.

Included in the Articles of Association of the defendant Company, in addition to art. 158 (which is set out in the judgment of *Barton* J. hereunder), were the following:—

"68. Three days' notice at least, specifying the place, the day and the hour of meeting, and, in case of special business, the general nature of such business, shall be given to the members in manner hereinafter mentioned, or in such other manner, by advertisement or otherwise, as may be prescribed by the Company in general meeting, but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

"69. All business shall be deemed special that is transacted at an extraordinary general meeting, and also all that is transacted at an ordinary general meeting with the exception of sanctioning a dividend, the consideration of the accounts and balance-sheets, and the ordinary report of the directors."

The other material facts are stated in the judgment of *Barton* J. hereunder.

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F. Villeneuve Smith (with him *J. S. Murray*), for the appellant.

W. A. Magarey (with him *R. N. Finlayson*), for the respondents.

During argument reference was made to *Kaye* v. *Croydon Tramways Co.* (1); *Baillie* v. *Oriental Telephone and Electric Co.* (2); *In re Bridport Old Brewery Co.* (3); *In re Silkstone Fall Colliery Co.* (4); *Tiessen* v. *Henderson* (5); *Campbell's Case* (6); *Sewell's Case* (7); *Wright's Case* (8); *Oakbank Oil Co.* v. *Crum* (9); *Griffith* v. *Paget* (10); *Grant* v. *United Kingdom Switchback Railways Co.* (11); *Betts & Co. Ltd.* v. *Macnaghten* (12); *Stiebel on Companies*, p. 384; *Palmer's Company Precedents*, 11th ed., Part I., pp. 692, 695; *In re Trench Tubeless Tyre Co.*; *Bethell* v. *Trench Tubeless Tyre Co.* (13); *In re South African Supply and Cold Storage Co.*; *Wild* v. *South African Supply and Cold Storage Co.* (14); *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan* (15); *Companies Act* 1892 (S.A.), *secs.* 3, 18, 134, 137 (IV.), 152, 154.

Cur. adv. vult.

Melbourne, June 8.

The following judgments were read :—

BARTON J. The appellant, who is the plaintiff, sues on behalf of himself and all other holders of vendor's shares in the defendant Company, now respondent. The Company was incorporated on 12th April 1915. Out of 65,000 shares of a nominal value of 10s. each, being the capital of the respondent Company, the plaintiff holds 13,000 vendor's shares, accounted as paid up, and 5,000 which are contributory. There are 30,000 vendor's shares and 35,000 contributory shares. There are held in Western Australia 24,900 of the vendor's shares and 13,100 of the contributory shares, so that the balance of the shares appear to be held in Adelaide; namely just over one-sixth of the

(1) (1898) 1 Ch., 358.
(2) (1915) 1 Ch., 503, at p. 515.
(3) L.R. 2 Ch., 191.
(4) 1 Ch. D., 38.
(5) (1899) 1 Ch., 861, at p. 866.
(6) L.R. 9 Ch., 1, at p. 21.
(7) L.R. 3 Ch., 131, at p. 140.
(8) L.R. 12 Eq., 331, at p. 345 (*n*).
(9) 8 App. Cas., 65, at p. 70.
(10) 6 Ch. D., 511, at p. 516.
(11) 40 Ch. D., 135.
(12) (1910) 1 Ch., 430.
(13) (1900) 1 Ch., 408.
(14) (1904) 2 Ch., 268.
(15) L.R. 6 Eq., 91.

paid up shares and nearly two-thirds of the contributory. The Company is registered, and holds its board and general meetings, in Adelaide.

A notice dated 18th September 1915 was published on the 21st of the same month by advertisement in the Western Australian newspapers published in Perth and Westonia respectively. It was published on the 18th and the 21st in Adelaide. It ran as follows:—"Edna May Junction Gold Mining Company No Liability.—Notice is hereby given that an Extraordinary General Meeting of shareholders will be held at the registered office, No. 1 Brookman Buildings, Grenfell Street, Adelaide, on Friday 1st October 1915 at 11.30 o'clock in the forenoon, for the purpose of considering and, if thought advisable, to pass the following as a Special Resolution, viz:—'That the Edna May Junction Gold Mining Company No Liability be wound up voluntarily.' Should such resolution be so passed a further resolution for the appointment of a liquidator and fixing his remuneration will be proposed. Dated this 18th day of September 1915. By order of the Board, E. M. Twiss, Secretary."

On the day notified, namely, 1st October 1915, the extraordinary general meeting was accordingly held in Adelaide, and it was attended by not quite a dozen people, including the chairman of directors, Mr. Young. The chairman in opening the meeting explained that the Company's properties had been found to be valueless, and (as has been found by *Buchanan* J., who tried the case) he read extracts from the manager's reports as to the leases at a place called Westonia and the manager's advice to the Board that it would be well to abandon those leases. The manager had also reported that the work carried out on certain option claims in another part of Western Australia had proved disappointing. In view of the manager's reports, extracts from which were put before the meeting, the chairman said that the directors had decided to abandon both the leases and the option claims, and had decided to call the meeting to pass the winding up resolution. I am of opinion also that the chairman told the meeting that there had been no profit from the Company's operations. In any case such an inference must have been almost irresistibly drawn from the statement that the properties

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were valueless and must be abandoned. A special resolution was thereupon carried by the requisite majority, in the form indicated in the notice—namely, that the Company be wound up voluntarily; an adjournment having been moved for (but refused) to enable the shareholders resident in Western Australia to be represented; and a liquidator was appointed. The statement of claim sets out No. 158 of the Articles of Association, which I shall mention more fully presently. Suffice it is to say at this stage that the article prescribed that on a winding up there should be a distribution among the shareholders *pro rata* according to the number of shares held by them respectively, with a proviso that if a voluntary liquidation occurred within six months after incorporation by reason of the non-return of any profits to the Company, the holders of vendor's shares were not to participate in any surplus assets until the money actually contributed on the paid up shares should have been repaid. The plaintiff claimed in the alternative:—(1) A declaration that the surplus assets should be applied among the members *pro rata*, and an injunction to restrain the Company from liquidating on any other basis; (2) alternatively, and on the assumption that the liquidation was because of non-return of profits, that the Company did not give the members notice of the general nature of the business to be transacted at the meeting (Articles of Association, clauses 2 and 68), nor did the Company comply with secs. 3 and 134 (2) of the South Australian *Companies Act* 1892. Under this alternative the claim was for a declaration that the special resolution was *ultra vires* and illegal, for an injunction, and for an order for compulsory winding up. There does not appear to be evidence on which to found such an order as last mentioned.

In defence the respondent Company upholds the notice of the meeting as proper and sufficient, asserts its compliance with the *Companies Act*, avers that the Company went into voluntary liquidation within six months after its incorporation by reason of the non-return of any profit, and denies the right of the appellant and other holders of vendor's shares to participate in the surplus assets until the capital actually paid up on the contributory shares has been fully repaid. For this it relies on the

proviso to art. 158. There was a counterclaim for a declaration that holders of vendor's shares are not entitled to participate in the surplus assets until the capital actually paid on the contributory shares has been fully repaid.

The Memorandum and Articles referred to in the pleadings are an exhibit. Of these the most material are art. 2, which repeats the definition of "special resolution" contained in sec. 3 of the *Companies Act*; art. 68, which requires at least three days' notice of the general meeting, specifying place, day and hour and the general nature of any special business, but provides that the non-receipt of any notice shall not invalidate the proceedings at any general meeting; and art. 158, which is as follows:—"If the Company shall be wound up, the assets remaining after payment of the costs and expenses of and attending the liquidation, and the debts and liabilities of the Company, shall be applied in the first place in or towards repaying to the members *pro rata* the amounts paid up, or deemed so to be, on their shares, and the surplus (if any) shall be distributed between all the members *pro rata* according to the number of shares held by them respectively. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions. Provided, however, that if the Company shall go into voluntary liquidation at any time within six calendar months after its incorporation by reason of the non-return of any profit to the Company, then and in any such case the vendor's shares, Nos. 1 to 30,000 inclusive, shall not confer upon the proprietors thereof any rights to participate in the surplus assets until the capital actually paid up on the contributing shares shall have been fully repaid."

On 18th September, the date of the notice, the directors, in view of the absence of profit and the disappointing reports of the manager, resolved to call the extraordinary general meeting which was held on 1st October, to consider and, if thought advisable, to pass a resolution to wind up the Company. It is plain, therefore, that while the directors did not give notice of a winding up resolution in terms of the proviso to art. 158, it was their intention that the distribution should in fact be in accordance

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with that proviso—that is, that the vendor shareholders should be postponed.

On 21st September the secretary of the Company received and laid before the board, the chairman of which put his initials to it, the following telegram:—"If liquidated what dividend do you estimate? Would paids participate? Carmichael." Carmichael lives at Perth, and was the holder of 200 contributory and not of any vendor's shares. The reply to this telegram is not among the exhibits. It was sent on the same day, and it was admitted that the reply to the second question that it asked was in the negative.

The action was heard by *Buchanan* J., who gave judgment for the respondent Company with costs, declaring "that the plaintiff and all other holders of vendor's shares are not entitled to participate in the surplus assets of the Company remaining after the payment of the costs and expenses of and attending liquidation and the debts and liabilities of the Company until the capital actually paid up on the contributing shares shall have been fully repaid."

The plaintiff, in the first instance, rests his appeal from that decision on the ground that the respondent Company did not give the members notice of the general nature of the business to be transacted at the meeting (arts. 2 and 68), nor did the respondent Company comply with secs. 3 and 134 (2) of the *Companies Act* 1892, and the proceedings at the meeting and the resolution there carried were *ultra vires* and void. On the hearing of the appeal the grounds were amended by consent by the addition of the further ground that the winding up resolution was not expressed to be for the non-return of profit, and that the holders of vendor's shares are therefore entitled to participate *pro rata*. This is in effect a restoration of the first prayer in the appellant's statement of claim.

The two questions to be determined are really these:—1. Was the notice sufficient, or to what extent was it insufficient? 2. Is the liquidation (if any) to be on the basis of the main provision in art. 158, or on the basis of the proviso to the article?

First, as to the notice. The first consideration that presses me is that expressed by *Page Wood* V.C. in *Clinch* v. *Financial*

Corporation (1):—"The only excuse is, that when the meeting was held the real transaction was stated, ... but how is it possible for the Court to know how many shareholders abstained from attending the meeting, being satisfied that the arrangement, as it was proposed, was advantageous to them, and being quite content to exercise no voice about it?" That was a case of fraud, but the words quoted are applicable to this notice. In *Alexander* v. *Simpson* (2) *Bowen* L.J. said, speaking for himself and *Fry* L.J., the other member of the Court:—"It seems to me, however, to be impossible for us to adopt the view that a benevolent construction ought to be put on commercial notices. What we have to consider is not what is the result of any particular construction, but what was the meaning which ordinary men of business would attribute to the notice at the time they received it." And, at p. 149:—"The construction of a notice convening an extraordinary general meeting of a company is not a technical point, and I agree entirely with what Mr. Justice *Chitty* has pointed out—the extreme importance that these notices should be so plain that those who run may read, and that they should be construed in a sense in which business men to whom they are addressed would understand them." What, then, was the meaning which ordinary men of business would attribute to the notice at the time they received it? There was evidence that the time allowed was sufficient to enable the holders of vendor's shares in Western Australia to attend the meeting, and the date on which the mail steamer sailed from Fremantle, 25th September 1915, and the date of her arrival at Adelaide, 29th September 1915, are among the admissions. The holders of these 24,900 vendor's shares, or the bulk of them, did not attend; and among the absentees was the appellant, who held more than half of them. Had they been aware that it was intended to make a distribution of surplus assets in accordance with the proviso to art. 158, it is scarcely credible that these holders, or most of them, would not have been represented personally or by proxy. The amendment for an adjournment for three weeks to enable the Western Australian shareholders to be present was moved evidently in view of the intention apparent from the chairman's

(1) L.R. 5 Eq., 450, at p. 481. (2) 43 Ch. D., 139, at p. 147.

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speech, but the motion was defeated. The proposed resolution embodied in the notice said nothing about the non-return of profits as a basis for that resolution, and if even a newspaper cutting giving some indication of it had been posted together with the notice, it would not have been sufficient to express the intention entertained by the directors in the absence of any expression of it in the notice or the proposed resolution (see the judgment of *Chitty* J., sustained on appeal in the case just cited). In *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan* (1) it was held by *Giffard* V.C. that in order to bring a transfer of the business of one company to another company within the provision of sec. 161 of the English *Companies Act* 1862, the circular convening the meeting at which the transaction is to be submitted to the shareholders must contain a distinct notice that the arrangement is to be carried out by the liquidators under sec. 161. The notice there in question said nothing conveying that the arrangement indicated in the notice was to be carried out by the liquidators under the section named.

The following cases may be mentioned as supporting the proposition that a notice which by the Articles is to indicate the general nature of the business to be brought before the meeting, or its object, must give members fair warning of the matters to be dealt with:—*In re Bridport Old Brewery Co.* (2); *Wright's Case* (3); *Lawes's Case* (4), *per Selwyn* L.J.; *Kaye* v. *Croydon Tramways Co.* (5). In *Tiessen* v. *Henderson* (6), where it was held, following *Kaye's Case* (7), that a notice of an extraordinary general meeting must disclose all facts necessary to enable the shareholder receiving it to determine in his own interest whether or not he ought to attend the meeting, and that pecuniary interest of a director in the matter of a special resolution to be proposed at the meeting is a material fact for this purpose, *Kekewich* J. said (8):—"Those facts were not stated in the circular. If a meeting properly convened, and properly instructed as to the purpose for which it is convened, chooses to assent to this, there is no reason why it should not do so; but I think it ought to have the

(1) L.R. 6 Eq., 91.
(2) L.R. 2 Ch., 191.
(3) L.R. 12 Eq., at p. 345.
(4) 1 De G. M. & G., 430.
(5) (1898) 1 Ch., 358.
(6) (1899) 1 Ch., 861.
(7) (1898) 1 Ch., 358.
(8) (1899) 1 Ch., at p. 870.

opportunity of considering the point. The man I am protecting is not the dissentient, but the absent shareholder—the man who is absent because, having received and with more or less care looked at this circular, he comes to the conclusion that on the whole he will not oppose the scheme, but leave it to the majority. I cannot tell whether he would have left it to the majority of the meeting to decide if he had known the real facts."

Now, it is clear that it was intended to wind up this Company voluntarily, and both the appellant's party and the respondent Company, who represented before the Court the rest of the shareholders, are willing that it should be wound up. Their difference is as to the manner of distribution. My reading of art. 158 is that it is intended that in ordinary circumstances the distribution of surplus assets should be *pro rata* to the amounts paid up or deemed so to be on the shares, and the surplus, if any, after that process should be distributed among all members *pro rata* according to the number of shares held by each. That is to be the ordinary acceptation of a voluntary winding up. The distribution contemplated by the proviso is to operate only on the concurrence of two events: first, that the liquidation is entered upon within six months after incorporation, and second, that the reason of that liquidation is the non-return of any profit to the company, and I repeat that it is only in any such case that the vendor's shares are not to confer on their proprietors any right to participate in the surplus assets until the capital actually paid up on the contributory shares shall have been fully repaid. Then, as between these two methods of distribution, which would an ordinary business man infer to be contemplated by a notice of a naked resolution for voluntary winding up? To my mind it is clearly that indicated in the main portion of the article, namely, that a *pro rata* liquidation was in contemplation. Justly drawing that inference, it is natural that he would not attend or be represented. He comes distinctly within the words which I have just quoted as used by *Kekewich* J.

The notice, then, points in my opinion to what may be called, in view of art. 158, an ordinary as distinguished from an exceptional winding up and distribution.

Then are the whole proceedings to be held invalid because the notice was insufficient as a notice of winding up according to the

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proviso ? Under the circumstances of this case I think not. As pointed out, all parties desire a voluntary winding up; but, as *Buchanan* J. has observed, "a difference of opinon having arisen between the liquidator and the holders of vendor's shares as to the existence of a right of preference in the holders of contributing shares, this action has been brought to obtain an authoritative declaration by the Court upon the point." I think that, as the special resolution should be construed in terms of the notice, it should be declared that it is a resolution for a voluntary winding up under art. 158 and not under the proviso; a further declaration should be made in the terms of the appellant's claim (*a*) in par. 8 and an injunction in terms of his claim (*b*) in the same paragraph.

The counterclaim should be dismissed.

ISAACS J. The appellant's claims in the action, and as they stand on the amended notice of appeal, are twofold. The first claim is that the winding up should be held to be a valid and binding winding up on a *pro rata* basis of distribution. The second is alternative, and seeks a declaration that if the winding up resolution as it stands is not to be regarded as on a *pro rata* basis of distribution, but on the special basis of deferring the paid up shareholders, then it is invalid by reason of defective notice.

The respondent Company's defence and counterclaim, and its contentions on the appeal, maintain the validity of the winding up resolution, and maintain it also on the basis of the special mode of distribution.

On the appeal the question resolved itself into a mere dispute as to the method of distribution, leaving the voluntary winding up itself unchallenged.

I am of opinion that the appellant's position is sound, and that he should succeed. The resolution for winding up was in this simple form that the Company "be wound up voluntarily." No reason was added, and the fact that the resolution was passed for the specific reason that no profit had been made has only been established by the finding of the Court upon conflicting and circumstantial evidence. In other words, there has been no corporate declaration of the reason for the resolution.

I by no means rely upon a hard and fast rule that a resolution in the simple and unqualified terms adopted in this case must

always be read apart from the unexpressed "reason" or the "purpose" for which it was passed, and treated as a winding up upon the ordinary conditions. See *In re South African Supply and Cold Storage Co.* (1). The express resolution and the unexpressed purpose may possibly both be given effect to. On the other hand such a simple resolution if it departs from the notice may possibly be utterly invalid for any purpose (see *In re Teede & Bishop Ltd.* (2)); or it may, by reason of the notice not being entirely followed, be voidable only, and form ground for a compulsory order to supersede it (see *Thomson* v. *Henderson's Transvaal Estates Ltd.* (3)). Each case must depend upon its own circumstances.

In the present instance, there was the clear, though simple, resolution to wind up voluntarily. And there was a notice in its terms equally clear and simple—because in the same words. Statutory conditions were complied with. There was, therefore, an effective winding up. The mere fact that shareholders who voted for a resolution were for some particular reason, not properly attributable to the notice, mentally impelled to vote for the resolution, cannot affect their overt corporate act. (See *per Fletcher Moulton* L.J. in *Thomson* v. *Henderson's Transvaal Estates Ltd.* (4).) But on what terms? Here again mere mental motive cannot determine the question. The resolution is to be construed as a winding up upon ordinary conditions if the notice supports that view, and ultimately, as I think, we are driven back upon the notice. That too *primâ facie* is a notice for winding up *simpliciter*, which ordinarily would involve the *pro rata* distribution specified in the early part of art. 158.

Now, the first contention of the respondent is that as the proviso says the special mode of distribution shall prevail if only the winding up is by reason of non-return of profit, then, so long as that reason is proved *aliunde*, it does not matter that the notice and resolution are alike silent on the point. Having regard to the social compact contained in the Memorandum and Articles of this Company, I entertain no doubt that the contention is unsound.

(1) (1904) 2 Ch., 268.
(2) 70 L.J. Ch., 409.
(3) (1908) 1 Ch., 765, at p. 778.
(4) (1908) 1 Ch., at p. 775.

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Arts. 68, 69 and 158, read in conjunction, entitled the proprietors (possibly transferees for value) of the vendor's shares, Nos. 1 to 30,000, to reasonable notice that the business intended to be transacted at the meeting of 1st October included the deferring of their participation in the assets until the contributory shares were satisfied. That was the real and substantial part of the business as the respondents construe the resolution. From a business standpoint that was on such construction the cause, rather than the consequence, of the winding up at that particular juncture. In law the distribution was the consequence, but so far as the respective rights of the shareholders were concerned it was the effective cause, because it was the practical step proposed to be taken. And this all-important fact was not disclosed in the notice. Why not? I do not attribute any *mala fides* to the directors in not stating it in the notice, but the Company, whose agents they were, must take the responsibility of the omission. The shareholders are not to be put upon conjecture as to what might be intended. They cannot, of course, require meticulously precise notices. All that is needed in the absence of definite provision is a fair and reasonable intimation of what is actually proposed to be done. *Selwyn* L.J. in *Wright's Case* (1) said:— "The shareholders must have proper notice on the subject of that which is proposed to be done." I do not postulate that a notice is necessarily insufficient because the formal document itself does not express all that is intended to be done. If on the whole it gives fair business-like notice in the circumstances, that, as *Bowen* L.J. has said (*Alexander* v. *Simpson* (2)), is enough. See also *Irvine* v. *Union Bank of Australia* (3) and *Boschoek Proprietary Co. Ltd.* v. *Fuke* (4).

Now, upon the facts, did this notice give such fair intimation to the holders of vendor's shares as business men that it was proposed as part of the business of the meeting to deprive them of their primary right of equal distribution? Would the fact of calling the meeting for a date prior to the expiration of the six months mentioned in the proviso suffice for the purpose? In my opinion it would not. It might raise a doubt; and so far would be ambiguous—which is not what fairness demands where notice

(1) 37 L.J. Ch., 529, at p. 537.
(2) 43 Ch. D., 139, at p. 147.
(3) 2 App. Cas., 366, at p. 375.
(4) (1906) 1 Ch., 148, at p. 164.

is required. The essence of the matter is that the shareholders were entitled, not merely to be put on inquiry, but to be notified with reasonable clearness that their property was in fact to be put in danger. It was consistent with ordinary or extraordinary distribution that the winding up should take place when it was proposed, particularly as other mining property—Mid Iron Cap—outside the leases sold by the vendor, had also been worked by the Company; and a business man would, I think, have expected to be told if it were really proposed to differentiate between him and his fellow shareholders. It was so easy to do it.

Then it was suggested that developmental reports had been published in the Adelaide daily newspapers between 20th April and 24th July. Apart from other and obvious reasons why such publications could not suffice, it is clear that, unless the Articles so provide, shareholders are not bound for such a purpose to read newspapers: *Alexander* v. *Simpson* (1). The Company did not prove any circumstances by reason of which, notwithstanding the silence of the notice itself, the shareholders, reading it fairly, would understand it as applying to those circumstances, and thereby know that the general nature of the business included the special treatment of the paid up shares. On the contrary, there was put in evidence a telegram, dated 21st September, from a shareholder named Carmichael in Western Australia in which he inquired of the Company:—"If liquidated what dividend do you estimate? Would paids participate?" Carmichael appears by the list admitted in evidence as a contributory shareholder only. He was informed that paid-ups would not participate. But he does not appear to have communicated that information, and it was to his advantage to remain silent. The chairman of the Company in his evidence says as to this telegram:—"It does suggest that Carmichael was in doubt whether paids would participate. He asks the question." Then the witness adds this important statement:—"There may or may not have been other shareholders in the same position of doubt."

Two observations naturally arise on that evidence. First, it indicates that the notice published in Western Australia on 21st September was ambiguous and the directors had it brought fully

(1) 43 Ch. D., 139, at p. 145.

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home to their minds that the ambiguity was felt by one shareholder and might be felt by others. The other observation is: that, notwithstanding the natural requirement of art. 158 itself from the broad standpoint of justice, and the additional effect of Carmichael's telegram, the directors did not trouble to give to the parties interested adversely to themselves any further intimation of the real business of the meeting. In my opinion, there is no ground for departing from the literal terms and primary limits of the notice, and therefore of the resolution. Decisions which assist the appellant by analogy are *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, India, and Japan* (1) and *Gardner* v. *Iredale* (2). This results in the winding up not only being valid and effective, but being also one on ordinary conditions. These are provided for in the first part of art. 158, and consist of a *pro rata* distribution of assets after outside obligations are satisfied. The plaintiff's claim in par. 8 of the statement of claim is therefore well founded, and his appeal should be allowed.

GAVAN DUFFY J. I have had the advantage of reading the judgments which have just been delivered. I agree in the opinion that the resolution to wind up voluntarily did not bring the case within the proviso in art. 158, and that the notice accurately described the nature of the business which was transacted at the meeting.

Appeal allowed. Declaration and order appealed from discharged. Declaration that plaintiff is entitled to the relief as asked for in claim (a) in par. 8 of the statement of claim, and an injunction in terms of claim (b) in the same paragraph. Counterclaim dismissed. Respondents to pay costs of action and of appeal.

Solicitors for the appellant, *Mayo, Murray & Cudmore.*
Solicitors for the respondents, *Hayward & Magarey.*

B. L.

(1) L.R. 6 Eq., 91.

(2) (1912) 1 Ch., 700, at pp. 711, 712.