[HIGH COURT OF AUSTRALIA.]

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED . . APPELLANT; RESPONDENT,

AND

PALMER . . . . . RESPONDENT. APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 21, 1928; *March* 27, 1929.

Isaacs, Higgins, Powers and Starke JJ.

Company—Joint holders of shares—Each a "member" of company—Voluntary liquidation—"Past member"—Personal representatives of deceased joint holder of shares—Liability to be placed on list of contributories—Companies Act 1899 (*N.S.W.*) (*No.* 40 of 1899), *secs.* 33*, 137.

A joint holder of shares in a company is a member of that company; and, in the event of the company going into voluntary liquidation after his death, his personal representatives are liable to be placed upon a list of contributories to the assets of the company, as personal representatives of a "past member" within the meaning of sec. 33 of the *Companies Act* 1899 (N.S.W.).

Decision of the Supreme Court of New South Wales (*Long Innes* J.): *In re Wool Trading Co. Ltd.* [*No.* 2], (1928) 28 S.R. (N.S.W.) 435, affirmed.

* The *Companies Act* 1899 (N.S.W.), by sec. 33, provides that "In the event of a company formed or registered under this Part of this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves with the qualifications following (that is to say):—(*a*) No past member shall be liable to contribute if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up. (*b*) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member. . . . (*d*) In the case of a company limited by shares no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member."

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APPEAL from the Supreme Court of New South Wales.

The Wool Trading Co. Ltd. was incorporated on 24th March 1924 in the State of New South Wales under Part I. of the *Companies Act* 1899, as a company limited by shares, with a capital of £25,000, divided into 25,000 shares of £1 each, its registered office being in Sydney. On 4th April 1924, 5,331 ordinary shares of £1 each were allotted and issued as paid up to 5s. per share to Sir Timothy Coghlan and his son, Austin Francis Coghlan, who were thereupon entered in the share register of the Company as the holders of the said shares. Sir Timothy Coghlan died on 30th April 1926, and probate of his will was, on 29th September 1926, granted in New South Wales to the appellant, the Permanent Trustee Co. of New South Wales Ltd. Further sums, of £500 on 10th July 1926 and of £86 15s. 2d. on 23rd November 1926, were apparently paid to the Company, but by whom was not shown, in respect of the shares in question, making a total payment in respect thereof of £1,919 10s. 2d. On 24th November 1926 the Company went into voluntary liquidation. Calls were subsequently made by the liquidator, Colin Edward Douglas Rodgers, up to the full nominal amount of liability upon the shares in question ; and at the date of the hearing there remained due in respect of the calls on such shares the sum of £3,411 9s. 10d. The liquidator, by affidavit, stated that unless he called upon past members to contribute to the assets of the Company it would be impossible for him to pay and satisfy the debts and liabilities of the Company and the costs, charges and expenses of the winding-up, and to provide for the payment of such sums as would be required for the adjustment of the rights of contributories *inter se*. Austin Francis Coghlan was at all material times an infant.

The articles of association provided (*inter alia*) :—" 8. The joint holders of a share shall be severally as well as jointly liable for the payment of all instalments and calls due in respect of such shares. 41. The executors or administrators of a deceased member (not being one of several joint holders) shall be the only persons recognized by the Company as having any title to the shares registered in the name of such member, and in the case of the death of any one or more of the joint registered holders of any shares the survivors

shall be the only persons recognized by the Company as having any title to or interest in such shares."

By motion under sec. 137 of the *Companies Act* 1899, after notice to the Permanent Trustee Co. of New South Wales Ltd. as personal representative of Sir Timothy Coghlan deceased, the Supreme Court of New South Wales was asked to determine the following questions :

(1) Whether upon the death of one of two persons registered as joint shareholders in the above Company and the grant of probate in the estate of the person dying his personal representatives may be sued for calls duly made after such date by the Company upon the shares standing in the name of the deceased person and the name of the other person jointly ; and, as amended,

(2) Whether the personal representatives of Sir Timothy Coghlan are liable to be placed upon the " B " list of the Company as personal representatives of a past member within the meaning of sec. 33 of the *Companies Act* 1899.

Long Innes J. answered question 1 in the negative, and question 2 in the affirmative : *In re Wool Trading Co. Ltd.* [*No.* 2] (1).

After the institution of the proceedings William Harrington Palmer was appointed liquidator of the Company in lieu of Colin Edward Douglas Rodgers.

From the decision of *Long Innes* J., as regards question 2 only, the Permanent Trustee Co. of New South Wales Ltd. now appealed to the High Court.

D. Williams (with him *Cook*), for the appellant. A past member of the Company within the meaning of sec. 33 of the *Companies Act* 1899, is a person who was a present member of the Company and has transferred his shares to another person in accordance with the rules and regulations of the Company.

[HIGGINS J. referred to sec. 18 of the *Companies Act* 1899.]

As the shares were allotted to Sir Timothy Coghlan and his son, and had not been transferred and Sir Timothy Coghlan had died prior to the voluntary liquidation of the Company, his liability

(1) (1928) 28 S.R. (N.S.W.) 435.

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under the *Companies Act* ceased. Whilst both were alive both had a joint interest. The one dying must be deemed to have had a life interest only. There is nothing in the *Companies Act* to cut down the ordinary incidence of joint tenancy. Joint tenancy in respect of a share is not a joint tenancy for all purposes because a share cannot be severed, and a transfer of such a share must be done in accordance with the articles of association of the Company duly executed by all the joint tenants. The position contemplated by *Long Innes* J., that a release by one of two joint members to another or others, as well as a transfer to a stranger, even if made with express intent to evade the liability imposed by sec. 33 would be effective, and the releasing or transferring joint member could not be placed on the " B " list as a past member, could not arise.

[HIGGINS J. referred to *Lindley* on *Company Law*, p. 734.]

A person ceases to be a member as soon as the company receives notice of his death, and so does his estate (*Halsbury's Laws of England*, vol. v., p. 491). Executors of deceased trustees were removed from a list of contributories in *In re Imperial Banking Co. Ltd.* (1) (see also *Albert Life Assurance Arbitration Cases* (2)).

[STARKE J. referred to *Kirby's Executors' Case* (3).]

That case was not one of a limited company but of a company in the nature of a partnership. Sec. 33 was intended to meet the case where a shareholder, knowing that the company was about to go into liquidation, transferred his shares to a man of straw; but that is not the position in this case. In *Cory* v. *Reindeer Steamship Ltd.* (4) *Sargant* J. held that the joint holders of shares only count as one member. On the death of Sir Timothy Coghlan, no calls having been made during his lifetime, the whole of his liability as a member of the Company ceased. There was a composite membership which on his death became a single membership. If each joint holder of a share is a member of a company, then a company could be registered in which one share only had been issued to seven joint holders. Sir Timothy Coghlan never was a " present member," and therefore he could not be a " past member " : the " member " consisted of Sir Timothy Coghlan and his son.

(1) (1893) 15 A.L.T. 35.
(2) (1871) 15 Sol. J. 788, 790.
(3) (1871) 15 Sol. J. 922.
(4) (1915) 31 T.L.R. 530.

Even if he were held to be a " past member " his liability would be limited to the payment of calls made prior to the time when he ceased to be a member.

Weston, for the respondent. The only question to be determined is what was meant by the Legislature when it used the phrase " past member." The term " past member " in sec. 33 of the *Companies Act* is used in the same way as it is in art. 46 of Table A, where the Legislature referred to each joint holder of a share as a member. Each of two joint holders has been recognized as being a full member (*Siemens Bros. & Co. Ltd.* v. *Burns* (1)). During the lifetime of Sir Timothy Coghlan both he and his son were members of the Company within the meaning of the Act. A joint tenant is a full member (*Dunster's Case* (2)). Art. 8 of the Company's articles of association regulates liability during joint ownership and afterwards. Once it is established that a person is a " past member," then the provisions of sec. 33 apply. On the articles as they stand, and without the aid of sec. 33, the executors of Sir Timothy Coghlan may be placed on the list of contributories subject to the fact that they cannot be held liable to pay any debts or meet other obligations arising after the death of Sir Timothy Coghlan. If *Kirby's Executors' Case* (3) is distinguishable, then they are liable to be placed on the list of contributories by virtue of sec. 33. If a call is made within twelve months after a member ceases to be a member or holder, he remains liable subject to payment not being made by the present member or holder. Sir Timothy Coghlan was a " present member " of the Company, and through his membership there attached a joint and several liability to pay calls and debts approved to the date of his death, and upon his death sec. 33 preserved precisely that sort of liability which had been imposed upon him just prior to his death.

D. Williams, in reply. If one of two joint holders dies the other becomes the member by right of survivorship. Sir Timothy Coghlan never agreed to become a member : he only agreed that he and his

(1) (1918) 2 Ch. 324. (2) (1894) 3 Ch. 473.
(3) (1871) 15 Sol. J. 922.

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son should become a member. The statutory obligation is a joint obligation. The calls not having been made prior to the death of Sir Timothy Coghlan, there is no liability under sec. 33.

Cur. adv. vult.

The following written judgments were delivered :—

ISAACS J. The problem may be shortly stated. A and B jointly held shares in a company limited by shares and incorporated under the New South Wales *Companies Act* 1899, the relevant provisions being common to those in England and in all Australian States. A died, and afterwards, but within a year, the Company went into liquidation, with debts contracted before A's death and still unpaid. The existing members are unable to satisfy the contributions required of them and the shares which were held by A and B are unpaid. The question is : Is A to be regarded as a " past member " within the meaning of sec. 33 of the Act so as to make his estate liable to contribute on the " B " list of contributories ?

The learned primary Judge, *Long Innes* J., determined that question in the affirmative, and against that decision this appeal is brought.

I must confess that from the moment the real point emerged I thought the appellant's position hopeless. That impression has hardened into conviction. The expression " every present and past member " in sec. 33 has reference to the commencement of the winding-up (per *Lindley* L.J. in *In re National Bank of Wales—Taylor, Phillips and Rickards' Cases* (1)). A person who is a member at that time is a " present member " ; a person who at any anterior time was a member, but who prior to the commencement of the winding-up ceased for any reason — death, transfer or forfeiture—to be a member is a " past member." The appellant takes a very distinct stand, indeed the only possible one to support its case, namely, that A never was a member, and that until A died B was not a member. The contention is that in all cases of joint holding of shares the " member " is a composite entity consisting of all the joint holders of the shares ; that survivorship or transfer may eventually make one individual the

(1) (1897) 1 Ch. 298, at p. 307.

member, but as long as joint holding lasts none of the joint holders can be said to be a " member." The learned primary Judge thought that judicial decisions so far gave little or no assistance, but that, on principle, A must be regarded as a past member. I agree with the learned Judge that principle, including in that the terms of the statute, will support the conclusion at which he arrived, but there is weighty judicial assistance both direct and indirect to the same effect.

Sec. 33, on which the liability of the appellant depends, provides that in winding up, " every present and past member " of a company shall be liable to contribute " for payment of the debts and liabilities of the company " &c. That is qualified, and the circumstances postulated in the problem satisfy the qualifications. In order that A should be a " past member " he must at the time of his death have been an actual member. So the sole question is : Was he a member ? Sec. 18, after reference to subscribers, says " every other person who has agreed to become a member of a company under this Part of this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." It is not contested that A and B agreed to become and did become joint holders of the shares and were so registered. Why, then, is it not correct to say that A was a " person " who had so agreed, and whose name was entered on the register ? The answer suggested is that the two persons formed a unity for the purposes of membership. Whether the individuals separately had no membership or only half membership is left unexplained. There are serious difficulties, verging on the absurd, in attempting to reconcile the view suggested with the provisions of the statute. To begin with, it is quite clear that the only possible members of the company are " persons " who either (1) are subscribers or (2) have agreed &c. But " agreed " : When and to what ? As to " when " it is necessarily before they become members and therefore before they can acquire, if at all, any fictional personality. Indeed, the law recognizes no fictional personality of the individuals. A firm, for instance, is not an entity. Then to " what " must " every other person " agree ? The Act requires him to agree " to become a member," not to become an indescribable fraction of a fictional

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member. Any other interpretation makes nonsense of the very words of the provision. He may and often does agree to become a member who holds shares in conjunction with another member, but both are members. Then, says the Act, every such "person" is deemed to be a "member."

What I have just said is really the fundamental consideration which determines the matter. It is borne out by what follows in the statute. Sec. 19 requires the register to contain "the names and addresses and the occupations (if any) of the members of the company." Now, suppose the joint holders are a Judge in Victoria, a stockbroker in New Zealand and a company, such as the appellant, in New South Wales, and since the *Conveyancing Act* 1919, sec. 25, this is quite possible; what would be the name, address and occupation of the composite member? Sec. 19 also requires the register to show the "date at which any person ceased to be a member": if the appellant is right, a transfer by all three of the supposed holders to the company trustee or the successive deaths of the two individuals would either be foreign to the legislative requirement referred to, or would require the register to state that all three ceased to be a member. Similarly as to sec. 20 (2) (*h*). It is plain that the legislation would be shorn of much of the security it affords, or would be misleading. Under sec. 232 a person aggrieved or any member of the company may apply for rectification of the register if there is unnecessary delay in entering "the fact of any person having ceased to be a member of the company." If the appellant is right, a "joint" holder who, by joint transfer, has made his co-holder the sole holder would have no remedy under that section. Since a "B" contributory must be a past member, secs. 80, 81 and 82 would be inoperative in the case of joint holders. If, for instance, A and his wife and his unmarried daughter were joint contributories, and A became bankrupt, his wife died and his daughter married, none of these sections would have any application. If each of four groups of five persons held 5,000 shares in a company of 20,000 shares, the appellant's case is that there are only four members in the company, which would be a ground under sec. 84 for winding up the company. There is not a word in the Act to support this fanciful notion, and, as I have

shown, there is much against it. But it is said the general law leads to the conclusion contended for. The first important principle of the general law is that a corporation is composed of corporators, that is, members. Members are units. See *In re Express Engineering Works Ltd.* (1). In *Portal* v. *Emmens* (2) *Jessel* M.R., speaking of a share company, said: "The only possible members or corporators of a company are its shareholders." In such a company "shareholder" and "member" are convertible terms (see *Morris's Case—In re Oriental Commercial Bank* (3); *In re South London Fish Market Co.* (4); *In re Bowling and Welby's Contract* (5), and *Rawlins and Macnaghten's* work on *Companies* (1901), at pp. 162-163). Each joint holder of shares "holds" them all, though, as between him and his co-holders, his rights are limited, and as between him and the company his rights may be qualified by the articles. *Dunster's Case* (6) shows this, as it seems to me, conclusively. There 100 shares were taken by the firm of Dunster & Wakefield. The Court declined to act on Dunster having for himself become a subscriber for 100 shares: that would have led to what *Davey* L.J. called "an outrage" (7). The case was treated as an ordinary agreement by two to take and hold shares jointly. The articles required a director to hold 100 shares. One of the questions the Court of Appeal decided was whether Dunster held the 100 shares. *Lindley* L.J. said (8): "Dunster did hold the 100 shares, and there is nothing which requires him to hold them in his own name alone." So also per *Lopes* J. *Davey* L.J. said he agreed with *Lindley* L.J. "that a man is none the less a holder of 100 shares because the company has the additional advantage of having another person joined with him, both of these joint holders being jointly and severally liable to the company." That case was acted on very distinctly in *Grundy* v. *Briggs* (9). Executors were registered as joint holders of their testator's shares. One of the executors (Grundy) was afterwards appointed director. He already held five shares in his own name, but the articles

(1) (1920) 1 Ch. 466, at pp. 470-471.
(2) (1876) 1 C.P.D. 664, at p. 667.
(3) (1872) L.R. 7 Ch. 200, at p. 204.
(4) (1888) 39 Ch. D. 324, at p. 335.
(5) (1895) 1 Ch. 663, at p. 669.
(6) (1894) 3 Ch. 473.
(7) (1894) 3 Ch., at p. 481.
(8) (1894) 3 Ch., at p. 480.
(9) (1910) 1 Ch. 444.

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required each director to be "the registered holder of not less than twenty shares." His qualification being challenged raised the question very pointedly. *Eve* J. held that Grundy was "the registered holder of . . . 112 shares in the joint names" (1). The learned Judge referred to the explicit expression of opinion, both by *Lindley* L.J. and *Davey* L.J. in *Dunster's Case* (2). The expression "hold a share" is not a technical expression. It signifies nothing more than to be entitled to a certain interest in the company carrying rights and obligations according to circumstances. That is very well and authoritatively illustrated by the case of *Bombay Burmah Trading Corporation Ltd.* v. *Smith* (3). There the registered holder of shares in a limited company died. The shares still stood in his name. A question arose whether the company was bound to pay the unregistered executors a dividend that had accrued after the member's death. Lord *Macnaghten* said: —"The appellants contend that the extra dividend is not payable now because there is nobody who can be said to hold Mr. Wallace's shares. Mr. Wallace, they say, does not hold them because he is dead; his executors do not hold them because their names are not on the register. But then who does hold them? Certainly no one else. And why are the shares not held by Mr. Wallace or his executors or administrators? There is no magic in the word 'hold.' Mr. Wallace's name is on the register. The company cannot remove it. As long as it is there the company are bound to credit the proper dividends to his holding and to recognize the title of his legal personal representatives to receive any dividends which may be carried to his credit." In *In re Wala Wynaad Indian Gold Mining Co.* (4) *Chitty* J. decided very much the same point. A person "holds" shares that appear against his name in the register. That necessarily follows from the concept of a "share" as described by *Farwell* J., in *Borland's Trustee* v. *Steel Bros. & Co. Ltd.* (5), namely, "an interest measured by a sum of money and made up of various rights contained in the contract." And one of those rights may be that the "share" can be held by a shareholder or member jointly

(1) (1910) 1 Ch., at p. 451.
(2) (1894) 3 Ch., at pp. 480-482.
(3) (1894) L.R. 21 Ind. App. 139.
(4) (1882) 21 Ch. D. 849, at pp. 852 *et seqq.*
(5) (1901) 1 Ch. 279, at p. 288.

with another shareholder or member. Not only, however, is there an absence from the Act of anything inconsistent with a joint holder of shares being himself a member, but there is a strong affirmative indication by the Legislature that he is a member. The statutory Table A, being the Legislature's own words, is cogent evidence of the meaning it intends by similar words in the body of the Act. Art. 46 says: "If one or more persons are jointly entitled to a share, the *member* whose name stands first in the register of members as one of the holders of such share and *no other* shall be entitled to vote in respect of the same." Thus not only is the first named person designated a "member" but the subsequent expression "no other" indicates that every other registered person jointly entitled is also a member. Apply that to art. 48, which allows votes personally or by proxy, and to art. 49, which says: "No person shall be appointed a proxy who is not a member of the Company." Could not the first named joint holder give a proxy to the second? If the appellant is right, he could not, though their interests are identical, but he might give it to a stranger who happens to hold a share separately. There are articles which provide, as in *In re Copal Varnish Co.* (1), that "no share shall be transferred to any person who is not already a member of the company without the consent of the directors." Can it reasonably be said that the transfer by A and B jointly to A alone comes within such a provision. If the appellant is right it does. One important principle in this connection is that "when you come to look at each particular company, you must look at the constitution of that company, and see what constitutes membership in it" (per *Lindley* L.J. in *In re Bowling and Welby's Contract* (2)). The constitution of this Company must be found partly in the Act itself and partly in the articles which the Act makes binding. There is nothing in the articles of the Company which weakens what has been said. But arts. 8 and 41 rather strengthen the individual right of membership of each joint holder. Art. 8 says: "The joint holders of a share shall be severally as well as jointly liable for the payment of all instalments and calls due in respect of such share." Art. 41 says: "The executors or administrators of a *deceased member* (not being one of several joint

(1) (1917) 2 Ch. 349, at p. 354. (2) (1895) 1 Ch., at p. 669.

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holders) shall be the only persons recognized by the Company as having any title to the shares registered in the name of such member, and in the case of the death of any one or more of the joint registered holders of any shares the survivors shall be the only persons recognized by the Company as having any title to or interest in such shares." As to art. 8, it would be anomalous to regard joint holders as rigidly "one proprietor" only, and yet make each severally liable for calls. As to art. 41, it treats of death in two aspects, (1) death of member who is not a joint holder and (2) death of a member who is a joint holder. If the matter rested there, I should have no hesitation in affirming the judgment of *Long Innes* J. There is, however, very weighty judicial precedent which supports that view, some of it circumstantial and some quite direct. By "circumstantial" I mean the customary use of terms which, although this precise point was not present to the mind of the Court, would be inaccurate if the appellant's position were sound. For instance, *Re Phœnix Life Assurance Co.—Hoares' Case* (1); *Gore and Durant's Case* (2); *Morris's Case* (3). Also in *Weikersheim's Case* (4) *James* L.J. and *Mellish* L.J. dealt with the holding of shares by a firm of two persons. Constantly they were referred to as "past members" and "members" of the company. *James* L.J. says (5): "The appellants did agree to become members of the company under the Act"; and he says (6): "Their names were so entered by the company as a registration of the title of the members as between them and the company." *Mellish* L.J. refers to them as "members" and "shareholders." So in *Barton* v. *London and North-Western Railway Co.* (7), where every member of the Court of Appeal referred to executors as "shareholders." I take another illustration still more recent, the case of *In re T. H. Saunders & Co. Ltd.* (8), a decision of Lord *Warrington* when Judge of first instance. Three executors of a deceased member claimed to be registered by a company as the joint holders of shares without any reference to executorship. The learned Judge, besides using the words "members" and "holders" just as in the former case, asks (9): "Can the company insist on

(1) (1862) 2 J. & H. 229, at p. 236.
(2) (1866) L.R. 2 Eq. 349, at p. 351.
(3) (1872) 7 Ch. 200.
(4) (1873) 8 Ch. 831.
(5) (1873) 8 Ch., at p. 836.
(6) (1873) 8 Ch., at p. 837.
(7) (1889) 24 Q.B.D. 77, at pp. 87, 89.
(8) (1908) 1 Ch. 415.
(9) (1908) 1 Ch., at p. 421.

having that qualification inserted after the names of *three of its members*?" He then quotes from the *Companies Act* 1862 the sections corresponding to secs. 18 and 19 of the New South Wales Act, and later refers to the executors as "absolute owners" (1). The learned jurists who employed the terms mentioned were dealing in current coin, and if it had rung false, they would have rejected it. Before citing the more direct authority I should refer to a case, or perhaps two cases, much relied on for the appellant and thought to support its contention. They are the *Albert Life Assurance Arbitration Cases* and decisions of Lord *Cairns*. One is *Alexander's Case* (2), the other is *Kirby's Executors' Case* (3). In each case Lord *Cairns* was dealing with the question of liability to be on the "A" list of contributories. *Kirby's Executors' Case* is a very ordinary case. Kirby and Anderson held shares jointly in the Albert Co. Kirby died before the winding-up. It was held that his estate was liable only for contracts up to the time of his death, and his executors were jointly liable with Anderson as up to that time. It does not touch the present problem. *Alexander's Case*, however, contains an expression which is seized upon as the enunciation of a principle which, I should imagine, would astonish no one more than Lord *Cairns* if he could possibly hear it suggested. Alexander and two others were in 1860 jointly admitted as proprietors of 250 shares in the Family Endowment Society. While so holding, the society amalgamated with the Albert Co. The two other trustees died. Lord *Cairns* had to determine whether all three were liable as contributories—that is, what are called "A" contributories—of the company. It depended on the effect and the validity of what was called a deed of acceptance of 4th February 1860, by which the three trustees accepted the shares of their testator. As to its effect, Lord *Cairns* held them clearly liable if the deed of acceptance was not *ultra vires* of the directors. As to that the learned Lord had to construe the company's deed of settlement. Clause 105 forbade the directors permitting more than one person to become a proprietor of the society in respect of any share in the capital of the society, it being intended that two or more persons jointly entitled either as trustees or

(1) (1908) 1 Ch., at p. 423. (2) (1871) 15 Sol. J. 788.
(3) (1871) 15 Sol. J. 922.

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beneficially to any share or shares shall not be allowed to join as proprietors of the society in respect thereof. That was relied on to establish *ultra vires*. But there was also another clause, 164, which stated that where an executor wishes to take the share himself "the following form of deed of acceptance is to be used with such variation as the circumstances of each case shall render necessary." The form used followed the form prescribed. Lord *Cairns* had to reconcile the two clauses. He did reconcile, as I understand, what he called two equally clear and imperative provisions by distinguishing between a taking by transfer a share that previously never was the transferee's in any sense and taking by deed of acceptance a share to which the recipient was already entitled by operation of law. In one part of the judgment he refers to the executors as "shareholders," in another part as "a joint proprietor." But if Lord *Cairns*' opinion was, as is now suggested, that joint holders are in law one person, there was no need to trouble about reconciling the two clauses: the law already would have done that. I do not take that judgment as sufficient to support the appellant's contention. In the first place see Lord *Cairns*' own judgment in *Elkington's Case* (1). There the learned Lord referred to a firm of Messrs. Elkington as "members and shareholders" and as "shareholders." (See also per *Neville* J. in *In re Coasters Ltd.* (2).) Again, in *Bell's Case* (3) his language is opposed to it: Lord *Cairns* there *refers* to Bell, a joint holder, as "a shareholder" in the bank, approves of the Lord President's reasoning, which treats each of the "joint owners" as severally recognizable, and leaves open the question as to whether Janet Hill should be inserted as a contributory. Lord *Penzance* (4) refers to the trustees as "holders" of the stock, and Lord *O'Hagan* (5) says Bell "became a shareholder" and the trustees "became shareholders." Fortunately *Alexander's Case* (6) and *Kirby's Case* (7) were the subject of consideration by a very distinguished Court—the First Division of the Scottish Court of Session—of which Lord President *Inglis* and Lord *Shand* were

(1) (1867) L.R. 2 Ch. 511, at p. 522 *et passim*.
(2) (1911) 1 Ch. 86, at p. 91.
(3) (1879) 4 App. Cas. 547, at pp. 558, 559, 562.
(4) (1879) 4 App. Cas., at p. 565.
(5) (1879) 4 App. Cas., at p. 566.
(6) (1871) 15 Sol. J. 788.
(7) (1871) 15 Sol. J. 922.

members. In *Oswald's Trustee* v. *City of Glasgow Bank* (1) the facts were for all material purposes on all fours with the facts here, except that the Court was considering the liability of a deceased trustee's estate to contribute as a "present member." The Court held there was no liability as a present member, and the two cases were specifically mentioned in Lord *Shand's* judgment. Nevertheless, the Lord President, after saying that Oswald's executors were not liable to contribute, said :—"I do not mean to say that for liabilities incurred by a trustee before his death in the administration of the trust estate his executors will not be answerable. On the contrary it is perfectly clear that they will, but then that is only a liability as the representatives of a past member, and we are not dealing at present with the making up of a list of past members or of representatives of past members, but only with a list of contributories including those who are or ought to be present members of the company and persons liable for them." Lord *Shand*, after holding that Oswald's estate was not then liable to contribute, proceeds to say :—"Of course the result cannot be that by death the liability for past transactions shall at once come to an end. The person who has died having been a party to partnership transactions during his life, *his liability for these will remain.* But that is subject, as your Lordship has noticed, to the provisions of sec. 38 of the Act of 1862, which are in the first place to this effect that no *past member*" &c.—the provisions quoted being identical with sec. 33 (*a*), (*b*) and (*c*). The rest of the section is identical with (*d*), (*e*), (*f*) and (*g*). His Lordship's observations just referred to show that his view of *Kirby's Case* (2) and *Alexander's Case* (3) was not that suggested as to "one proprietor." Not more convincing, but perhaps more authoritative, is the judgment of Lord *Blackburn* a few months afterwards. In *Cuninghame* v. *City of Glasgow Bank*, one of the *Glasgow Bank Cases* (4), five trustees jointly purchased shares in the bank as a trust investment, took a transfer into their joint names and were registered jointly as shareholders. One of them, Cuninghame, did not sign the transfers, and on that ground

(1) (1879) 16 S.L.R. 221.
(2) (1871) 15 Sol. J. 922.
(3) (1871) 15 Sol. J 788.
(4) (1879) 4 App. Cas. 607.

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petitioned to be struck off the list of contributories. Lord *Blackburn's* judgment (1) is most explicit. He says, to begin with: "I take it that under the Act of 1862, when a name is entered upon the register, a person entitled as a shareholder is prima facie, until the contrary is proved, to be taken as a shareholder." Then he quotes sec. 23 of that Act, which says "that every . . person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." Lord *Blackburn* then states the question, which is the very question here, namely, whether the joint shareholder "had agreed to become a member of this company." He says:—"Here Mr. Cuninghame agreed to become *a shareholder* in every way in which any man can agree. He, under his own hand, authorized the buying of the shares *in his name*, by his agent, who had authority to act in his behalf; he caused the documents to be drawn up in such a way that the shares would be transferred *into his name* by his agent. . . . He with his own hand wrote a letter, saying that the *shares were now standing in his name*, and asking that the dividend upon them should be paid in a certain way." Reference to the letter (2) shows that Cuninghame therein stated that the stock was "standing in our names," and this gives special force to Lord *Blackburn's* words. Then adds the learned Lord: "Stronger evidence that he directed *his name* to be entered upon the register and *agreed to be a shareholder* I cannot conceive." I have italicized some of the words of Lord *Blackburn* in order to emphasize his interpretation of the statutory definition of "member" and his application of it to a joint holder. It is not unimportant that this judgment was delivered in the presence of Lord *Cairns*, who himself referred to the earlier cases in the same volume which include *Bell's Case* (3) and Lord *Blackburn's* explicit statement accords entirely with the language of Lord *Cairns* in *Bell's Case* (4). The opinion of Lord President *Inglis* and Lord *Shand* in *Oswald's Case* (5), that the liability of the deceased's estate to contribute in such a case as the present depends on the statute

(1) (1879) 4 App. Cas., at pp. 613-614.
(2) (1879) 4 App. Cas., at p. 611.
(3) (1879) 4 App. Cas. 547.
(4) (1879) 4 App. Cas., at p. 557.
(5) (1879) 16 S.L.R. 221.

operating as to "past members" is borne out by *Creyke's Case* (1) and *Brett's Case* (2). Once establish the fact of actual membership that ceased before liquidation, then past membership necessarily follows, and, if that be shown, sec. 33 at once operates. There may be added usefully, I think, an observation in a text-book of recognized authority. In *Palmer's Company Precedents*, 13th ed., at p. 679, following earlier statements to the same effect, in a note to clause 64 of Form No. 251, it is said with reference to the quorum at a general meeting: "In the case of joint holders it would seem prima facie that any one of them may be counted in a quorum." It is this prima facie right which, in my opinion, underlies the decisions in *In re T. H. Saunders & Co. Ltd.* (3) and *Burns* v. *Siemens Bros. Dynamo Works Ltd.* (4), and it is supported by the observations of *James* L.J. in *Baird's Case* (5). I have already referred to the first. In the second, *Astbury* J. also referred to joint holders as "the members," "the principal corporators" and "joint owners."

The appeal should be dismissed.

POWERS J. I have had the advantage of reading the judgment of my brother *Isaacs* on this appeal, and I agree with him—for the reasons given by him—that the appeal should be dismissed.

STARKE J. Sir Timothy Coghlan and his son Austin Francis Coghlan, an infant, were registered on 29th April 1924 as the joint holders of 5,331 £1 shares, paid up to 10s., in a company incorporated under the *Companies Act* 1899 of New South Wales and named the Wool Trading Co. Ltd. Sir Timothy died on 30th April 1926, and the appellant, the Permanent Trustee Co. of New South Wales Ltd., is his legal personal representative. It was resolved on 24th November 1926 that the Company be wound up voluntarily. *Long Innes* J. has placed the appellant upon the "B" list of contributories of the Company as the personal representative of a past member, and, in my opinion, that decision is right. Sir

(1) (1869) L.R. 5 Ch. 63.
(2) (1873) L.R. 8 Ch. 800, at pp. 807-808.
(3) (1908) 1 Ch. 415.
(4) (1919) 1 Ch. 225.
(5) (1870) L.R. 5 Ch. 725, at p. 734.

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Timothy and his son were, I think, members of the Company who held their shares jointly. (*Palmer's Company Precedents*, Part I.; cf. *Hill's Case* (1).) No doubt in the case of a company limited by shares and carrying on its business when a joint holder of shares dies, the shares go to the survivor by right of survivorship, and all liability (apart from any liability upon a several obligation) devolves upon the survivor (*Hill's Case*; *National Trustees, Executors and Agency Co.* v. *Walsh* (2); *In re Imperial Banking Co. Ltd.* (3)). A provision in the articles of association of this Company (art. 8) stipulates that the joint holders of a share shall be severally as well as jointly liable for the payment of all instalments and calls due in respect of such share, and this stipulation operates as a covenant on the part of the members of the Company and their personal representatives to conform to all the regulations contained in the articles, subject to the provisions of the *Companies Act* (see *Companies Act* 1899, sec. 14 (2)). The Act does not prohibit an obligation on the part of joint holders of shares to contribute severally as well as jointly to the amount unpaid on their shares. But the precise effect and operation of such an article is not at all settled (cf. *Goldsmith* v. *Colonial Finance &c. Corporation* (4); *Land Mortgage Bank of Victoria* v. *Reid* (5)). In the present case, *Long Innes* J. decided that upon the death of one of two persons registered as joint holders in the Company, his personal representatives could not be sued for calls made after the day of his death upon shares standing in the name of the deceased person and another jointly, and consequently that Sir Timothy's personal representative was not liable to be placed upon the " A " list of contributories. And from this decision there has been no appeal. *Long Innes* J., however, also decided that the personal representative of Sir Timothy was liable to be placed upon the " B " list of the Company as personal representative of a joint member within the meaning of sec. 33 of the *Companies Act* 1899. Pursuant to that section, every present and past member of a company registered under the Act, and being wound up, is

(1) (1875) L.R. 20 Eq. 585.
(2) (1895) 21 V.L.R. 75; 17 A.L.T. 75.
(3) (1893) 15 A.L.T. 35.
(4) (1909) 8 C.L.R. 241.
(5) (1909) V.L.R. 284; 31 A.L.T. 9.

liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, with certain qualifications immaterial for the purpose of the present case. One share is, no doubt, the unit of division of the capital in a limited company under the *Companies Act*, but there is nothing in the Act prohibiting a plurality of holders of a share. Indeed, the articles of a company generally recognize this by providing for the method by which joint holders shall vote, the position of the survivor as regards the company in case of death, and the liability of the joint holders in respect of contributions to capital.

Consequently, in my opinion, a joint holder of a share in a company is properly described as a member of the company holding a share jointly with another. If this is so, then upon his death it cannot be denied that he was a past member of the company who held a share jointly with another. The Act (sec. 33) does not discriminate between past members who held shares alone and those who held jointly with others: all fall within the category of past members. The section then, in my opinion, does the rest, and makes the deceased member liable to contribute to the assets of the company—subject to the qualifications set out in the section.

The appeal ought, therefore, in my opinion, to be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Minter, Simpson & Co.*

Solicitors for the respondent, *Clayton, Utz & Co.*

J. B.

[*Note.*—THE HON. MR. JUSTICE HIGGINS died before judgment was delivered.—*Ed. C.L.R.*]