[HIGH COURT OF AUSTRALIA.]

JOSEPH . . . . . APPELLANT;
APPLICANT,

AND

CAMPBELL (LIQUIDATOR OF THE LONDON FURNISHING COMPANY LIMITED (IN LIQUIDATION)) . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 9, 10, 14.

Rich, Dixon, and McTiernan JJ.

Company—Winding up—Contributory—Shares—"Payment in cash"—Formation of company—Cross-cheques—Intention of the parties—Concurrent counter payments—Companies Act 1899 (*N.S.W.*) (*No.* 40 *of* 1899), *sec.* 55.

J. and his wife were the only shareholders of L. Ltd., furniture manufacturers. J. resolved to set up another business and for that purpose to incorporate another company. Delay occurred in the registration of the proposed company, and J, therefore, opened the business under a trade name. He obtained £1,000 from L. Ltd. for the purpose of meeting the expenses of establishing and conducting the business, including the purchase of stock-in-trade. Other stock-in-trade, to the value of £800 16s. 6d., was supplied by L. Ltd. That business was taken over by the new company, F. Ltd., upon its incorporation. No record was made of any terms upon which the business was taken over. F. Ltd. continued the same set of books of account. On 18th April 1928, J. drew in the name of F. Ltd. a cheque for £1,800 in favour of L. Ltd. The bank account of F. Ltd. was not opened until 20th April. On that day L. Ltd. drew a cheque for a like amount in favour either of J. or F. Ltd., it did not appear which, and debited the amount of the cheque in its books as an advance against J. On the same day J. applied to F. Ltd. for 1,800 shares and paid L. Ltd.'s cheque into F. Ltd.'s bank account, thus opening the account. In his application he said: "I have paid to the company's bank at Newcastle

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the sum of £1,800, being at the rate of £1 per share." On 23rd April, F. Ltd.'s cheque of 18th April was presented for payment and the amount debited to its account. In the books of F. Ltd. the amount of the cheque was treated as a payment on account of the liabilities to L. Ltd. which had been incurred in the establishing of the business taken over by F. Ltd. All the shares in F. Ltd., except six, were held by J. The liquidator of F. Ltd. placed J. on the list of contributories as liable to pay £1,800 for the shares allotted to him.

Held that J. had been wrongly so placed on the list. He had paid for the shares in cash, within the meaning of sec. 55 of the *Companies Act* 1899 (N.S.W.), and the transaction was not illusory, inasmuch as the payment and counter-payment by cross-cheques were, in the circumstances, no more than a formal expression of the payment of share capital and a concurrent but legitimate application of the share capital by F. Ltd. to discharge an actual liability incurred in the acquisition of its assets.

Decision of the Supreme Court of New South Wales (*Harvey* C.J. in Eq.): *In re The London Furnishing Co. Ltd.*; *Ex parte Louis Joseph*, (1933) 50 N.S.W.W.N. 106, reversed.

APPEAL from the Supreme Court of New South Wales.

Alexander Ewan Campbell, the liquidator of the London Furnishing Co. Ltd. (in liquidation), placed the name of Louis Joseph on the list of contributories of that company as the holder of one thousand eight hundred £1 shares on which the sum of £1,800 was alleged to be unpaid.

By a summons under the *Companies Act* 1899 (N.S.W.), Joseph made an application to the Supreme Court of New South Wales, in its equitable jurisdiction, for the removal of his name from the list on the ground that he had paid for the shares in cash, or, alternatively, that there was a contract which could be registered as entitling him to set off cash due to him against the cash due for the shares. The alternative ground was not, however, pressed.

Harvey C.J. in Eq. dismissed the application, but held that Joseph was entitled to prove as a creditor in respect of transactions under which the company took a business over from him and used his assets: *In re The London Furnishing Co. Ltd.*; *Ex parte Louis Joseph* (1).

From that decision Joseph now appealed to the High Court.

The material facts are sufficiently shown in the judgment of the Court hereunder.

(1) (1933) 50 N.S.W.W.N. 106.

Bonney K.C. (with him *Spender*), for the appellant. The evidence shows that shares allotted to the appellant were paid for either by stock supplied, or directly by cheque for £1,800. Payment by cheque is payment by cash, and is operative from the time the cheque is handed over. It is a payment which is effective unless it is shown that the cheque was dishonoured. It follows then that the shares in question were paid for in cash. The transaction was carried out honestly and the liquidator has not discharged the burden which lies upon him of establishing a specific fraud. The cheque for £1,800 received from the appellant by the respondent company must be taken as a cash payment for the shares, which therefore, must be regarded as fully paid up. The payment for the shares was actually received by the company. What the company did with the money after its receipt is immaterial. The surrounding circumstances do not disclose any fraud on the part of the appellant. The facts show that there was in law an undertaking by the respondent company to indemnify the prior owner of the business against the debts which had been incurred in respect of that business. That implied indemnity warranted the payment made by the respondent company, which by virtue of that indemnity owed the money on account of the business taken over. The company cannot be said to have acted *ultra vires*, improperly, or fraudulently by reason of having paid all its debts before due date. If fraud is alleged it should have been charged in clear and definite terms (*Salomon* v. *Salomon & Co.* (1); *Larocque* v. *Beauchemin* (2)). The fact that the appellant took exactly the number of shares necessary to liquidate the company's obligation shows that his object was to assist the company, not to control it. He could have achieved the latter object by taking a much smaller number of shares. When used by laymen, accountancy terms, e.g., book-entry, cross-entry, should be given a liberal interpretation. The entries here in question are adjusting entries and, without more, are not fraudulent (*In re Washington Diamond Mining Co.* (3); *Spargo's Case* (4)). Payment is effected as soon as the cheque is received by the payee (*Marreco* v. *Richardson* (5)). The parties

(1) (1897) A.C. 22, at p. 35.
(2) (1897) A.C. 358.
(3) (1893) 3 Ch. 95, at p. 110.
(4) (1873) 8 Ch. App. 407.
(5) (1908) 2 K.B. 584.

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were entitled to determine the liability themselves. In this respect, which involves set-off, the case is similar to the case of *North Sydney Investment and Tramway Co.* v. *Higgins* (1) which meets the case of *In re Johannesburg Hotel Co.*; *Ex parte Zoutpansberg Prospecting Co.* (2). The evidence shows that the payment by cheque on 23rd April of £1,800 by the London Furnishing Co. to Louis Joseph Proprietary Ltd. was not a sham return to the appellant of the £1,800 paid on 20th April in respect of the shares, but was a proper and genuine payment to that company.

Williams, for the respondent. The payment of £1,800 by the appellant for the shares was not a real payment. There is no evidence of any agreement between the appellant and the company by which the company agreed to pay him, or on his behalf, the sum of £1,800 in respect of the taking over of the business. The case of *In re Washington Diamond Mining Co.* (3) does not assist the appellant. There the question before the Court was whether the transaction under review was a preference; the question whether it was a sham payment did not arise and was not considered. As to whether there was a real payment in cash by the appellant in respect of the shares within the meaning of sec. 55 of the *Companies Act*, see *The Commissioner of Stamp Duties* (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.* (*Saxton's Case*) (4). The company was a separate entity in every way from the business previously carried on by the appellant under the name of Lionel Emanuel, but this distinction was not realized by the appellant. The evidence does not disclose the existence of a contract, either express or implied, for the sale of the Emanuel business to the company for the sum of £1,800, and that such sale was the real nature of the transaction. At the material time the value of the assets of the Emanuel business was considerably less than £1,800. It was doubtless thought by the appellant that a cheque for £1,800 paid to the company and immediately drawn out would amount to a payment under sec. 55 of the *Companies Act*. On the question as to whether the transaction constituted a real payment in cash within the meaning of sec. 55 it is not necessary

(1) (1899) A.C. 263.
(2) (1891) 1 Ch. 119.
(3) (1893) 3 Ch. 95.
(4) (1929) 43 C.L.R. 247.

to suggest that the appellant was engaged in any way in perpetrating a fraud. The cheques drawn by the appellant and the company respectively were simply cross-cheques, and the result of the transaction was that the company received no cash credit: therefore, the requirement of sec. 55 as to payment in cash was not satisfied (*Saxton's Case* (1)).

Bonney K.C., in reply. In *Saxton's Case* (1) the company concerned attempted to lend its funds for the purpose of buying its own shares, which is a very different question from that which arises in this case. As to the meaning of "payment in cash," see *In re Matthew Ellis Ltd.* (2).

Cur. adv. vult.

Aug. 14.

THE COURT delivered the following written judgment:—

The appeal is from an order of *Harvey* C.J. in Eq., which dismissed an application on the part of the appellant for the removal of his name from a list of contributories. The list of contributories was settled by the liquidator of The London Furnishing Co. Ltd. (in liquidation). It imposed upon the appellant a liability in respect of 1,800 shares of £1 each upon the footing that no amount had been paid up thereon. The question for decision is whether the appellant did or did not pay up in cash the capital represented by these shares. The appellant and his wife were the only shareholders of a company incorporated in Victoria called Louis Joseph Pty. Ltd., the business of which he conducted. This company had a branch of its business in Sydney and a branch at Newcastle. The appellant resolved to set up another business in Newcastle and for that purpose to incorporate another company, but under the law of New South Wales. Some delay occurred in the registration of the proposed company, and, in the meantime, it became necessary to secure a lease of the premises which the appellant desired to use for the new business. The appellant, therefore, opened the business under a trade name, Lionel Emanuel, before the company was registered. He obtained £1,000 from Louis Joseph Pty. Ltd., by

(1) (1929) 43 C.L.R. 247. (2) (1933) Ch. 458.

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drawing two cheques of £500 each upon its bank account, which, indeed, he appears to have used as his ordinary means of banking. This sum was applied in meeting the expenses of establishing and conducting the business, including the purchase of some of the stock-in-trade. The remainder of the stock-in-trade was supplied by Louis Joseph Pty. Ltd., and debited to the new business at Newcastle. This business was opened at the end of January 1928. The Company was registered on 5th April 1928, and is the liquidating Company. Before the date of the incorporation goods had been supplied to the business by Louis Joseph Pty. Ltd. to the amount of £800 16s. 6d. Upon its incorporation the liquidating Company took over the business. No formal agreement was drawn up and no record was made of any terms upon which the business was so taken over. The name of the Company was substituted for the trade name previously used. It continued the same set of books of account, which were made up upon the footing of a business commencing its accounting period at the end of January 1928, and contained no record or suggestion of any change of ownership on the new Company's registration. A bank account had been maintained under the trade name previously used, and into this bank account the two cheques, amounting to £1,000, of Louis Joseph Pty. Ltd. had been paid at the end of January 1928. A new account was opened in the name of the Company after its incorporation and the old account was closed by transferring to the account of the new Company, by means of a cheque, the amount standing at the credit of the old account, which was £172 12s. 2d. Upon its registration, the memorandum of association of the Company was subscribed by seven persons in respect of one share each: otherwise no share capital had been issued. On 18th April 1928, the appellant drew in the name of the liquidating Company a cheque for £1,800 in favour of L. Joseph Pty. Ltd. The bank account of the liquidating Company was not opened until 20th April 1928. On that day a cheque was drawn in the name of L. Joseph Pty. Ltd. on that Company's account for a like amount in favour either of the appellant or of the liquidating Company, it does not appear which. In the books of Louis Joseph Pty. Ltd., the amount of the cheque was debited against the appellant as an advance to him. On 20th April 1928 the appellant made out

an application to the liquidating Company for 1,800 shares and paid the cheque for £1,800 into that Company's bank account, thus opening the account. In his application he said: "I have paid to the Company's bank at Newcastle the sum of £1,800 being at the rate of £1 per share." On 23rd April 1928 the liquidating Company's cheque of 18th April was presented for payment and the amount debited to its account. It is this transaction which the appellant relies upon as constituting a payment up of the amount of the shares which were allotted to him in pursuance of his application.

The decision appealed from denies that a payment in cash in respect of the shares took place, on the ground that the cheques were no more than cross-cheques representing no actual payment. There can be no doubt that the two cheques were meant to effect concurrent counter-payments. When the cheque of Louis Joseph Pty. Ltd. was given in payment of the liability upon the shares, it was intended that, by means of the cheque of the same amount which had, on 18th April, been issued in the name of the liquidating Company, its proceeds should be at once withdrawn from the bank account to which it would be credited. If the liquidating Company issued that cheque neither in payment of a liability which it was bound to discharge, nor in exchange for some equivalent consideration, it would, in our opinion, be clear that the effect of the transaction was to leave the liability upon the shares undischarged. Although the cheque would have been credited to the liquidating Company's account as money, yet inasmuch as it was appropriated to answer the Company's own outstanding cheque, it would not form part of the liquidating Company's general resources, and the Company would not have been put in funds by the transaction. Upon this hypothesis the appellant would remain liable for the amount of the shares. The rules of law which bring about this result are not in doubt. They are stated in *The Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Saxton's Case)* (1) in the judgment of *Knox* C.J. and *Dixon* J. as follows:—"The provision contained in sec. 25 of the English *Companies Act* 1867 is in force in New South Wales: it is sec. 55 of the New South Wales *Companies Act* 1899. Therefore, in the absence of a filed agreement providing

(1) (1929) 43 C.L.R., at pp. 263-264.

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for some other form of payment, shares must be paid up in cash. It is, of course, well settled that when the liability upon shares and the liability upon a cross-demand against the company of a sum certain immediately payable are mutually extinguished by an agreed set-off, this amounts to payment within the section. (See *Larocque* v. *Beauchemin* (1); *North Sydney Investment and Tramway Co.* v. *Higgins* (2).) The circuity involved in actual cross-payments is dispensed with. *Spargo's Case* (3), *Fothergill's Case* (4), *Larocque's Case* (5) and *Higgins' Case* (2) were directed to the application to the requirements of this section of the principles of the common law which enabled payment to be effected without circuity. But these principles are called into play only for the purposes of sec. 25, and only where there is a sum lawfully payable by the company which when paid might lawfully be repaid to the company in discharge of the liability upon the shares. The liability upon shares cannot be discharged unless the company obtains in funds or assets that which is, or is supposed to be, a real equivalent to the capital represented by the shares." But does the same result follow, if the cheque drawn against the proceeds of the cheque given in respect of the share capital is used to discharge an actual liability of the liquidating Company, or is applied in the acquisition of assets? In our opinion it does not. If the Company's assets are increased or the actual liabilities diminished to the extent of £1,800 as a result of the transaction, it appears to us that, in substance, the share capital of the Company has been supplied to it and utilized by it for a legitimate purpose. No objection can be made that if the share capital has been provided it has not been provided in cash. The payment of a cheque credited to the bank account is a cash payment. The complaint is not, as so often is the case under sec. 55 of the *Companies Act* of New South Wales (sec. 25 of the English *Companies Act* 1867), that, although the share capital is provided, it is not paid in cash. It is that an apparent payment in cash is illusory because it is annihilated by a counter-payment. The real question appears to us to be whether the counter-payment restores the first payment to the payer or is an expenditure by the Company

(1) (1897) A.C., at p. 365.
(2) (1899) A.C. 263.
(3) (1873) 8 Ch. App. 407.
(4) (1873) 8 Ch. App. 270.
(5) (1897) A.C. 358.

in the discharge of its liabilities or for some other legitimate purpose. In other words, has share capital been paid but applied in the acquisition of assets or the discharge of liabilities ? If the Company had been registered on or before the date when the business was commenced, and the cheque for £1,800 in favour of L. Joseph Pty. Ltd. had been given in respect of stock-in-trade supplied by it, we think no doubt could be entertained of the propriety and efficacy of the transaction. But, because the registration of the Company was delayed, the Proprietary Company advanced the sum of £1,000 and supplied goods for the purpose of the Newcastle business. When the liquidating Company took over the business as a going concern a formal agreement might have been made imposing on the Company, as part of the consideration for the acquisition of the business, the obligation to reimburse the Proprietary Company in respect of these advances and goods, and in that case, we think that there could have been no doubt that the shares would have been effectually paid up. But the transfer of the business to the new Company was accomplished merely by putting the Company in possession of the enterprise, and was accompanied by no express statement of the terms upon which it was done. Did it involve the Company in any implied obligation to discharge the debts of the business, or to reimburse the expenditure incurred in connection with it ? In the judgment appealed from, *Harvey* C.J. in Eq. answers this question in effect, by saying that it is a reasonable inference that the Company took over the business on a " walk in, walk out " basis, indemnifying the appellant against any liabilities which he had incurred up to the date of the Company's taking over the business and that his Honor believes this is what would be held to be the implied contract. We agree that a contractual relationship was created between the appellant and the new Company, but we think the obligation implied is a little more than mere indemnity. When the affairs of two or more companies or enterprises are governed by the decisions of one mind, the absence of any formal expression of an intention to contract often means that no contractual intention existed. But, in the present case, the plan upon which the transaction proceeded is clear, and, in our opinion, that plan necessarily involved the assumption of obligations on the part of the Company. The plan was that the

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Company, upon its registration, should assume the proprietorship of the business retrospectively as from its inception. Upon this footing the accounts of the business continued as if the Company had existed at the beginning and the books of account were its books, the receipts, whether of capital or revenue, its receipts; and the expenditure, its expenditure. The first balance-sheet was made up as for an accounting period beginning at the end of January when the business was established and before the Company was incorporated. Even apart from the oral evidence and depositions, all this makes it clear that there was a real intention that, in acquiring the benefit of the business, the Company should do so upon terms that it should bear all the burdens incurred as from the establishment of the business which was set up in anticipation of the Company's formation. Those burdens had necessarily been imposed upon the appellant, and the books, particularly the private ledger, show that they were considered as undertaken by the Company. The true implication is, we think, that the Company should reimburse the moneys provided and discharge the expenditure incurred pending its registration. In the accounts the sum of £1,800 represented by its cheque of 18th April 1928 is treated as a payment on account of the liabilities of the business to Louis Joseph Pty. Ltd., incurred from 28th January to 31st December 1928, that is, by the successive proprietors for the time being of the business. Among these liabilities are included the advance of £1,000 and the price of the goods supplied. It follows that the payment should be taken as made in intended discharge or recoupment of these sums. The books of Louis Joseph Pty. Ltd. are not in evidence, but we do not think we should assume that the payment was not there credited accordingly.

In these circumstances we are of opinion that the cross-cheque was given and used to discharge an actual liability of the Company incurred in the acquisition of its assets. The result appears to us to be strictly in accordance with the policy of the company law, because the actual outlay incurred in establishing the enterprise for the benefit of the intended Company was thrown against share capital and this was done when the enterprise was fresh and before it underwent any material change or deterioration. Although payment and counter-payment by cross-cheques may raise suspicion,

yet, in this case upon examination, it turns out to be no more than a formal expression of the payment of share capital and a concurrent but legitimate application of the share capital so paid.

For these reasons we think the appeal should be allowed.

The order of the Supreme Court dismissing the summons should be discharged, and, in lieu thereof, it should be ordered that the appellant should be settled on the list of contributories of the London Furnishing Co. Ltd. (in liquidation) in respect of 1,800 shares fully paid up instead of 1,800 shares upon which nothing has been paid up. The appellant should have his costs in the Supreme Court of the summons and his costs of this appeal out of the assets of the Company.

Appeal allowed. Order of the Supreme Court discharged. In lieu thereof, order that the list of contributories of London Furnishing Co. Ltd. (in liquidation) be varied by settling the appellant thereon as the holder of 1,800 *shares fully paid up at the commencement of the winding up instead of* 1,800 *shares upon which no amount was paid up. The appellant's costs of this appeal and of the summons in the Supreme Court to be paid by the respondent out of the assets of the Company.*

Solicitors for the appellant, *Braund & Watt.*

Solicitor for the respondent, *W. G. Hayes-Williams.*

J. B.