[HIGH COURT OF AUSTRALIA.]

A. M. SPICER AND SON PROPRIETARY LIMITED (IN LIQUIDATION) . . PLAINTIFF, } APPELLANT;

AND

SPICER AND HOWIE . . . . . DEFENDANTS, RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 18, 19, 20; *Oct.* 1.

Rich, Starke, Dixon and Evatt JJ.

Company—Ultra vires—Money advanced to shareholder—Secured by deposit of shares in company—Reconstruction of company—New company to acquire assets and discharge liabilities of old company—Debenture by new company to secure money previously advanced—Whether debenture invalid because of interest of director voting to give same—Whether giving of debenture beyond powers of company—Principal and surety—Primary and secondary liability.

H. paid to a company at the request of S. the sum of £10,000 for the acquisition by S. of 10,000 preference shares in the company. S. covenanted with H. to repay this sum with interest, and lodged with him the shares and a transfer thereof and also the title deed to certain lands as security for repayment of the said sum of £10,000 and interest. Subsequently the company went into liquidation and a new company was formed to acquire the assets of the old company and to discharge its liabilities, and share capital in the new company was allotted to members of the old company in the proportion of one share for every two shares held in the capital of the old company. In pursuance of this arrangement 5,000 preference shares in the new company were issued in the name of S. H. at first refused his assent to the arrangement but after protracted negotiations agreed as follows: (1) That he assented to the arrangement; (2) that he advanced £3,000 to the new company, and (3) that the new company gave him a charge over its assets by way of floating security to secure the sums of £3,000 and £10,000, in all £13,000, and interest thereon. H. advanced to the new company the sum of £3,000, and the

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company issued to him a debenture by way of floating charge over all its assets to secure £13,000 and interest thereon. The debenture was issued pursuant to a resolution of the directors of the new company at a meeting constituted by S. and his son. H. did not release or discharge the obligation of S. upon his covenant or the security over the land created by the deposit of the title deed. H. subsequently appointed a receiver under the debenture, and thereby obtained out of the assets of the new company more than £12,000. The principal objects of the company were to carry on the business of manufacturers, buyers and sellers of boots and shoes, to acquire and undertake the whole or any part of the business and assets of any person, firm or company carrying on any of the business which the company was authorized to carry on and, as part of the consideration for such acquisition, to undertake all or any of the liabilities of such person, firm or company, to borrow or raise money and to secure repayment of any money borrowed, raised or owing by mortgage or charge on the whole or any part of the company's assets and to do all such other things as were incidental or conducive to the interests of the company or the attainment of any of the objects of the company. The articles of association of the new company provided that the directors might exercise all the powers of the company subject to the Companies Acts and the articles, that there should be not less than two nor more than four directors, that two directors should form a quorum, that a meeting of directors for the time being at which a quorum was present should be competent to exercise the powers of the directors generally and (by article 97) that all acts done by any meeting of the directors should, notwithstanding that it should afterwards be discovered that there was some defect in the appointment of such directors or that they or any of them were disqualified, be as valid as if every such person had been fully appointed and was qualified to be a director.

Held, as follows :—

(1) That a relation analogous to that of principal and surety existed between S. and the new company, that the liability of S. was primary and that of the company was secondary, and that upon the debt being paid by the company or out of its assets the company would be entitled to be recouped by S. and to resort to the securities in H.'s hands which S. had provided.

Dictum of Lord *Selborne* L.C. in *Duncan Fox & Co.* v. *North and South Wales Bank*, (1880) 6 App. Cas. 1, at p. 11, applied.

(2) That the debenture issued by the new company was not invalid: by *Rich* and *Dixon* JJ., because the articles did not exclude directors from voting on any matter relating to business with the company in which S. was personally interested and, *semble*, because the duty of S. as a director did not conflict or tend to conflict with his own interests; and, by *Starke* and *Evatt* JJ., because the issue of the debenture was protected by the provisions of article 97.

In re Greymouth Point Elizabeth Railway and Coal Co.; *Yuill* v. *Greymouth Point Elizabeth Railway and Coal Co.*, (1904) 1 Ch. 32; *Cox* v. *Dublin City Distillery* [No. 2], (1915) 1 I.R. 345; *Dawson* v. *African Consolidated Land and Trading Co.*, (1898) 1 Ch. 6; *British Asbestos Co.* v. *Boyd*, (1903) 2 Ch. 439; *Channel Collieries Trust Ltd.* v. *Dover, St. Margaret's and Martin Mill*

Light Railway, (1914) 2 Ch. 506, and *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.*, (1914) 2 Ch. 488, considered.

(3) That the giving of the debenture was not invalid as being beyond the powers of the company to incur a liability of £10,000 and secure it over its assets.

Bisgood v. *Henderson's Transvaal Estates Ltd.*, (1908) 1 Ch. 743, distinguished on facts.

Appeal from decision of the Supreme Court of Victoria (*Wasley* A.J.), in part dismissed and in part allowed.

APPEAL from the Supreme Court of Victoria.

In an action brought by A. M. Spicer and Son Pty. Ltd. against Alfred Albert Milton Spicer and John Donald Howie, by the statement of claim indorsed on the writ the plaintiff alleged, in substance :— (1) On or about 30th June 1922 the defendant Howie advanced by way of loan to the defendant Spicer a sum of £10,000, and thereupon the defendant Spicer entered into the covenants to secure and repay the said advance and interest thereon at the rate and in the manner set out in an agreement under seal dated 30th June 1922 and made by the said two defendants. At or immediately after the time of the execution of the said agreement the defendant Spicer deposited and lodged with the defendant Howie certificate of title, vol. 3963, fol. 792509 ; and by the agreement the defendant Spicer, as part of the consideration for the said advance, covenanted and agreed with the defendant Howie that he, Spicer, if and whenever called upon so to do would sign and execute to the defendant Howie, a mortgage over the land described in the said certificate of title to secure payment of the said advance and interest intended to be thereby secured. (2) The defendant Spicer paid the interest payable on the said advance up to 22nd March 1928, on which date the whole of the said sum of £10,000 remained due and owing by the defendant Spicer to the defendant Howie. (3) On 31st December 1925 the plaintiff was incorporated under the *Companies Acts* for the time being in force, as a company limited by shares. (4) The defendant Spicer and his son William Albert Milton Spicer were, at all times material, directors, and the only directors of the plaintiff. (5) According to the terms of a debenture bearing date 22nd March 1928, which purports to be executed by the plaintiff, the plaintiff

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covenanted with the defendant Howie to pay to the defendant Howie the sum of £13,000 in certain instalments therein specified and to pay the defendant Howie interest thereon at the rate of £9 per cent per annum computed from 22nd March 1928 and payable quarterly on the dates therein specified, and by way of first charge charged with the payment of the said sum of £13,000 and interest thereon as aforesaid its undertaking and all its real and personal property whatsoever and wheresoever, both present and future, including its uncalled capital and the goodwill of its business. The said debenture also contained conditions providing (*inter alia*) that the charge thereby created should constitute a floating security; that the principal and interest moneys thereby secured should become immediately payable on the happening of certain events therein specified, and that the defendant Howie might at any time after the principal or interest moneys thereby secured became payable appoint a receiver of the property and assets expressed to be charged by the said debenture with the powers therein set forth. (6) The consideration for the undertakings and covenants contained in the said debenture and for the charge which it purported to create was expressed therein to be the sum of £10,000 then due and owing by the plaintiff to the defendant Howie, and the further sum of £3,000 advanced to the plaintiff by the defendant Howie, making together the sum of £13,000, which was the sum covenanted to be repaid and secured as aforesaid. (7) In fact there was not on 22nd March 1928 or at any time a sum of £10,000 or any sum then due or owing by the plaintiff to the defendant Howie, and the sum of £10,000 referred to in and intended to be secured by the said debenture was the personal debt of the defendant Spicer referred to in pars. 1 and 2 hereof. (8) The said debenture was wholly or, alternatively, so far as it related to the sum of £10,000 expressed to be due and owing by the plaintiff, beyond the powers of the plaintiff and was made and given in violation of the conditions contained in the plaintiff's memorandum of association and was not binding upon the plaintiff. (9) At all times material the articles of association of the plaintiff provided (*a*) that the business of the plaintiff should be managed by the board of directors who might exercise all the powers of the plaintiff subject, nevertheless, to certain

qualifications not material to this action; (*b*) that the seal of the plaintiff should never be used except by the authority of the directors previously given; (*c*) that the number of directors should not be less than two; (*d*) that unless otherwise determined by the directors two directors should be the quorum necessary for the transaction of business. (10) There was no determination otherwise than that two directors of the plaintiff should be the quorum necessary for the transaction of business. (11) Upon the proper construction of the said articles of association or as an implied condition thereof— (*a*) no director was, in respect of any contract or transaction in which he might be interested or in which his personal interest and his duty as a director might conflict, competent to vote; (*b*) a quorum of directors necessary to transact the business of the plaintiff was to consist of two (or the number otherwise determined) of the directors of the plaintiff each of whom was competent to vote in respect of such business and/or in computing such quorum there was not to be counted or recounted any director incompetent to vote on the business to be transacted. (12) The said debenture was given and executed by and on behalf of the plaintiff and the plaintiff's seal was affixed thereto pursuant to a resolution in the following terms passed on 22nd March 1928 by the defendant Spicer and the said William Albert Milton Spicer purporting to act as a board of directors of the plaintiff, namely, "Resolved that the seal of the Company be affixed to the debenture mortgage in favour of Mr. John Donald Howie to secure the sum of £13,000." (13) The defendant Spicer was materially interested in the plaintiff executing and giving the said debenture and such interest was in conflict with his duty to the plaintiff as one of its directors. The defendant Spicer was therefore rendered incompetent to vote on the question as to whether or not the said debenture should be given and executed by the plaintiff and/or to be counted or reckoned in computing a quorum of directors necessary for the transaction of the business constituted by the giving, executing and sealing of the said debenture. (14) The resolution referred to in par. 12 hereof was not passed by a quorum of directors of the plaintiff properly constituted as required by the said articles of association, and at no time prior to the said debenture being executed and sealed as aforesaid did the

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plaintiff or its directors in manner required by the said articles or at all authorize the said debenture to be given, executed or sealed and the same was not binding upon the plaintiff. (15) The defendant Howie and/or his agents were at all material times aware of the facts and matters alleged in pars. 8 to 14 hereof. (16) Between 22nd March 1928 and 1st August 1929 there were paid out of the funds of the plaintiff to the defendant Howie by the defendant Spicer and/or William Albert Milton Spicer purporting to act as directors of the plaintiff the sum of £1,589 5s. for interest payable under the said debenture and the sum of £1,000 on account and in reduction of the principal sum purported to be secured thereby. (17) Upon a petition presented to the Supreme Court of Victoria on 1st August 1929 the plaintiff was by order of the said Court made on 15th August 1929 ordered to be wound up by the said Court. (18) On or about 7th July 1929 the defendant Howie, purporting to act under the powers contained in or derived from the said debenture, appointed and authorized one Frederick William Spry to act as receiver of the assets of the plaintiff and acting under the instructions and authority of the defendant Howie the said Frederick William Spry on or about such last-mentioned date took possession of the said assets, sold and disposed of a considerable portion thereof; and out of the proceeds of such sale and disposal paid to the defendant Howie, as and by way of satisfaction of the balance of principal and interest owing under the said debenture, the following sums on the dates set opposite the same respectively, namely :—[Various dates from 27th August to 15th November 1929 inclusive were set out, and the amounts of money set out amounted to the sum of £12,279 10s. 4d.] The said Frederick William Spry acting under the like authority and instructions retained out of the said proceeds a sum of £613 18s. 6d. as and for his remuneration as such receiver and paid to the defendant Howie's solicitors a sum of £48 11s. 6d. for their costs incurred on the instructions of the defendant Howie in connection with the said receivership. (19) The defendant Howie had and received the sums referred to in pars. 16 and 18 hereof or, alternatively, the said sums less £3,000 and interest thereon at £9 per cent per annum from 22nd March 1928 to 9th September 1929 to the use of the

plaintiff. (20) Alternatively to par. 19 the defendant Howie converted to his own use the goods and chattels of the plaintiff (being the assets sold and disposed of as set out in par. 17 hereof) and thereby the plaintiff suffered damage amounting to the total of the sums paid and retained as set out in par. 18 hereof. (21) Alternatively to pars. 8 and 14 hereof the plaintiff gave and executed the said debenture at the request of the defendant Spicer, and upon the plaintiff giving and executing such debenture:—(*a*) The plaintiff became liable with the defendant Spicer for the debt of such last mentioned defendant referred to in par. 1 hereof together with interest thereon as provided for in the said debenture. (*b*) The defendant Spicer impliedly agreed to indemnify the plaintiff against any and all payments which it might be called upon to make under the said debenture and/or any loss or damage which the plaintiff might suffer in consequence of its having given and executed the said debenture. (22) The plaintiff having been called upon and/or compelled by the defendant Howie so to do paid the sums referred to in pars. 16 and 18 hereof to the use of the defendant Spicer and/or the said sums so paid constitute loss and damage suffered by the plaintiff by reason of its having given and executed the said debenture. (23) By reason of the premises the plaintiff upon payment of the said sums in satisfaction of the said debenture became entitled to the full benefit of all securities which were held by the defendant Howie, or to which he was entitled in respect of the said sum of £10,000 and in particular to the security constituted by the deposit in manner hereinbefore referred to of the certificate of title mentioned in par. 1 hereof but the defendants deny the plaintiff's said right. (24) The defendant Spicer and/or the said William Albert Milton Spicer purporting to act as directors of the plaintiff paid or caused to be paid out of the funds of the plaintiff to the defendant Spicer or, alternatively, credited or caused to be credited to the defendant Spicer in his account with the plaintiff the sum of £1,443 1s. 8d. on 30th June 1928 and the sum of £150 in the month of June 1929. (25) There was no consideration for the payments or credits mentioned in par. 24 and/or the same were made or given as bonuses to reimburse the defendant Spicer in respect of amounts paid by him to the defendant Howie for interest on the said advance

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of £10,000 prior to 22nd March 1928. (26) The said payments or credits were beyond the powers of the plaintiff and were made or given in violation of the conditions contained in the plaintiff's memorandum of association and were not authorized by the plaintiff or by any properly constituted board of directors of the plaintiff as required by the plaintiff's articles of association or at all. (27) The articles of association of the plaintiff at all times provided: (*a*) that the defendant Spicer should be one of the first directors of the plaintiff; (*b*) that the defendant Spicer whilst he held the office of a director should be the managing director of the plaintiff and should be entitled to be paid a salary of £750 per annum. (28) The defendant Spicer was at all times a director and the managing director of the plaintiff. (29) The defendant Spicer and/or the said William Albert Milton Spicer, acting or purporting to act as directors of the plaintiff, from and after 1st July 1927 paid or caused to be paid out of the funds of the plaintiff to the defendant Spicer or, alternatively, credited or caused to be credited to the defendant Spicer in his account with the plaintiff salary as managing director at the rate of £1,500 per annum and thereby over the period 1st July 1927 to 30th June 1929 the defendant Spicer was paid or credited with £668 in excess of the sum to which he was entitled under the said articles. (30) The excess payments or credits referred to in par. 28 hereof were beyond the powers of the plaintiff and/or were made or given in violation of the terms of the plaintiff's articles of association and/or were not authorized by the plaintiff or by any properly constituted board of directors of the plaintiff as required by the said articles of association or at all. (31) The defendant Spicer was guilty of breaches of trust and/or of his duty as a director of the plaintiff in (*a*) procuring and/or authorizing or taking part in authorizing the said debenture to be given and executed by the plaintiff; (*b*) making or procuring to be made and/or in authorizing or taking part in authorizing (i.) the payments referred to in par. 16 hereof, (ii.) the payments or credits referred to in par. 24 hereof, (iii.) the payments or credits referred to in par. 29 hereof, whereby the defendant Spicer received and/or benefited by or to the extent of and/or the plaintiff lost the sums referred to in pars. 16, 18, 24 and 29 hereof. The plaintiff claimed against the defendant

Howie:—(*a*) A declaration that the said debenture was beyond the powers of the plaintiff and/or was not authorized by or binding upon it. (*b*) An order for payment to the plaintiff of the sums mentioned in pars. 16 and 18 or, alternatively, for payment of the said sums less £3,000 and interest thereon at £9 per cent per annum from 22nd March 1928 to 9th September 1929. (*c*) An order for payment of interest at £8 per cent per annum on the moneys claimed under (*b*) from the date or respective dates when they were paid to the defendant Howie or to his use to the date of judgment. (*d*) Alternatively to (*b*) and (*c*) damages £12,942 0s. 4d. (*e*) A declaration that the plaintiff is entitled to the benefit of the securities mentioned or referred to in par. 23. (*f*) Such further or other relief as to the Court shall seem fit. And the plaintiff claimed as against the defendant Spicer:—(*g*) An order for payment to the plaintiff of the sums mentioned in pars. 16 and 18 hereof less £3,000 and interest thereon at £9 per cent per annum from 22nd March 1928 to 9th September 1929. (*h*) An order for payment to the plaintiff of the sums mentioned in pars. 24 and 29 hereof or, alternatively, a declaration that the defendant Spicer is not entitled to credit for the said sums or either of them. (*i*) An order for payment of interest at £8 per cent per annum on the moneys claimed under (*g*) and (*h*) hereof. (*j*) A declaration that the plaintiff is entitled to the benefit of the securities mentioned or referred to in par. 23 hereof. (*k*) Such further or other relief as to the Court shall seem fit.

The defendant Spicer by his defence, in substance, alleged:—(1) At all material times Spicer Shoe Co. Pty. Ltd. was a proprietary company incorporated under the *Companies Act* 1915 and carrying on business in Melbourne and defendant Spicer was managing director thereof. (2) In June 1922 the said Company applied to defendant Howie for a loan of £10,000. Defendant Howie offered to lend that amount to the Company on having repayment secured in the manner following, that is to say:—The Company to issue out of its unsubscribed capital 10,000 cumulative preference shares fully paid to £1 each; the same to be registered in the Company's register in the name of the defendant Spicer; the defendant Spicer to hold the same in trust for the defendant Howie; the defendant Spicer personally to guarantee repayment of the amount by the

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Company and by way of further security to deposit with the defendant Howie the title deeds to certain freehold property of his own, and on further minor terms and conditions not material. The Company agreed to accept the loan on the terms so stipulated and the defendant Spicer agreed to provide the further security and to guarantee repayment in manner aforesaid and hold the said shares in trust for the defendant Howie. The defendant Howie advanced to the Company the sum of £10,000 and a deed dated 30th June 1922 made between the Company and the two defendants and a further deed of the same date between the two defendants were executed contemporaneously and were intended to carry into effect the above-mentioned transactions. The latter of the said two deeds is the deed mentioned in par. 1 of the statement of claim. (3) No part of the said sum of £10,000 was lent to or received by the defendant Spicer who acted throughout as a surety and trustee only. (4) The said Company went into voluntary liquidation on 16th September 1925. (5) On 31st December 1925 the plaintiff Company was incorporated and shortly afterwards it acquired all the assets of the liquidating Company on the terms and for the consideration set forth in a deed dated 15th March 1926 made between the liquidating Company, all the shareholders therein individually, the defendant Howie and the plaintiff Company. (6) At that time the sum of £10,000 was still owing by the liquidating Company to the defendant Howie. (7) By the said deed dated 15th March 1926 the defendant Howie and the defendant Spicer released the liquidating Company from all claims which they or either of them then had or might have had against it and the plaintiff covenanted to take over, satisfy and discharge all the obligations and liabilities of the liquidating Company and pursuant thereto and in further consideration of a present advance of £3,000 made by the defendant Howie to the plaintiff the plaintiff gave to the defendant Howie a debenture over its assets to secure repayment to him of £13,000 which is the debenture referred to in the statement of claim. In giving the said debenture the plaintiff was acting within the powers conferred by its constitution. (8) If (contrary to what is alleged in pars. 2 to 7 inclusive of the defence) the said sum of £10,000 was not lent to the liquidating Company by the defendant Howie, it was lent to it by the defendant

Spicer and was still owing to him at the date of the deed referred to in pars. 6 and 7 hereof and the defendant Spicer claims to set off the said sum of £10,000 with interest thereon against the plaintiff under the plaintiff's covenant set forth in par. 7 hereof. (9) The plaintiff ought not to be permitted to say that the said sum of £10,000 was not owing by the liquidating Company to the defendant Howie, because the plaintiff acting pursuant to the deed mentioned in pars. 5 and 7 hereof elected to treat the said sum of £10,000 as a sum owing by the liquidating Company to the defendant Howie and thereby induced the defendant Spicer to forego any claim he then had against the liquidating Company in respect thereof. (10) Save as aforesaid the defendant Spicer admits pars. 1, 3 to 6, 9, 10, 12 and 16 to 18 inclusive of the statement of claim. (11) The defendant Spicer denied every allegation in pars. 2, 7, 8, 11, 13 to 15 and 19 to 23 inclusive. (12) To accommodate the liquidating Company and subsequently the plaintiff Company in finding the moneys required to pay to the defendant Howie the interest due to him by the said Companies respectively in respect of the said loan of £10,000 the defendant Spicer permitted those Companies respectively to deduct from moneys payable to him by the respective Companies sums paid for interest amounting to £2,250 and the sums of £1,443 1s. 8d. and £150 referred to in par. 24 of the statement of claim were paid to him by the plaintiff Company in part satisfaction of the moneys so deducted. Save as aforesaid the defendant Spicer admits par. 24 and denies every allegation in pars. 25 and 26 of the statement of claim. (13) Subject to the production of the articles of association he admits pars. 28 and 29 of the statement of claim. (14) At a general meeting of shareholders in the plaintiff Company held on 11th July 1927 it was resolved that the remuneration of the managing director be increased to £1,500 a year. Such resolution was not *ultra vires* the Company. The moneys referred to in par. 29 of the statement of claim were paid to him pursuant to such resolution. (15) He denies every allegation in pars. 30 and 31 of the statement of claim.

The defendant Howie by his amended defence in substance alleged :—(1) He admits that he executed an agreement under seal dated 30th June 1922 and made between himself and the defendant

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Spicer. He admits that on 30th June 1922 the defendant Spicer deposited with him certificate of title, vol. 3963, fol. 792509. Save as aforesaid he denies each and every allegation in par. 1 of the statement of claim. (2) He denies each and every allegation in par. 2 of the statement of claim. (3) He admits par. 3 of the statement of claim. (4) He admits that at all material times the defendant Spicer and his son William Albert Milton Spicer were directors of the plaintiff and save as aforesaid he does not admit any of the allegations contained in par. 4 of the statement of claim. (5) He admits pars. 5 and 6 of the statement of claim. (6) and (7) He denies each and every allegation contained in pars. 7 and 8 of the statement of claim. (8) At all material times the plaintiff had power under its memorandum of association to acquire and undertake the whole or any part of the business, goodwill and assets of any company carrying on any of the businesses which the plaintiff was authorized to carry on and as part of the consideration for such acquisition to undertake all or any of the liabilities of such company and to give by way of consideration for any of the acts or things aforesaid or property acquired any debenture that might be agreed upon. (9) Pursuant to the powers aforesaid the plaintiff acquired the assets of Spicer Shoe Co. Pty. Ltd., a company carrying on a business which the plaintiff was authorized to carry on and as part of the consideration for such acquisition undertook the liabilities of the said Company to its shareholders and to the defendant Howie as the holder of 10,000 £1 preference shares in the said Company and gave the said debenture so far as the same secured the payment by the plaintiff to the defendant Howie of the sum of £10,000 with interest thereon in discharge of the liability of the said Company to the defendant Howie and/or in consideration of the defendant Howie forgoing any claim he might have against the said Company in respect of the said 10,000 preference shares and/or in consideration of the defendant Howie consenting to the sale by the said Company of its assets to the plaintiff. (9) (*a*) The plaintiff ought not to be permitted to deny that the sum of £10,000 referred to in the said debenture was on 22nd March 1928 due and owing by it to the defendant Howie because the plaintiff by its execution of an agreement dated 15th March 1926 and made between Spicer Shoe Co.

Pty. Ltd., the liquidators thereof, individual shareholders thereof, the defendant Howie and the plaintiff and by the terms of the said debenture and by its execution thereof elected to treat the said sum of £10,000 as owing by it to the defendant Howie and on the faith thereof the defendant Howie advanced a further sum of £3,000 to the plaintiff and gave up his rights against the said Spicer Shoe Co. Pty. Ltd. and on or about 9th March 1928 executed the agreement dated 15th March 1926. (10) He refers to the articles of association of the plaintiff and save as aforesaid does not admit any of the allegations in par. 9 of the statement of claim. (11) He does not admit any of the allegations in par. 10 of the statement of claim (12) He denies each and every allegation in par. 11 of the statement of claim. (13) He admits par. 12 of the statement of claim. (14) He denies each and every allegation contained in pars. 13, 14 and 15 of the statement of claim. (15) At and prior to the execution of the said debenture the defendant Howie had no knowledge of the matters alleged in pars. 10, 13 and 14 of the statement of claim and upon the faith of the execution of the said debenture by the plaintiff he gave his consent to the sale by the Spicer Shoe Co. Pty. Ltd. of its assets to the plaintiff and paid to the plaintiff the sum of £3,000, and by reason of the premises the plaintiff is estopped as against him from denying that the said debenture was validly executed and/or issued by it. (16) Further and in the alternative the plaintiff is estopped as against the defendant Howie from denying that the said debenture was validly executed and/or issued by it by reason of the following circumstances :—(*a*) On 10th May 1928 the execution of the said debenture by the directors of the plaintiff was duly ratified and/or confirmed by resolution of the shareholders of the plaintiff in general meeting. (*b*) Pursuant to the resolution referred to in clause (*a*) hereof the plaintiff between the months of July 1928 and July 1929 paid to the defendant Howie the sum of £1,000 on account and in reduction of the principal sum secured by the said debenture and the sum of £1,589 5s. for interest thereunder. (17) He admits that between 2nd July 1928 and 2nd August 1929 the plaintiff paid him £1,000 on account and in reduction of the principal sum secured by the said debenture and the sum of £1,589 5s. for interest and save as aforesaid he does not admit any

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of the allegations contained in par. 16 of the statement of claim. (18) He admits pars. 17 and 18 of the statement of claim. (19), (20) and (21) He denied all or did not admit any of the allegations contained in pars. 19 to 31 inclusive of the statement of claim.

In its reply to the defence of the defendant Spicer, the plaintiff said:—(1) Save as to the admissions contained therein it joins issue thereon. (2) It will object that the defendant ought not to be permitted to give evidence of and is estopped from relying upon any of the agreements alleged in par. 2 save those expressed in the two deeds therein referred to. (3) The agreements alleged in par. 2 thereof save in so far as they are contained in or expressed by the deeds therein referred to were unlawful and void and/or not binding upon the Spicer Shoe Co. Pty. Ltd. by reason of their expressly or impliedly requiring such Company either directly or indirectly to purchase or deal in its own shares. (4) The liquidating Company referred to in par. 7 thereof was under no obligation or liability to the defendant Howie. (5) If the sum of £10,000 was lent to the liquidating Company by the defendant Spicer (which is denied) any agreement to repay such loan (if made which is denied) was unlawful, void and not binding upon such last mentioned Company by reason of such agreement expressly or impliedly requiring the said last-mentioned Company either directly or indirectly to purchase or deal in its own shares. (6) If any such election as is alleged in par. 9 was made (which is denied) it was beyond the powers of the plaintiff to make such election and such election was not binding upon it and/or by reason of the facts and matters alleged in pars. 9 to 15 inclusive of the statement of claim was to the knowledge of the defendant Spicer made without the authority of the plaintiff and not binding upon it. (7) The defendant Spicer had no claim against the liquidating Company referred to in par. 9 thereof in respect of the sum of £10,000 therein referred to nor did he make or forgo any such claim. (8) If any such resolution as is referred to in par. 14 thereof was ever passed at a general meeting of the shareholders of the plaintiff (which is not admitted) such meeting of the plaintiff's shareholders was not properly convened or held and such resolution was invalid. Particulars:—No notice convening such meeting was given to the shareholders of the plaintiff

Company. The notice (if any) convening such meeting did not fully or at all set out the business to be transacted thereat and in particular did not set out that the increasing of the defendant Spicer's remuneration of £1,500 a year formed part of such business. No proper or sufficient quorum of shareholders was present at such meeting.

In its reply to the defence of the defendant Howie, the plaintiff said:—(1) Save as to admissions contained therein it joins issue thereon. (2) It denies (*a*) that the defendant Howie was the holder of 10,000 or any preference shares in the Company referred to in par. 9 thereof; (*b*) that the said Company was under any liability to the defendant Howie in respect of any such shares; (*c*) that the defendant Howie had in fact any claim or ever made any claim or has ever forgone any claim against the said Company in respect of any such shares; (*d*) that the defendant Howie at any material date consented to the sale therein referred to. (3) If any such election as is alleged in par. 9 (*a*) was made (which is denied) it was beyond the powers of the plaintiff to make such election and such election was not binding upon it and/or by reason of the facts and matters alleged in pars. 9 to 15 inclusive of the statement of claim was to the knowledge of the defendant Howie made without the authority of the plaintiff and not binding upon it. (4) If any such resolution as is referred to in par. 16 thereof was ever passed at a general meeting of the shareholders of the plaintiff (which is not admitted) such meeting of the plaintiff's shareholders was not properly convened or held and such resolution was invalid. Particulars:—No notice convening such meeting was given to the shareholders of the plaintiff Company. The notice (if any) convening such meeting did not fully or at all set out the business to be transacted thereat and in particular did not set out that the ratification of the execution of such debenture formed part of such business. The notice (if any) did not disclose clearly or at all that the defendant Spicer one of the plaintiff's directors was interested in the said debenture being given and executed and in the passing of the resolution alleged to have been passed or the nature and extent of such interest. No proper or sufficient quorum of shareholders was present at such meeting.

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The memorandum of association of the plaintiff Company included among the objects of the Company the following:— "8. To acquire and undertake the whole or any part of the business goodwill and assets of any person firm or company carrying on or proposing to carry on any of the business which this Company is authorized to carry on and as part of the consideration for such acquisition to undertake all or any of the liabilities of such person firm or company or to acquire any interest in amalgamate with or enter into any arrangement for sharing profits or for co-operation or for limiting competition or for mutual assistance with any such person firm or company and to give or accept (subject to the limitations as to allotment of shares in this memorandum contained) by way of consideration for any of the acts or things aforesaid or property acquired any shares debentures debenture stock or securities that may be agreed upon and to hold and retain or sell mortgage or deal with any shares debentures debenture stock or securities so received. . . . (10) To borrow or raise money in such manner as the Company may see fit and in particular by the issue of debenture or debenture stock perpetual or otherwise and to secure the repayment of any money borrowed raised or owing by mortgage charge or lien upon the whole or any part of the Company's property or assets (whether present or future) including its uncalled capital and also by similar mortgage charge or lien to secure and guarantee the performance by the Company of any obligation or liability it may undertake. . . . (15) To do and carry on all such other things as are incidental or conducive to the interests of the Company or to the attainment of the above objects or any of them."

The articles of association of the plaintiff Company provided (*inter alia*):—"77. The number of directors shall not be less than two nor more than four. 78. The first directors of the Company shall be Alfred Albert Milton Spicer and Milton Spicer and each shall hold office whilst holding one hundred shares at the least. The said Alfred Albert Milton Spicer whilst he holds the office of a director shall be the managing director of the Company and shall be entitled to be paid a salary of £750 per annum. . . . 83. The remuneration of the directors shall be at the rate of such sum per

annum as the Company may in general meeting direct and such remuneration shall be divided amongst the directors in such proportions as they may determine. The Company in general meeting may increase or reduce the amount of such remuneration either permanently or for a year or longer term. Any resolution of the directors to forgo or postpone the payment of all or any part of their remuneration shall bind all the directors. . . . 93. The directors may meet together for the despatch of business adjourn and otherwise regulate their meetings as they think fit and may determine the quorum necessary for the transaction of business. Unless otherwise determined two directors shall be a quorum. 94. A director may at any time and the secretary upon the request of a director shall convene a meeting of directors. Questions arising at any meeting shall be decided by a majority of votes and in the case of an equality of votes the chairman shall have a second or casting vote. 95. The chairman of directors shall be Alfred Albert Milton Spicer and he shall be entitled to hold the office of chairman during his lifetime subject to article 81, but if at any meeting the chairman is not present at the time appointed for holding the same the directors present shall choose one of their number to be appointed chairman of such meeting. 96. A meeting of directors for the time being at which a quorum is present shall be competent to exercise all or any of the authorities powers or discretions by or under the regulations of the Company for the time being vested in or exercisable by the directors generally. 97. All acts done by any meeting of directors shall notwithstanding that it shall afterwards be discovered that there was some defect in the appointment of such directors or that they or any of them were disqualified be as valid as if every such person has been fully appointed and was qualified to be a director. . . . 99. A resolution in writing and signed by all the directors shall be as valid and effectual as if it had been passed at a meeting of directors duly called and constituted. 100. The business of the Company shall be managed by the board who may pay all expenses of or incident to the formation registration and advertising of the Company and the issue of its capital including brokerage and commissions for obtaining applications or for placing shares. The board may exercise all the powers

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of the Company subject nevertheless to the provisions of any Acts of Parliament or of these articles and to such regulations (being not inconsistent with any such provisions or these articles) as may be prescribed by the Company in general meeting but no regulations made by the Company in general meeting shall invalidate any prior act of the board which would have been valid if such regulations had not been made. . . . 130. The directors shall provide for the safe custody of the seal and the seal shall never be used except by the authority of the directors previously given and in the presence of one director at the least and he shall sign every instrument to which the seal is affixed and every such instrument to which the seal is affixed shall be countersigned by the secretary or some other person appointed by the directors."

The relevant facts were as follows:—John Donald Howie paid to the Spicer Shoe Co. Pty. Ltd. at the request of Alfred Albert Milton Spicer the sum of £10,000 for the acquisition by Spicer of 10,000 preference shares in the Company. Spicer covenanted with Howie to repay this sum with interest and lodged with him the shares and a transfer thereof and also the title to the land above referred to as security for repayment of the said sum of £10,000 and interest. Subsequently the Company went into liquidation and a new company, A. M. Spicer & Son Pty. Ltd., was formed to acquire the assets of the old Company and to discharge its liabilities, and share capital in the new Company was allotted to members of the old Company in the proportion of one share for every two shares held in the capital of the old Company. In pursuance of this arrangement 5,000 preference shares in the new Company were issued in the name of Spicer. Howie at first refused his assent to the arrangement, but after protracted negotiations he assented to the arrangement and agreed to advance £3,000 to the new Company, and it was also agreed that the new Company would give him a charge over its assets by way of floating security to secure the sums of £3,000 and £10,000, in all £13,000 and interest thereon. Howie advanced to the new Company the sum of £3,000 and the Company issued to him a debenture by way of floating charge over all its assets to secure £13,000 and interest thereon. The debenture was

issued pursuant to a resolution of the directors of the new Company at a meeting constituted by Spicer and his son William Albert Milton Spicer. Howie did not release or discharge the obligation of Spicer upon his covenant or the security over the land created by the deposit of the title. Howie subsequently appointed a receiver under the debenture and thereby obtained out of the assets of the new Company more than £12,000.

The action was heard by *Wasley* A.J., who decided (1) that the debenture of 22nd March 1928 to secure the repayment of the sum of £13,000 to the defendant Howie was a valid instrument and a security for the full amount binding upon the plaintiff Company, and (2) that its liability upon the debenture was primary so that the defendant Spicer was not in the position of a surety liable to recoup the plaintiff Company the amount paid out of its assets under the debenture, or liable to have the security which he had provided for such sum handed over by the defendant Howie to the plaintiff Company.

The order of the Supreme Court was, so far as material, as follows: —The Court doth order that in respect of the claim under pars. 27 to 31 (*b*) (iii.) of the statement of claim the defendant Alfred Albert Milton Spicer pay to the plaintiff the sum of £668 and also so much of the plaintiff's costs of the action as are incidental to such claim such costs to be taxed And this Court doth further order that save as aforesaid the said action be dismissed as against the defendant Spicer and that the plaintiff pay to the said defendant his costs thereof to be taxed except such costs as are incidental to the claim hereinbefore referred to And this Court doth further order that this action be dismissed as against the defendant John Donald Howie and that the plaintiff pay to the defendant his costs thereof to be taxed And the Court doth certify for pleadings, &c. And this Court doth further order that the amounts payable to and by the defendant Spicer under this judgment be set off the one against the other.

The plaintiff, A. M. Spicer and Son Pty. Ltd., now appealed to the High Court against the decision of the Supreme Court.

Hudson (with him *Sholl*), for the appellant. The debenture is void because it is *ultra vires* the Company and also *ultra vires* the

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directors. As Spicer was interested, the directors could not authorize it. Alternatively, the Company became a guarantor of Howie's debt and therefore became entitled to the securities. The real agreement was that Howie should receive the debenture. [Counsel referred to *In re Johnston Foreign Patents Co.* (1).] There was no quorum of directors at the meeting. [Counsel referred to *North-West Transportation Co.* v. *Beatty* (2); *In re Greymouth Point Elizabeth Railway and Coal Co.*; *Yuill* v. *Greymouth Point Elizabeth Railway and Coal Co.* (3); *In re North Eastern Insurance Co.* (4); *Victors Ltd.* v. *Lingard* (5); *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.* (6); *Palmer's Company Precedents*, 13th ed., Part I., p. 727; *Aberdeen Railway Co.* v. *Blaikie Bros.* (7).] Part of the goods had been supplied and *restitutio in integrum* was not impossible. [Counsel referred to *Colonial Bank* v. *Loch Fyne Co.* (8); *Hutton* v. *West Cork Railway Co.* (9); *Small* v. *Smith* (10).]

Robert Menzies K.C. (with him *Coppel*), for the respondent Howie. The evidence supports the conclusion that Howie really lent money to the Company and the Company really borrowed from Howie. [Counsel referred to *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.* (11); *Alexander* v. *Webber* (12); *Binney* v. *Ince Hall Coal and Cannel Co.* (13); *Bradford Banking Co.* v. *Henry Briggs, Son & Co.* (14).] There is no article referring to disqualification by interest (*Phosphate of Lime Co.* v. *Green* (15)). Ratification arises from the fact that Howie would not have parted with his £3,000 unless he got a debenture. On the question of *restitutio in integrum* counsel referred to *Picturesque Atlas Publishing Co.* v. *Phillipson* (16).

Harry Walker, for the respondent Spicer. As between the Company and Spicer the Court should look at the circumstances behind the

(1) (1904) 2 Ch. 234.
(2) (1887) 12 App. Cas. 589, at p. 593.
(3) (1904) 1 Ch. 32.
(4) (1919) 1 Ch. 198.
(5) (1927) 1 Ch. 323.
(6) (1914) 2 Ch. 488, at p. 500.
(7) (1854) 1 Macq. H.L. 461.
(8) (1866) 3 W.W. & àB. (L.) 168.
(9) (1883) 23 Ch. D. 654, at p. 672.
(10) (1884) 10 App. Cas. 119.
(11) (1875) L.R. 10 Ch. 515, at p. 527.
(12) (1922) 1 K.B. 642.
(13) (1866) 35 L.J. Ch. 363.
(14) (1886) 12 App. Cas. 29, at pp. 37, 38.
(15) (1871) L.R. 7 C.P. 43, at p. 58.
(16) (1890) 16 V.L.R. 675; 12 A.L.T. 103.

documents (*Barton* v. *Bank of New South Wales* (1); *Macdonald* v. *Whitfield* (2)).

Hudson, in reply.

Cur. adv. vult.

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The following written judgments were delivered:—

RICH J. I agree with the judgment of my brother *Dixon*, and have nothing to add.

STARKE J. This was an action by A. M. Spicer and Son Pty. Ltd. (in Liquidation) seeking (*inter alia*) a declaration, against Howie that a debenture for £13,000 issued by it to him was beyond its power, and against both Howie and Spicer that the Company was entitled to the benefit of all securities held by Howie in respect of a debt of £10,000 owing by Spicer to him; and an order against both defendants for payment to it of considerable sums of money collected pursuant to the powers and authorities contained in the debenture and also some other moneys mentioned in the statement of claim. The Spicer Shoe Co. Pty. Ltd. was incorporated in Victoria under the Companies Acts, and its principal shareholders were the defendant Spicer and his family. The Company needed further capital, and the defendant Howie was approached. But he did not care to become a shareholder, though he was prepared to make an advance, secured by way of floating charge over the assets of the Company. On the other hand, the Company did not desire to give a charge or security over its assets because such an instrument would require registration, and that might affect its credit. So another arrangement was adopted, whereby the Company obtained further capital. It is set forth in two agreements, dated 30th June 1922, one between Spicer and Howie, the other between the Company, Spicer, and Howie. Howie paid to the Company at the request of Spicer the sum of £10,000, for the purchase by Spicer from the Company of 10,000 cumulative preference shares of £1 each. Spicer covenanted to repay this sum, and also to pay interest thereon, and he also assigned the preference shares to Howie, and agreed to deposit the title deeds of certain lands as a security for the advance.

(1) (1890) 15 App. Cas. 379, at p. 381. (2) (1883) 8 App. Cas. 733, at p. 745.

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The Company agreed to issue to Spicer 10,000 shares, preferential to all other shares in the Company, both as to capital and, to a certain extent, as to dividends, and hand the same to Howie. The preference shares were duly issued, and deposited with Howie, who did not, however, become registered as the proprietor thereof. The title deeds were also deposited with Howie, in accordance with the agreements.

Wasley A.J. found that though Spicer appeared to be the borrower of the money, nevertheless the real transaction was that the Company was the borrower, and Spicer, in assuming liability for the loan, was only acting as agent for the Company. This finding cannot be supported. The evidence makes it clear, I think, that the idea of the Company borrowing money from Howie was dropped, and recourse was had to another method. That other method would answer as well and be just as advantageous to the parties. It is set forth in the agreements of 22nd June 1922, to which I have referred. That was the real transaction and the transaction into which all parties intended to enter. There is no reason why their arrangement should not be given effect to in the manner and form agreed upon.

In September of 1925 the Spicer Shoe Co. went into liquidation. The plaintiff Company, Spicer and Son Pty. Ltd., was incorporated in December 1925, and its principal shareholders were the defendant Spicer and his family. The main objects of the Company were to carry on the business of manufacturers, buyers and sellers of boots and shoes, in all its branches, to acquire and undertake the whole or any part of the business, goodwill and assets of any person, firm or company carrying on or proposing to carry on any of the business which the Company was authorized to carry on, and as part of the consideration for such acquisition to undertake all or any of the liabilities of such firm or company, to borrow or raise money, and to secure repayment of any money borrowed, raised or owing, by mortgage or charge on the whole or any part of the Company's property or assets, and to do all such other things as were incidental or conducive to the interests of the Company or to the attainment of any of the objects of the Company. The new company—the plaintiff Company—was really formed to take over the business of the old Company, and a scheme to that

end was negotiated between the liquidators of the old Company, the shareholders of the old Company, and the plaintiff Company. The details of the arrangement are set out in two documents bearing date 15th March 1926 and 23rd March 1927. In outline the arrangement was as follows:—(1) The plaintiff Company should take over as on 1st February 1926 all the estate, right, title and interest of the old Company in the plant, machinery, stock and other rights and interests specified in a schedule. (2) The plaintiff Company should pay to the old Company or its liquidators "sufficient to pay all persons who shall lawfully establish claims against the old Company or its liquidators the amounts in full of their claims or debts remaining unpaid." (3) The shareholders in the plaintiff Company should have allotted and issued to them in the capital of the plaintiff Company one share of £1 fully paid up for every two shares in the capital of the old Company registered in their name.

The assent of the shareholders to this arrangement places it outside the decision in *Bisgood* v. *Henderson's Transvaal Estates Ltd.* (1). It was intended that Howie should be a party to and join in the arrangement, but he refused to do so until his interests were secured. As already set forth, 10,000 cumulative preference shares had been deposited with him as security for the money advanced by him to the defendant Spicer, and he was entitled to call for a transfer of and become registered as the proprietor of the shares. The surplus assets of the old Company were sufficient to repay the capital paid up on these shares, but if those moneys were repaid, the plaintiff Company would have insufficient capital to carry on business. Protracted negotiations took place, and in 1928 the following terms were agreed upon: (1) that Howie should execute the agreement of March 1926; (2) that Howie should advance £3,000 to the plaintiff Company; (3) that the plaintiff Company should give a charge over its assets by way of floating security to secure the sum of £13,000.

Howie accordingly executed the agreement bearing date March 1926, and advanced £3,000 to the plaintiff Company, and it issued a debenture to Howie, creating a floating charge over all its assets

(1) (1908) 1 Ch. 743.

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to secure the sum of £13,000 and interest thereon. It is recited in the debenture that the sum of £10,000 was due and owing by the plaintiff Company to Howie, and that Howie had advanced to it the further sum of £3,000. The latter recital is undoubtedly true, but how did the sum of £10,000 become due and owing by the Company to Howie? The transaction of 1928 was not the substitution of the liability of the plaintiff Company under the debenture for the liability of the old Company on the cumulative preference shares in respect of its surplus assets. The issue of 5,000 cumulative preference shares to Spicer in the plaintiff Company under the arrangement of 1926 makes this clear. These new shares were never deposited with or handed over to Howie. Moreover, the evidence of Howie and his representative Perry is to the effect that if the plaintiff Company would give him a debenture in respect of the old debt of £10,000 (that is, the amount owing by Spicer to Howie), then Howie would advance an additional sum of £3,000 to the plaintiff Company. The position assumed by the plaintiff Company was therefore that of surety or quasi-surety in respect of the debt due by Spicer to Howie. There was no release or discharge of Spicer's obligation nor of the mortgage security given by him over the lands already mentioned.

The most critical question raised in this case is whether the assumption of this liability by the plaintiff Company through and by means of the debenture issued to Howie was within its powers. In my opinion it was. The plaintiff had power to acquire the business of the old Company, and, as part of the consideration for such acquisition, to undertake all the liabilities of the old Company. Now part of these liabilities was the obligation to repay to the cumulative preference shareholder out of its surplus assets the capital paid up on those shares, namely, £10,000. If the persons entitled to those rights refrained from forcing a realization and distribution of the proceeds of those assets, why should they not stipulate for some other right instead thereof? Spicer was prepared to take 5,000 cumulative preference shares in the plaintiff Company. Howie, however, required a charge upon its assets. On the bulk of those assets he already had a prior call through the cumulative preference shares deposited with him as security for the £10,000

advanced to Spicer. The plaintiff Company could not obtain title to those assets or to the business of the old Company unless it conceded Howie's terms. The substance of the matter was, however, that the plaintiff Company by its action freed the surplus assets from the claims of Spicer and Howie in the hands of the old Company, but took upon itself a liability different in character—though the same in amount—towards the persons (Spicer and Howie) who had claims on the surplus assets. In short, the plaintiff Company assumed responsibility for the moneys advanced by Howie to Spicer, and secured by, *inter alia*, the deposit of the cumulative preference shares. Such a transaction appears to me within the express powers of the plaintiff Company, or at least incidental or conducive to its interests.

But then it was argued that the debenture was issued without any proper or lawful authority on the part of the directors. The defendant Spicer and his son were the directors of the plaintiff Company, and it was on their resolution, dated 22nd March 1928, that the seal of the Company was affixed to the mortgage debenture in favour of Howie. Under the articles (cl. 100) the directors may exercise all the powers of the Company, subject to the *Companies Act* and the articles. And clause 97 provides: "All acts done by any meeting of directors shall notwithstanding that it shall afterwards be discovered that there was some defect in the appointment of such directors or that they or any of them were disqualified be as valid as if every such person has been fully appointed and was qualified to be a director." Directors of a company have duties to discharge of a fiduciary nature towards their principal, and it is a rule of universal application, in the absence of any stipulation to the contrary, that no one having such duties to perform should be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly might conflict with the interests of those whom he is bound to protect (*Transvaal Lands Co.* v. *New Belgium* (*Transvaal*) *Land and Development Co.* (1)). And it was urged that the quorum at meetings of the board must be a quorum of persons competent to vote at the board meeting in question (*In re Greymouth Point Elizabeth Railway and Coal Co.*;

(1) (1914) 2 Ch., at p. 502.

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Yuill v. *Greymouth Point Elizabeth Railway and Coal Co.* (1)). It is difficult to resist the conclusion that, in giving a charge over the assets of the plaintiff Company in aid of a debt owing by the defendant Spicer to Howie, there were the elements of a conflict between the duty of Spicer as a director and his interest as a debtor to Howie. It is not so clear, however, that the members of the quorum required under the plaintiff Company's articles of association must all be disinterested persons. The articles do not—as in the *Greymouth Case* and other cases—provide that no director shall vote on any matter relating to any contract or business in which he might be interested, nor is there any provision vacating a director's seat if he be interested in any contract with the Company. But in my opinion the answer to the whole argument is found in article 97, already set out. "Notwithstanding that it shall afterwards be discovered that there was some defect," it has been held, does not mean "notwithstanding that the facts which show the defect were afterwards discovered," but "notwithstanding that the defect itself arising from the facts was afterwards discovered" (*Dawson* v. *African Consolidated Land and Trading Co.* (2); *British Asbestos Co.* v. *Boyd* (3); *Channel Collieries Trust Ltd.* v. *Dover, St. Margaret's and Martin Mill Light Railway* (4)). "If there is good faith . . . the mere fact that the person claiming the benefit of the" clause "had notice of the existence of the facts which led to the disability is not sufficient to disentitle him to rely upon it if he can honestly say 'I was not aware of the defect and the consequences of the facts I knew, I was not aware of the disqualification which now exists'" (*Channel Collieries Trust Case* (5)). The present case appears to me to be within this interpretation of the words occurring in article 97. Both Spicer and Howie knew of the original transaction between them and of the security required by Howie from the plaintiff Company if he gave up his rights arising from the deposit of the cumulative preference shares with him. But that either was aware of the possible consequences of the facts, namely, the disqualification of Spicer, is out of the question. The transaction was honest, in good faith,

(1) (1904) 1 Ch. 32.
(2) (1898) 1 Ch. 6.
(3) (1903) 2 Ch. 439, at p. 445.
(4) (1914) 2 Ch. 506.
(5) (1914) 2 Ch., at p. 512.

and necessary if the plaintiff Company were to carry on business. It should consequently be supported.

I pass to the claim of the plaintiff Company for a declaration against Howie and Spicer that it is entitled to the benefit of all securities held by Howie and to which he was entitled in respect of the sum of £10,000, and in particular to the security constituted by the deposit of the title deeds already mentioned. In my opinion, the Company is entitled to this declaration. Howie has enforced his debenture security against the Company, and obtained sufficient by a realization of the Company's assets to satisfy the sum of £10,000 secured thereby. But it has already been stated that the plaintiff Company assumed the position of surety or quasi-surety in respect of the debt due by Spicer to Howie. If this is so, the rule of law applicable is thus stated by the present Mr. Justice *Rowlatt* in his book on *Principal and Surety*, 1st ed., p. 6 :—" There lies, however, just beyond the border-line of suretyship the class of cases in which, without any contract between the debtors, there is a primary and secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both ; so that the other, if he should be compelled to pay it, would be entitled to reimbursement by the person by whom, as between the two, it ought to have been paid. Such persons, when both have become liable to the creditor, and it is in his choice upon which to put the burden, do stand in a relation to one another which gives rise to an equity identical with one which exists between principal and surety—namely, that securities given by the primary debtor are attributable in the hands of the creditor to the satisfaction of the debt, and do not go back to that debtor or his general creditors " (*Duncan, Fox & Co.* v. *North and South Wales Bank* (1)).

A further claim was made by the plaintiff Company for £1,593 18s. paid or credited by the Company to Spicer without consideration or as bonuses to reimburse Spicer in respect of amounts paid to Howie as and for interest on the advance of £10,000. But the parties do not appear to have devoted much attention to this claim,

(1) (1880) 6 App. Cas. 1.

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and the evidence, such as there is, leaves the matter in a doubtful and confused state. In these circumstances the plaintiff Company must fail on this last claim.

DIXON J. This is an appeal from a judgment of *Wasley* A.J. by which he decided (1) that a debenture of 22nd March 1928 expressed as given by the appellant Company to secure the repayment of £13,000 to the respondent Howie was a valid instrument and a security for the full amount binding upon the appellant Company and (2) that its liability upon the debenture was primary so that the respondent Spicer was not in the position of a surety liable to recoup the appellant Company the amount paid out of its assets under the debenture, or liable to have a security which he had provided for the same sum handed over by the respondent Howie to the appellant Company. It is convenient to state and discuss the course of events upon which these questions depend in the order in which they took place.

In 1922 a Company called the Spicer Shoe Company Proprietary Limited desired to raise a sum of £10,000 and applied to the respondent Howie who consented to supply the money at nine per cent. The Company did not wish to grant a debenture or create a floating charge over its assets and proposed that it should issue preference capital for the amount, but Howie was unwilling to become a shareholder. The respondent Spicer, who was the principal member of the Company and its managing director, was ready to provide additional security in the shape of a mortgage over a piece of land to which he was entitled, and eventually the transaction was carried through by documents which constituted the respondent Spicer the borrower of the money and secured it over the land and over 10,000 shares of £1 each in the Company which were issued as preferential both as to a cumulative dividend of nine per cent per annum and as to capital, and were allotted to Spicer by whom they were fully paid up by the application of the money lent to him by Howie. Spicer entered into a personal covenant with Howie to repay the loan with nine per cent interest or such greater interest as would be equal to the dividends on the shares, and to execute a mortgage of the land. He lodged with him the scrip for the shares indorsed

with a transfer executed in blank and appointed him his attorney or proxy to vote at meetings of the Company. The Company entered into a covenant with Howie and Spicer that the shares should be preferential as to capital and should bear a preferential dividend of nine per cent cumulative; that after nine per cent had been paid on the ordinary shares, the dividends on the preference shares should be *pari passu* with the ordinary shares; that the Company would give Howie information as to the affairs and business of the Company, and that it would at any time register a transfer of the shares to Howie. This transaction appears to me to have been effectual to create the relation between the parties which the documents describe. The view that a contract of loan was made between the Company and Howie cannot be supported.

For some time payments of interest to Howie were kept up, but at length, on 21st September 1925, the Company went into voluntary liquidation. Its assets appear to have had a value of £66,317, and the debts owing to its creditors seem to have amounted to £46,125. The liquidation proceeded; the creditors were paid dividends amounting to 10s. in the £ and as at 31st January 1926 the remaining assets were set down by the liquidators at £43,224. If the liquidation had gone on in the ordinary course, and if the assets had realized this sum, then after the creditors had received another £23,093 or thereabouts the preference shares issued to Spicer would be next in priority; £10,000 would have been paid upon them and Spicer's debt to Howie would thus have been discharged. But behind these preference shares stood 35,125 fully paid ordinary shares of £1 each, the greater number of which belonged to Spicer and his family, and a scheme of reconstruction was conceived in the interests of the holders of these shares. The plan was to form a new company to acquire from the liquidators the material assets and the business of the old Company, undertaking in return the discharge of the balance of its liabilities and allotting share capital to the members of the old Company in proportion to their holdings so as to cover the surplus value of its assets over its liabilities. Meetings of creditors were held and Spicer's solicitors explained the scheme which was eventually adopted by the liquidators, the creditors, and the shareholders, except two or three whom Spicer bought out. Howie's solicitor attended

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one meeting, the minutes of which record him as having concurred in all the proposals of Spicer's solicitors, but it does not appear that any of these proposals related to the priority which Howie's security over the preference shares, in effect, gave him in the application of the surplus if the winding up proceeded. Doubtless it was not a matter which concerned a creditors' meeting. In any case, having regard to the course taken at the hearing of this suit, it could not be suggested that any arrangement was made with Howie providing for the priority he would have if he could enforce his security over the preference shares.

The appellant Company was formed in order to take over the undertaking, and was registered on 31st December 1925. The liquidators divided the assets into two parts, consisting of liquid assets amounting to £15,733 readily available for distribution which they proposed to retain, and assets—for the most part material—amounting in value to £27,491 which they proposed to transfer to the appellant Company as from 1st February 1926. Two agreements were drawn up intended to bear the same date. The first agreement, which was prepared by the liquidators' solicitors, appears to have been concerned with the position of the liquidators and the creditors, and to have had in view the transfer of the assets, the securing of the discharge of the old Company's liabilities to its creditors and the indemnification of the liquidators against the claims of the shareholders who would have been entitled to participate in a distribution of the surplus. These claims the agreement appears to me to intend to extinguish, no doubt, upon the assumption that the shareholders would in some way regain their interests in the surplus by obtaining shares in the appellant Company. The second agreement, which was prepared by Spicer's solicitors, was concerned with obtaining for the shareholders shares fully paid up in the appellant Company to represent their right to participate in a distribution of the surplus assets in the liquidating Company. This instrument was expressed to be made between the appellant Company and the persons, ten in number, who were shareholders in the liquidating Company, called in this agreement "the vendor Company." After reciting the first agreement it witnessed that in consideration of the shareholders in the vendor Company having consented to

the vendor Company and its liquidators effecting the sale at the price and upon the terms and conditions expressed in the first agreement, and in further consideration of them agreeing to execute that agreement, the appellant Company should allot to each of them one share of £1 for every two shares held in the capital of the vendor Company. This meant, as a schedule to the agreement specifically stated, that in lieu of the 10,000 preference shares held by Spicer in the old Company over which the debt to Howie was secured, 5,000 preference shares in the new Company should be issued. Howie was not made a party to this agreement, although to the extent of £5,000 it involved an abandonment in favour of ordinary shareholders of his right, by means of preference shares, to obtain the amount of his debt out of the assets before they participated. But the draftsman of the first agreement, in order to protect the liquidators, made Howie a party to it. It was expressed to be made between the old Company and its liquidators of the first part, its shareholders of the second part, Howie of the third part and the new Company of the fourth part, and it recited that Howie had an equitable interest in the shares held by Spicer. The agreement which it contained consisted of (1) a sale by the old Company and its liquidators with the consent of its shareholders and of Howie to the appellant Company of the specified assets of the old Company and of its business as a going concern in consideration of £27,491 payable in instalments, the last of which should become due on 1st March 1927; (2) a proviso that if before 1st January 1927 the appellant Company should have paid to the old Company and its liquidators sums which with the instalments to that date would be sufficient to pay in full claims established against the old Company or its liquidators, together with certain interest and the costs, charges and expenses of winding up, then such payments should be accepted in satisfaction and discharge of the purchase price; (3) an undertaking by the appellant to give a debenture over all its assets including uncalled capital to secure payment of the price or the sums to be accepted in satisfaction of the price; (4) a release and discharge of the old Company and the liquidators by its shareholders from all claims by them in the winding up as shareholders; (5) an undertaking by Howie not to claim in the winding up and

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a release and discharge by him of the old Company and its liquidators from all claims which he might have against them. This agreement was dated 15th March 1926, but it was not executed upon that day. On 18th March 1926 Spicer's solicitors wrote to the liquidators' solicitors that the agreement and debenture had been executed by the appellant Company, and the agreement had also been signed by several shareholders and that their clients (presumably Spicer and the appellant Company) personally undertook that the remaining signatures would be obtained. The liquidators, however, were not prepared to put the appellant Company in possession of the assets unless the agreement was executed by all parties, or a personal undertaking was given by the solicitors for Spicer that it would be so executed. The second alternative was adopted, and on 26th March 1926 Spicer's solicitors personally undertook to hand to the solicitors for the liquidators one part of the first or sale agreement duly executed by the appellant Company and the shareholders and Howie, whereupon the appellant Company was put in possession of the assets to which the agreement related and proceeded to carry on the business. If Howie had executed this agreement, as for some reason it was expected that he would do, his security over the preference shares would have been lost, although apparently that security would have produced enough to satisfy Spicer's debt to him. For repayment of the amount of £10,000 Howie would have nothing better to look to than Spicer's personal liability to him secured only by the mortgage of his land, and by whatever shares the appellant Company might choose to allot to Spicer in virtue of Spicer's holding of the 10,000 preference shares in the liquidating Company. He would have no means of compelling the appellant Company to allot a number of preference shares which would afford the same security or, indeed, any number at all. In point of fact, according to the second agreement, a number of preference shares was to be allotted which conferred upon the ordinary shareholder an advantage to the extent of £5,000 at the expense of Howie's security. It is, therefore, no wonder that Howie refused to execute the agreement and insisted upon some better protection of his interests. So long as this refusal was maintained the document, though perhaps delivered

as a deed operative at law (see *Federal Commissioner of Taxation* v. *Taylor* (1)), had no efficacy in equity. "It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute" (per *Jessel* M.R., *Luke* v. *South Kensington Hotel Co.* (2)). Thus unless and until the agreement was executed by Howie a title was not obtainable by the appellant Company to the assets which it had taken over.

During the next two years various proposals were made to Howie, all of which he refused. Nevertheless, the appellant Company continued to carry on the business which the liquidators had put into its control. By 16th March 1927 the creditors had been paid off in full by the liquidators, who had received £9,963 from the appellant Company, which together with £15,733 retained by them sufficed to pay the remaining 10s. in the £1, amounting to £23,093 or thereabouts, and also, as it seems, the costs, charges and expenses of the liquidation. The result was that from this date the assets in the control of the appellant Company represented surplus assets in the liquidation which, but for the reconstruction to which Howie was asked to agree, must have been applied first in or towards a return of the share capital of £10,000 represented by the preference shares over which his advance of £10,000 was secured. For some reason, not clearly explained, the completion of the second or shareholders' agreement was delayed, but at length it was executed by all the shareholders probably on 23rd March 1927, the date which it actually bears in spite of being expressed to be of even date with the first or sale agreement. In the meantime, according to the records of the appellant Company and its returns to the Registrar-General, shares were allotted in conformity with the provisions of the incomplete agreement, "the consideration being the value of their respective holdings in the 'Spicer Shoe Company Pty. Ltd.' in liquidation." The date given for the allotment, which is recorded as accomplished by resolution of the members, is 12th March 1926, but there is some reason to doubt the record. It may be noticed that the scheme which resulted in the allotment of these fully paid up shares did not follow sec. 193 of the *Companies*

(1) (1929) 42 C.L.R. 80.

(2) (1879) 11 Ch. D. 121, at p. 125.

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Act, and that arguments which might be relied on to establish that the appellant Company did receive money's-worth for its paid-up shares within *Wragg's Case* (1), tend to support an application to the sale by the liquidating Company of *Bisgood* v. *Henderson's Transvaal Estates Ltd.* (2). But all the shareholders agreed and in any case the validity of Howie's debenture would not be involved. At length, after two years, the appellant Company reached an arrangement with Howie. The arrangement was that he should lend to the Company a sum of £3,000 and that the Company should grant a debenture acknowledging a debt of £13,000 with interest at nine per cent per annum repayable as to part by sixteen quarterly instalments of £200 each and as to the residue on 1st July 1932, secured by a floating charge upon all the assets of the Company. On 22nd March 1928 this debenture was sealed on behalf of the Company pursuant to a resolution of a meeting of directors, and upon its registration Howie paid over the additional £3,000 and executed the first or sale agreement of 15th March 1926. There is no evidence that when Howie obtained this debenture he agreed to, or intended to, take it in discharge of Spicer's personal liability to him for the sum of £10,000. It is likely that little importance would be attached to that liability by Howie and Spicer, who probably took a lay view of the matter. But it seems improbable that Howie would give up his security over Spicer's land, and this would be the necessary result of a discharge without more of the liability it secured. It is enough to say that there is no material upon which it could be found that the debenture was taken in discharge of Spicer's indebtedness or in relief of the security over his land or over the shares allotted to him in virtue of his holding 10,000 preference shares in the old Company. Apart from a question whether so much of this debenture is valid as imposed upon the appellant Company an obligation secured over its assets to pay the sum of £10,000, the result was that both Spicer and the appellant Company were liable to Howie in respect of the same sum of £10,000. If Spicer repaid it, the Company's debenture would be discharged. If the Company discharged its debenture, Spicer's debt to Howie would be paid. So far as Howie is concerned the liability to him of Spicer upon his

(1) (1897) 1 Ch. 797. (2) (1908) 1 Ch. 743.

covenant of 1922 and the liability of the appellant Company upon its covenant of 1928 were equal. He could resort to either of them indifferently. But, "where a creditor has a right to come upon more than one person or fund for the payment of a debt, there is an equity between the persons interested in the different funds that each shall bear no more than its due proportion" (per Lord *Blackburn*, *Duncan, Fox & Co.* v. *North and South Wales Bank* (1)). As between the appellant Company and the respondent Spicer, were their liabilities upon an equality, or is one secondary and the other primary? Before the Company gave the debenture its position was that it had allotted fully paid-up shares to the members of the old Company in respect of their right to participate in a distribution of its surplus assets in the liquidation, and it had found the consideration required by the creditors of that Company, whose claims ranked before the shareholders in the winding up. Among the share interests in the old Company in respect of which shares in the new were allotted, was the prior right given by 10,000 preference shares. The necessity of giving the debenture arose from the fact that these very shares were encumbered with Spicer's debt to Howie, who thus was in a position to make claims which the Company and the liquidators had recognized and because of which the liquidators would not allow the transaction to go through without Howie's concurrence. The 5,000 shares had been allotted to Spicer in virtue of his holding the 10,000 preference shares, and payment of Spicer's debt to Howie would discharge the liability so secured over them. In these circumstances Spicer's liability could not but be primary and the Company's secondary. The relation is analogous to that of principal and surety. It falls within the third of the cases given by Lord *Selborne* L.C. in *Duncan, Fox & Co.* v. *North and South Wales Bank* (2), and is one of "those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid." Accordingly,

(1) (1880) 6 App. Cas., at p. 19. (2) (1880) 6 App. Cas., at p. 11.

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upon the debt being paid by the Company or out of its assets, the Company would become entitled to be recouped by Spicer and to resort to the securities in Howie's hands which he had provided.

On 7th July 1929, in the exercise of the powers expressed to be given by the debenture, Howie appointed a receiver who realized assets of the Company out of the proceeds of which Howie received £12,279 10s. 4d. It does not appear what amount was owing upon the debenture for interest and for principal when these moneys were received. On 1st August 1929 a winding-up petition was presented against the appellant Company upon which a winding-up order was made. The liquidators of the appellant Company then brought this suit against Howie and Spicer, claiming against the former that the debenture was invalid, and against the latter, *inter alia*, that, if the debenture was not invalid, he was bound to pay to the Company the amount obtained by the receiver under the debenture out of the Company's assets, and the Company was entitled to the benefit of the security held by Howie. The suit came before *Wasley* A.J. who decided against both these alternative claims. In support of the appeal from this decision it was contended that the debenture was invalid, or not binding upon the appellant Company, because it was given pursuant to a resolution passed at a meeting of directors at which no quorum or proper quorum was present, and thus it was not authorized on behalf of the appellant Company by a duly constituted board of directors. The directors of the Company were the respondent Spicer and his son. The articles of association provided that there should be not less than two directors nor more than four; that two directors should be a quorum; that a meeting of directors for the time being at which a quorum is present should be competent to exercise the powers of the directors generally; and that the business of the Company should be managed by the board, which might exercise all the powers of the Company. The contention is that when the article prescribes two directors as a quorum, it means two directors who have no interest conflicting or possibly conflicting with their duty towards the Company, and that the respondent Spicer had such an interest in the transaction because of his personal liability to Howie. In my opinion this argument fails. In the first place, I

do not think the article is open to the construction which excludes from a quorum directors who have an interest in business before the board. *In re Greymouth Point &c. Co.* (1), *Neal* v. *Quinn* (2), *In re North Eastern Insurance Co.* (3) and *Victors Ltd.* v. *Lingard* (4) are cases in which an article of association provided that no director should vote upon any matter in which he should be interested, and the article requiring a quorum was interpreted to mean a quorum of directors none of whom was disqualified by this provision from voting. But these cases afford no ground for the view that where an interested director is not forbidden by the articles to vote, he may not be reckoned in the quorum. Some expressions used in *Cox* v. *Dublin City Distillery* [*No.* 2] (5) may perhaps appear wide enough to cover such a position, but I do not think they were intended to do so. In the next place, having regard to the fact that Spicer was and remained primarily liable to Howie and the issue of the debenture did not relieve him of responsibility for the amount of the debt, I am not prepared to say that he occupied a position of conflicting duty and interest. I doubt whether in equity the transaction would have been at its inception voidable because of Spicer's interest, assuming Howie had notice of the facts. But the principal contention by which the validity of the debenture is impeached is that it was beyond the powers of the Company to incur a liability for the £10,000 and secure it over its assets. The objects of the Company, contained in its memorandum of association, included the acquisition by any means of any property; the acquisition of any business, goodwill and assets of any company carrying on the business of manufacturers, buyers and sellers of boots and shoes; the giving by way of consideration for any of the property acquired any debentures or securities; and the doing of all things incidental or conducive to the interests of the Company or to the attainment of the above objects or any of them.

The debenture was given to secure payment of a sum of money which, in a due course of administration in the liquidation of the old Company, should have been answered out of the very assets

(1) (1904) 1 Ch. 32.
(2) (1916) W.N. 223.
(3) (1919) 1 Ch. 198.
(4) (1927) 1 Ch. 323.
(5) (1915) 1 I.R. 345.

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which the appellant Company had taken over under an arrangement which in equity gave it no title to them; the acquisition of the assets was plainly within the power of the Company; and the liability undertaken was not primary. In my opinion it was incidental or conducive to the attainment of the objects of the Company, which empowered it to acquire the boot and shoe manufacturing business of the old Company, to give a debenture by which the liability for the £10,000 was incurred by the Company and secured by a floating charge upon its assets.

On the other hand, I am unable to agree with the decision appealed from, in so far as it holds that the respondent Spicer was not liable to the Company in respect of the sums obtained by Howie under the debenture in satisfaction of the debt of £10,000. For the reasons I have stated, I think he occupied a position of primary obligation. It is not clear that Howie has recovered the entire sum of £13,000 and interest secured by the debenture, and, if he has not done so, presumably he could appropriate the amount which he has recovered so as first to extinguish the £5,000, with the consequence that the security provided by Spicer would be available for the deficiency. It appears, however, that Howie considered on 10th May 1930 that he had no further claim upon the security. If so, the appellant Company is entitled to its benefit.

A further claim was made by the appellant Company against Spicer in respect of £1,443 1s. 8d. and £150 by which he is said to have been reimbursed in respect of interest paid to Howie for periods prior to the date of the debenture and debited to Spicer's account. But I am not satisfied that these sums do not represent bonuses declared by way of a distribution out of the supposed profits to Spicer as a preference shareholder. If so, the validity of the distribution has not effectively been put in issue in this suit.

The appeal should be dismissed as against the respondent Howie with costs, and allowed as against the respondent Spicer with costs.

The judgment appealed from should be varied as follows:— Discharge so much of the judgment appealed from as orders that, save in respect of the claim referred to in such judgment, the action be dismissed as against the respondent Spicer, and as orders that the plaintiff pay the respondent Spicer's costs. In

lieu thereof: (i.) Declare that the respondent Spicer became liable to repay to the appellant Company the amount paid by it or by the receiver out of its assets in or towards the satisfaction of the sum of £10,000 parcel of the sum of £13,000 secured to the respondent Howie by the debenture in the pleadings mentioned which said sum of £10,000 is specifically referred to in such debenture and that upon payment to the respondent Howie of the said sum of £10,000 and all other sums for interest or otherwise payable to the respondent Howie by the respondent Spicer under the indenture made 30th June 1922 between them the appellant Company is entitled to the securities held by the respondent Howie in respect of such sums. (ii.) Reserve liberty to apply to the Supreme Court for further relief consistent with this judgment in respect of the matters to which the last declaration relates. After the words " and this Court doth further order that " and before the words " this action be dismissed as against the defendant John Donald Howie " insert the words " save as aforesaid."

EVATT J. I concur in the judgment of my brother *Starke*.

As against respondent Howie appeal dismissed with costs. As against respondent Spicer appeal allowed with costs.

Judgment of the Supreme Court varied as follows :—Discharge so much of the judgment appealed from as orders that, save in respect of the claim referred to in such judgment, the action be dismissed as against the respondent Spicer, and as orders that the plaintiff pay the respondent Spicer's costs.

In lieu thereof:—(i.) Declare that the respondent Spicer became liable to repay to the appellant Company the amount paid by it or by the receiver out of its assets in or towards the satisfaction of the sum of £10,000 *parcel of the sum of* £13,000 *secured to the respondent Howie by the debenture in the pleadings mentioned which said sum of* £10,000 *is specifically referred to in such debenture and that upon payment to the respondent Howie of the said sum of* £10,000 *and all other sums for interest or*

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otherwise payable to the respondent Howie by the respondent Spicer under the indenture made 30th June 1922 between them the appellant Company is entitled to the securities held by the respondent Howie in respect of such sums. (ii.) Reserve liberty to apply to the Supreme Court for further relief consistent with this judgment in respect of the matters to which the last declaration relates. After the words "and this Court doth further order that" and before the words "this action be dismissed as against the defendant John Donald Howie" insert the words "save as aforesaid." Strike out the words "and also so much of the plaintiff's costs of the said action as are incidental to such claim such costs to be taxed." After the words "costs thereof to be taxed" and before the words "and this Court doth certify" insert "and that the defendant Spicer do pay to the plaintiff its costs of this action other than costs incurred by reason of the joinder of the defendant Howie and the claims against him."

Solicitors for the appellant, *Arthur Phillips & Just.*

Solicitors for the respondents, *Bullen & Burt* and *Abbott, Beckett, Stillman & Gray.*

H. D. W.