[PRIVY COUNCIL.]

CAMPBELL . . . . . APPELLANT;
RESPONDENT,

AND

ROFE . . . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.*
1932.
Nov. 28.

Company — Capital — Memorandum and articles of association — Ordinary and preference shares—Power of directors to issue preference shares—"Terms and conditions" of disposal of shares—"Management of the business of the company."

By its memorandum of association a company was empowered to issue, *inter alia*, preference shares as part of its original capital. The articles of association provided that "the shares shall be under the control of the directors who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such times as the directors think fit" (art. 10), and that "the management of the business of the company shall be vested in the directors who in addition to the powers and authorities by these presents or otherwise expressly conferred upon them may exercise all such powers and do all such acts and things as may be exercised or done by the company and are not hereby or by statute expressly directed or required to be exercised or done by the company in general meeting" (art. 117). The articles contained no express provision for preference shares as part of the original capital, but there was such provision as regards any future issue of new shares.

Held, that, as there was no clear restriction in the articles of the powers expressly conferred by the memorandum of association, the company had power to issue part of the original capital as preference shares, and that the articles authorized the directors to exercise the power of the company in this regard. The authority was conferred by art. 10; but, in the absence of such a provision, art. 117 would have been sufficient to confer it.

Decision of the High Court: *Rofe* v. *Campbell*, (1931) 45 C.L.R. 82, reversed, and the order of the Supreme Court of New South Wales (*Harvey* C.J. in Eq.) restored.

* Present—Lord Atkin, Lord Tomlin, Lord Thankerton, Lord Macmillan and Sir Lancelot Sanderson.

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APPEAL from the High Court to the Privy Council.

This was an appeal from the decision of the High Court (*Rofe* v. *Campbell* (1)), reversing the decision of *Harvey* C.J. in Eq. that under the articles of association of Marlow Rolls Theatres Ltd. the directors were authorized to issue certain preferential shares to Thomas Ernest Rofe, and that his name should not be removed from the list of contributories.

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LORD THANKERTON delivered the judgment of their Lordships, which was as follows :—

This case arises out of the proceedings in the compulsory liquidation of the Marlow Rolls Theatres Ltd. (hereinafter called "the Company"), of which the appellant is the official liquidator. The Company, which had a brief existence, was incorporated in New South Wales on 29th December 1928, and went into liquidation on 4th September 1929.

The appellant sought to place the respondent on the list of contributories in respect of 8,000 preference shares allotted to him by the directors of the Company on 12th March 1929, on the respondent's application therefor dated 7th March 1929. The respondent disputed his liability to be placed on the list of contributories on the ground that no preference shares were ever validly created by the Company. There was no resolution of the Company creating preference shares, and the sole question in this appeal is whether the directors had power under the memorandum and articles of association of the Company to issue these shares to the respondent.

On 3rd May 1930 the Master in Equity decided that the respondent was not liable as a contributory ; this order was reversed on 13th October 1930 by the Supreme Court of New South Wales (*Harvey* C.J. in Eq.), but was restored by the High Court of Australia on 17th December 1931 (*Rofe* v. *Campbell* (1)), from whose decision the present appeal is taken.

Clause 5 of the Company's memorandum is as follows : "5. The capital of the Company is £250,000 divided into 250,000 shares of £1 each, with power to divide the shares in the capital for the time

(1) (1931) 45 C.L.R. 82.

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being into several classes and to attach thereto respectively and" (*sic*) "preferential, deferred, qualified, or special rights, privileges or conditions."

The relevant articles of association are as follows:—"7. The capital is £250,000 and comprises 250,000 shares of £1 each." "10. The shares shall be under the control of the directors who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such times as the directors think fit and with full power to give to any person the call of any shares either at par or at a premium and for such time and for such consideration as the directors think fit. The directors may reserve any of the shares in the original or increased capital of the Company upon such terms as to payment for same and otherwise as they may deem expedient." "46. The Company in general meeting may from time to time increase the capital by the creation of new shares of such amount as may be deemed expedient." "48. The new shares shall be issued to such persons and upon such terms and conditions and with such rights and privileges annexed thereto as the general meeting resolving upon the creation thereof shall direct and if no direction be given as the directors shall determine and in particular such shares may be issued with a preferential or qualified right to dividends and in the distribution of the assets of the Company and with a special or without any right of voting." "50. Except so far as otherwise provided by the conditions of issue" (*sic*) "or by these presents any capital raised by the creation of new shares shall be considered part of the original capital and shall be subject to the provisions herein contained with reference to the payment of calls and instalments transfer and transmission forfeiture lien voting and otherwise. 51. The Company may from time to time by special resolution reduce its capital by paying off capital or cancelling capital which has been lost or is unrepresented by available assets or reducing the liability on the shares or otherwise as may seem expedient and capital may be paid off upon the footing that it may be called up again or otherwise. Provided that should a part of the issued capital at any time consist of preference shares the repayment of such preference share capital shall not be affected unless the holders of at least three fourths of the preference shares

shall so agree." "117. The management of the business of the Company shall be vested in the directors who in addition to the powers and authorities by these presents or otherwise expressly conferred upon them may exercise all such powers and do all such acts and things as may be exercised or done by the Company and are not hereby or by statute expressly directed or required to be exercised or done by the Company in general meeting but subject nevertheless to the provisions of the statutes and of these presents and regulations from time to time made by the Company in general meeting. Provided that no regulations so made shall invalidate any prior act of the directors which would have been valid if such regulations had not been made. 118. The board may from time to time at their discretion raise or borrow or secure the payment of any sum or sums of money for the purposes of the Company. 119. The board may raise or secure the payment or repayment of such moneys in such manner and upon such terms and conditions in all respects as they think fit and in particular by the issue of debentures or debenture stock (terminable or perpetual) of the Company charged upon all or any part of the property and assets of the Company (both present and future) including its uncalled and/or unpaid capital for the time being." "127. Subject to the rights attached to shares issued on special conditions and subject as aforesaid the profits of the Company shall be divisible among the members in proportion to the capital paid up or deemed to be paid up on the shares held by them respectively. Provided that where capital is paid up on any shares in advance of calls upon the footing that the same shall carry interest such capital shall not whilst carrying interest confer a right to participate in profits." "146. Each holder of registered shares whether preference or ordinary whose registered place of address is not in the Commonwealth of Australia may from time to time notify in writing to the Company an address which shall be deemed his registered place of address within the meaning of these articles of association. 147. As regards those members whether holding preference or ordinary shares who have no registered place of address a notice posted up at the office shall be deemed to be well served on such members at the expiration of twenty-four hours after such posting up." "154. If the Company shall be

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wound up and the assets available for distribution among the members as such shall be insufficient to repay the whole of the paid-up capital such assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid up or deemed to be paid up or which ought to have been paid up at the commencement of the winding up on the shares held by them respectively. And if in a winding up the assets available for distribution among the members shall be more than sufficient to repay the whole of the capital paid up or deemed to be paid up at the commencement of the winding up the excess shall be distributed among the members in proportion to the capital at the commencement of the winding up paid up or deemed to be paid up or which ought to have been paid up on the shares held by them respectively. But this clause is to be without prejudice to the right of the holders of shares issued upon special terms and conditions."

The respondent's application for preference shares was in response to a prospectus issued by the directors early in 1929, offering 22,000 ten per cent cumulative participating preference shares of £1 each for public subscription, and the question is whether the issue of these preference shares was within the powers conferred on the directors by art. 10 or otherwise by art. 117.

It is agreed that, under the express terms of the memorandum, there is a corporate power to issue preference shares, and the points for decision are (*a*) whether the existing articles, so long as unaltered, restrict the Company to the issue of shares with equal rights, in which case the directors cannot hold any wider powers under art. 10 or art. 117, or (*b*) if the Company is not so restricted, whether the power of the Company to issue different classes of shares is communicated to the directors by either of these articles. The New South Wales company law, which is governed by the *Companies Act* of 1899 of New South Wales, as regards the issue in this case may be taken as similar to the English company law of that period.

The Master in Equity held that art. 7 constituted an agreement on the part of the members of the Company that the shares in the original capital should be characterized by equality *inter se*, and that none of the other articles modified that agreement. In his view, art. 10 referred to terms and conditions to be attached to

allotment and disposal of shares, but not to terms and conditions altering the character of the shares themselves, and the powers conferred on the directors by art. 117 could not include a power which the Company did not itself possess. He based his conclusion on the opinion of Lord *Macnaghten* in *British and American Trustee and Finance Corporation* v. *Couper* (1).

On appeal, *Harvey* C.J. in Eq. declined to accept the Master's construction of art. 7, and stated :—" Whether the memorandum says that the Company may issue shares of different classes or is silent on the subject, it is clear law that the Company has the power to issue shares of different classes, and the only question is whether it is incumbent on the Company in its articles of association to say that it does propose to do so before it can effectively exercise that power. In my opinion the decision in *Andrews* v. *Gas Meter Co.* (2) must be taken as indicating that the Court of Appeal considered that such an expression of intention had to be found within the four corners of the articles of association." He further stated :—" It is not necessary, of course, that the words ' preference shares ' or ' different classes of shares ' should be used ; all that is necessary is that the articles should contain some express words indicating that all shareholders may not necessarily be on the same footing. That being so, it is necessary to turn to these articles to see whether there is such an express provision in them. Art. 117 does not, in my opinion, touch the matter. That article does not give the directors power to do anything which the Company itself, in general meeting, could not do. The case is then narrowed down to the question whether art. 10 authorizes the directors to issue preference shares." On consideration of art. 10, and certain other articles, the learned Judge held that the words " terms and conditions " included preferential rights.

In the High Court of Australia (3) the learned Judges unanimously held (1) that it could no longer be maintained that art. 7 amounted to a contract *inter socios* that the shares should be uniform and rank equally ; (2) that art. 10 did not deal with the classification of shares but only with the terms and conditions of their allotment

(1) (1894) A.C. 399, at p. 417. (2) (1897) 1 Ch. 361.
(3) (1931) 45 C.L.R. 82.

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and disposal; and (3) that art. 117 was concerned only with the management of the business of the Company and not with the relations of members of the Company *inter se*.

The law on this subject is very fully laid down in the judgment of the Court of Appeal, delivered by *Lindley* L.J., in *Andrews* v. *Gas Meter Co.* (1), where the earlier decisions are reviewed and the dictum of Lord *Macnaghten* in *British and American Trustee and Finance Corporation* v. *Couper* (2) is referred to. The law may be summarized as follows:—While the memorandum must state the amount of capital, divided into shares of a certain fixed amount, provision as to the character of the shares and rights to be attached to them is more properly made by the articles of association, which may be altered from time to time by special resolution of the company. If equality of the shareholders is expressly provided in the memorandum, that cannot be modified by the articles of association. If nothing is said in the memorandum, the articles of association may provide for the issue of the authorized capital in the form of preference shares; if the articles do not so provide, or do provide for equality *inter socios*, the power to issue preference shares may be obtained by alteration of the articles. If the memorandum prescribes the classes of shares into which the capital is to be divided and the rights to be attached to such shares respectively, the company has no power to alter that provision by special resolution.

The present case is not dealt with in that judgment, and appears to have now arisen for decision for the first time, for here the memorandum deals with the matter to the extent of giving the Company power to issue *inter alia* preference shares as part of the original capital. In the existing articles there is no express provision for preference shares as part of the original capital, but there is such express provision as regards any future issue of new shares. In these circumstances their Lordships are of opinion that, in the absence of any article clearly restricting the Company in that respect, the Company is entitled to exercise the powers expressly conferred on it by the memorandum. Their Lordships are unable to find any such restriction in the existing articles, and they are accordingly of

(1) (1897) 1 Ch. 361. (2) (1894) A.C., at p. 416.

opinion that the Company has power to issue part of the original capital as preference shares.

As regards the powers conferred on the directors by art. 10, their Lordships have come to the conclusion that they include the power to control the character of the shares and that the words " terms and conditions " have a wider meaning than the respondent seeks to have placed upon them. Any uncertainty arises from the want of consistency in the use of the words rights, privileges, terms and conditions throughout the articles, but it seems clear that in art. 127 the term " conditions " is used as including provisions as to preferential rights.

In this view, art. 117, which only purports to confer additional powers, does not include the powers conferred by art. 10; but, if their Lordships had taken a different view as to art. 10, they would have been prepared to hold that art. 117 clearly delegated to the directors power to do everything that the Company could do except where the authority of a general meeting of the Company is expressly prescribed, and that such delegation would include power to issue preference shares. Their Lordships are unable to agree with the narrow construction of the words " management of the business of the Company " adopted by the High Court.

Their Lordships are therefore of opinion that the respondent is liable to be placed on the list of contributories, that the order appealed from should be reversed and that the order of the Chief Judge in Equity should be restored, the appellant to have the costs of this appeal and his costs in the High Court. Their Lordships will humbly advise His Majesty accordingly.