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that can be done here is to hold that, as the orders of variation were outside the competence of the Arbitration Court, they are null and void.

Question answered in the affirmative. No order as to costs.

Solicitor for the applicant, *A. C. Roberts.*

Solicitors for the respondents, *Whiting & Byrne,* for *McLachlan, Westgarth & Co.*, Sydney.

H. D. W.

Discd *MSP Nominees* v *Comr of Stamps* (1999) 42 ATR 833

[HIGH COURT OF AUSTRALIA.]

THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED . . . . APPELLANT;
APPLICANT,

AND

THE GREATER MELBOURNE REALTY COMPANY PROPRIETARY LIMITED (IN LIQUIDATION) . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 3.

SYDNEY, *April* 7.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Company—Shareholder—Liability in respect of calls overdue—Shareholder unable to pay calls—Settlement of liability with company—Surrender of shares—Purchase of shares by company—Validity.

A shareholder in a company who held 1,500 £1 shares on which 5s. per share had been paid, and on which a further call of 2s. 6d. per share had been made but not paid, made the following arrangement with the company:—It was agreed that the money already paid, namely, £375, should be applied towards payment in full of 750 shares, that he should pay a further sum of £375 to

pay for the 750 shares in full, together with a further sum of £75 representing a refund of commission paid by the company on the sale of 750 of the shares to the shareholder, and that the company should cancel 750 of the shares standing in the shareholder's name. The company later on went into liquidation, and the liquidator treated the transaction as *ultra vires* and settled the shareholder's executor upon the list of contributories in respect of the 750 shares cancelled, treating them as paid up only to the extent of £75 and the other 750 shares as fully paid.

Held, that the transaction was neither a forfeiture of the 750 shares nor a compromise, but was, in effect, a purchase by the company of the shares cancelled, and that the shareholder's executor was properly included in the list of contributories.

Decision of the Supreme Court of Victoria (*McArthur* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

The respondent, the Greater Melbourne Realty Co. Pty. Ltd., was a company incorporated under the *Companies Act* 1915 of Victoria, and had adopted the Regulations in Table A, with some modifications immaterial to the decision of this case. John Luxton became the proprietor of 1,500 shares of £1 each in the Company, and he paid up on those shares a sum of £375 in cash, being 5s. per share. In December 1928 a call of 2s. 6d. per share was made on those shares, but Luxton did not meet the call. It was suggested that the Company should cancel the shares for non-payment of the call, but it refused to do so and continued to demand payment. Ultimately an arrangement was made between the appellant, the Union Trustee Co. of Australia Ltd. (acting under a power of attorney given to it by Luxton) and the respondent Company, pursuant to which Luxton paid to the respondent a further sum of £450, of which part, namely £75, was a refund of commission paid by the respondent on the sale of 750 shares to Luxton, and the respondent cancelled 750 shares standing in its share register in Luxton's name, and credited to the other 750 shares standing in his name the balance of the £450 and also the sum of £187 10s. which he had paid on the shares which were forfeited. Thus the 750 shares remaining in Luxton's name were credited or treated as fully paid up, and certificates were issued accordingly Luxton died in 1929, and appointed the appellant as his executor. The respondent Company went into liquidation in 1930, and its liquidator settled the

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executor upon the list of contributories of the Company in respect of the 1,500 shares taken up by Luxton, and claimed that the executor was liable to contribute in respect of these shares the sum of £675 after bringing into account the sum of £75 refunded to the Company as already mentioned. The Company never forfeited, or intended to forfeit, the 750 shares in the name of Luxton which it purported to cancel.

The appellant took out a summons asking that its name should be removed from the list of contributories. This summons was dismissed by *McArthur* J., and from that decision the appellant now appealed to the High Court.

Robert Menzies K.C. and *Coghill*, for the appellant. The circumstances in this case would justify a forfeiture of the shares, and the transaction operated as a valid surrender. The parties to such a surrender are entitled to make a bargain whereby the ordinary consequences of a forfeiture are to some extent modified, and that is what occurred in this case. [Counsel referred to the *Companies Act* 1928 (Vict.), secs. 33 (2) (*g*), 48 (1) (*e*), Second Schedule (Table A), clauses 24-30; *Trevor* v. *Whitworth* (1); *Bellerby* v. *Rowland and Marwood's Steamship Co.* (2); *Rowell* v. *John Rowell & Sons Ltd.* (3); *In re Melbourne Locomotive and Engineering Works Ltd.* (*Neave's Case*) (4); *Re Beaconsfield Heights Estate Co.* (5); *In re Denver Hotel Co.* (6).]

[DIXON J. referred to *British and American Trustee and Finance Corporation* v. *Couper* (7).]

C. Gavan Duffy, for the respondent. No surrender of partly paid shares can be valid except where the transaction amounts to a forfeiture; this case does not come within that exception.

Coghill, in reply. A surrender may be upheld if it is a bona fide compromise, and possibly in other cases, so long as no money is

(1) (1887) 12 App. Cas. 409.
(2) (1902) 2 Ch. 14.
(3) (1912) 2 Ch. 609.
(4) (1895) 21 V.L.R. 442; 17 A.L.T. 213.
(5) (1896) 22 V.L.R. 97; 17 A.L.T. 245.
(6) (1893) 1 Ch. 495.
(7) (1894) A.C. 399.

returned to the shareholder. [He referred to *Trevor* v. *Whitworth* (1); *Companies Clauses Act* 1863 (26 & 27 Vict. c. 118), secs. 9, 10; *Dixon* v. *Evans* (2).]

Cur. adv. vult.

The following written judgments were delivered:—

GAVAN DUFFY C.J., STARKE, DIXON AND EVATT JJ. The general rule of the *Companies Act* 1915 of Victoria is that the capital of a company limited by shares cannot be reduced without the sanction of the Court (*Trevor* v. *Whitworth* (1); *Bellerby* v. *Rowland &c. Co.* (3)). But a company may forfeit shares in respect of which a holder has not paid calls if its articles so provide. This power is recognized by the Act (sec. 33 (9) (2) (*g*), and Table A, clauses 24-30). The Act does not, nor do the Regulations, explicitly authorize the retirement of a member by surrendering his shares to the Company. See *Lindley* on *Companies*, 6th ed., vol. I., p. 719: "The effect of a surrender of shares, unless it be in exchange for others, is to diminish the capital of the company." Yet the articles of association of many companies authorize directors to accept from any member a surrender of his shares or of any part thereof (see *Palmer's Company Precedents*, 13th ed., vol. I., p. 732). And to some extent a power in companies so to provide has been recognized. Thus, Lord *Macnaghten* said in *Trevor* v. *Whitworth* (4):—"Surrender of shares stands on a different footing. It is not mentioned in the Companies Acts, but I conceive there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction." And *Palmer* (*Precedents*, 13th ed., p. 733) says: "It may be that where a company is in a position to forfeit . . . shares, a bona fide arrangement for a surrender as a short cut to the same end, and without payment or consideration, is valid."

The Greater Melbourne Realty Co. Pty. Ltd. was a company incorporated under the *Companies Act* 1915 of Victoria, and it adopted the Regulations in Table A, with some modifications

(1) (1887) 12 App. Cas. 409.
(2) (1872) L.R. 5 H.L. 606.
(3) (1902) 2 Ch. 14.
(4) (1887) 12 App. Cas., at p. 438.

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immaterial to the decision of this case. John Luxton became the proprietor of 1,500 shares of £1 each in the Company, and he paid up on those shares a sum of £375 in cash, or 5s. per share. In December 1928 a call of 2s. 6d. per share was made on these shares, but Luxton, who was heavily involved and had little ready money, did not meet the call. It was suggested that the Company should cancel the shares for non-payment of the call, but it refused to do so, and continued to demand payment. Ultimately an arrangement was made between Luxton and the Company, pursuant to which Luxton paid to the Company a further sum of £450—of which part, namely £75, was a refund of commission paid by the Company on the sale of 750 shares to Luxton—and the Company cancelled 750 shares standing in its share register in Luxton's name, and credited the sum of £375, the balance of the sum paid by Luxton, to the other 750 shares standing in his name, and also the sum of £187 10s., or 5s. per share, paid on the 750 shares which it had cancelled. Thus the 750 shares remaining in Luxton's name were credited or treated as fully paid up, and certificates were issued accordingly. Luxton died in 1929, and appointed the Union Trustee Co. of Australia Ltd. his executor. The Greater Melbourne Realty Co. Pty. Ltd. went into liquidation in 1930, and its liquidator settled the executor upon the list of contributories of the Company in respect of the 1,500 shares taken up by Luxton, and claimed that the executor was liable to contribute in respect of these shares the sum of £675, after bringing into account the sum of £75 refunded to the Company as already mentioned. The Company never forfeited, or intended to forfeit, the 750 shares in the name of Luxton which it cancelled or purported to cancel. One fact makes this plain, namely, that the sum of £187 10s., or 5s. per share, paid on these shares, was not forfeited but credited or appropriated in payment of the other 750 shares remaining in Luxton's name. Consequently, it cannot be said that the cancellation or taking back of the 750 shares in Luxton's name was a mere short cut to forfeiture and a surrender to that end. Next it was suggested that the transaction between Luxton and the Company amounted to a compromise of rights; but no rights were ever in dispute, nor were any rights compromised. All that can

be said is that the Company received the sum of £375 in respect of 750 shares retained in Luxton's name, and £75 in respect of the commission paid by it in consideration of its cancelling the other 750 shares, releasing Luxton's obligations thereon, and refunding the sum of 5s. per share paid on the cancelled shares by means of the credit already mentioned. Such a transaction operates as a mere reduction of capital, and is unauthorized by the Companies Acts unless sanctioned by the Court. Unfortunately, the arrangement here made was never so sanctioned.

The case is, as *McArthur* J. said, a hard one, but there is no doubt that his decision refusing to remove the executor from the list of contributories of the Company is right, and must be affirmed.

McTIERNAN J. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Proudfoot & Horton.*
Solicitors for the respondent, *Bullen & Burt.*

H. D. W.