[HIGH COURT OF AUSTRALIA.]

O'FLAHERTY . . . . . APPELLANT;
APPELLANT,

AND

CARCARY . . . . . RESPONDENT
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Sept.* 10, 12.

Rich, Dixon and McTiernan JJ.

Company reconstruction—Resolutions—Shareholder disapproves—Notice of disapproval—Time when notice should be given—Notice given before resolutions passed—Companies Act 1893 (*W.A.*), (*No.* 8 *of* 1893), *sec.* 176*.

At an extraordinary general meeting of a company held on 19th December 1932 two resolutions were passed, one to wind up the company voluntarily, and the other to appoint a liquidator. The meeting was then adjourned for a month. On 20th December a shareholder wrote to the liquidator dissenting from "the proposal of reconstruction that was carried at a meeting held on the 19th December 1932," and requiring him to refrain from carrying the resolution into effect, or to purchase the shareholder's shares as provided by the *Companies Act* 1893 (W.A.). The adjourned meeting was held on 19th January 1933, and the resolution for reconstruction was carried, the liquidator having previously received the shareholder's letter.

Held, that the notice of 20th December 1932 was a good notice of dissent, and complied with the requirements of the *Companies Act* 1893 (W.A.), sec. 176.

Decision of the Supreme Court of Western Australia (Full Court) reversed.

* The *Companies Act* 1893, sec. 176, provides as follows:—"In the case mentioned in the next preceding section, if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member, at the meeting held for passing the same, expresses his dissent from any such special resolution in writing, addressed to the liquidator, and left at the registered office of the company, not later than seven days after the date of the meeting at which such resolution was passed, such dissentient member may require the liquidator to do one of the following things, as the liquidator may prefer, that is to say—either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned . . ."

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APPEAL from the Supreme Court of Western Australia.

An order was made in Chambers which declared that the appellant had not expressed his dissent in accordance with the provisions of sec. 176 of the *Companies Act* 1893, to a special resolution for reconstruction passed at an extraordinary general meeting of a certain company, and that the liquidator should not treat the appellant as a dissentient member within the meaning of secs. 176 and 178. A meeting was convened and held on 19th December 1932, for the purpose of passing five resolutions of which only two were passed, namely, resolutions that the company should be wound up and a liquidator appointed. The meeting was then adjourned for one month. The appellant, by notice of dissent dated 20th December 1932, required the liquidator to refrain from carrying out the resolution as to the proposal of reconstruction, or to purchase his interest at the price determined by the provisions of the Act. On 22nd December the liquidator issued a notice to the shareholders informing them of the passing of the two resolutions, and that the adjourned meeting would be held on 19th January 1933 for the purpose of considering and if thought fit, of passing the remaining three resolutions which were before the meeting on 19th December 1932, one of which provided for the reconstruction of the company. The adjourned meeting was held on 19th January 1933, and the resolution to reconstruct was carried. The appellant had received the notice of the liquidator, but did nothing until 1st February 1933, when he wrote to the liquidator pointing out that his letter of 20th December 1932 still held good. On 14th February 1933 the liquidator wrote to the appellant, and said that his letter of 20th December 1932 was ineffectual, because the special resolution objected to had not then been passed. From the order in Chambers appellant appealed to the Full Court of Western Australia. The Full Court dismissed the appeal, and from this decision the appellant now appealed to the High Court.

Downing K.C. and *Bath*, for the appellant. Sec. 176 of the *Companies Act* does not require a literal performance by a dissentient shareholder; all that is required is that the liquidator should receive written notice of the dissent not later than seven days after the date of the meeting at which a resolution under sec. 175 has been passed.

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Under sec. 177, a liquidator may be appointed after the resolution has been passed. There is nothing to indicate that a dissentient notice may not be sent even before the meeting is held. A similar section was considered by *Chitty* J. in *Re London and Westminster Bread Co.* (1). Strict compliance had never been deemed essential. (See *Brailey* v. *Rhodesia Consolidated Ltd.* (2); *Re Needhams Ltd.* (3)). The section defines the ultimate point of time before which the notice of dissent must be given, and is in fact a statute of limitations (*In re Frank Harris Granite Co.* (*No.* 1) (4)). As a fact the notice of dissent was given within seven days after the holding of the meeting. The meeting was held, and after two resolutions had been passed, was adjourned for one month. The adjourned meeting was a continuation of the original meeting (*Scadding* v. *Lorant* (5)).

[RICH J. referred to *Catesby* v. *Burnett* (6).

[DIXON J. referred to *Neuschild* v. *British Equitorial Oil Co.* (7).]

In any event the written dissent which the liquidator received was a continuing notice (*Re London and Westminster Bread Co.* (1); *Wills* v. *Murray* (8)).

Lappin and *Riley*, for the respondent. The time runs from the date when the particular resolution was passed. *Catesby* v. *Burnett* (6) distinguishes the validity and effect of the resolutions passed. The special resolution had been passed and carried at the meeting held on 19th December 1932. Sec. 176 is an enabling section and therefore must be construed strictly; it differs from the section in the New Zealand Act referred to in *In re Frank Harris Granite Co.* (*No.* 1) (4), which is a disabling section, and in that case the statutory meeting effects nothing; but in this case the resolution is what is operative.

Downing K.C., in reply.

Cur. adv. vult.

(1) (1890) 59 L.J. Ch. 155.
(2) (1910) 2 Ch. 95.
(3) (1923) 130 L.T. 256.
(4) (1913) 32 N.Z.L.R. 835.
(5) (1851) 3 H.L. Cas. 418; 10 E.R. 164.
(6) (1916) 2 Ch. 325.
(7) (1925) Ch. 346.
(8) (1850) 4 Exch. 843; 154 E.R. 1458.

THE COURT delivered the following written judgment:—

RICH, DIXON AND MCTIERNAN JJ. This appeal is brought by special leave against an order of the Full Court of Western Australia affirming a decision of *Dwyer* J., which declared that the appellant had not expressed his dissent, in accordance with sec. 176 of the *Companies Act* 1893 (W.A.), from special resolutions for reconstruction adopted by the company of which the respondent is liquidator, and in the capital of which the appellant holds 250 shares.

The ground of the decision appealed against is that the appellant gave no notice of dissent which was, within the meaning of sec. 176, "left at the registered office of the company not later than seven days after the meeting at which such resolution was passed." He gave two notices of dissent, which, except for the time when they were given, would be considered sufficient notices of dissent. One was given before the actual adoption of the resolution. Another was given more than seven days after it was passed. The secretary of the company issued a notice to shareholders, dated 3rd December 1932. It notified them of an extraordinary general meeting to be held on 19th December 1932 in Perth for the purpose of considering five resolutions, and passing them as special resolutions. Briefly stated they were:—(1) To wind up voluntarily owing to its being desirable to reconstruct; (2) to appoint a liquidator; (3) to authorize him to register a new or reconstructed company; (4) to approve of a draft agreement to be made with a person on behalf of the company so intended to be registered, and to authorize the liquidator to enter into it; (5) to approve of an underwriting agreement relating to a proposed issue of shares by the new or reconstructed company.

This notice was received by the appellant who appears to reside in Adelaide. He did not attend the meeting of 19th December 1932. On that day the two first resolutions only of those proposed were carried. The meeting was adjourned until 19th January 1933 for the purpose of considering the remaining three proposed resolutions.

Evidently believing that all five resolutions had been passed, the appellant wrote on 20th December 1932 to the liquidator that he dissented "from the proposal of reconstruction that was carried by

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special resolution at a meeting held on 19th December 1932," and that he required him to refrain from carrying it into effect, or to purchase his interest at a price to be determined under the *Companies Act*. This notice was received by the liquidator before the expiry of seven days from the adoption of the resolution for winding up and the appointment of the liquidator. But sec. 176 requires a notice of dissent, not from those resolutions, but from the resolution mentioned in sec. 175 and described in sec. 176 as " such resolution." The resolution referred to in sec. 175 is one conferring authority on the liquidator to receive shares in compensation for the transfer of assets on the reconstruction.

On 22nd December 1932, the liquidator issued a notice to shareholders informing them that the first and second resolutions proposed at the meeting of 19th December 1932 had been passed, and that the meeting had been adjourned to 19th January 1933 to consider the remaining three proposed resolutions. The appellant received that notice, but when does not appear. He did nothing in relation to it until 1st February 1933, when he wrote to the liquidator that his letter of 20th December 1932 still held good, and the liquidator must refrain from carrying out the proposal to reconstruct, unless he first satisfied the objection of the appellant, who claimed 10s. a share. In the meantime, the three resolutions had been passed at the meeting of 19th January 1933.

Under the law of Western Australia, which in this respect anticipated the British *Companies Act* of 1929, a confirmatory meeting is not necessary for the adoption of a special resolution (sec. 3 of the *Companies Act* 1893 (W.A.)).

The liquidator did not communicate with the appellant until 14th February 1933, when he wrote that his letter of 20th December 1932 was ineffectual because the special resolutions objected to had not then been passed.

Upon these facts we are of opinion that the notice of 20th December 1932 should be considered a good notice of dissent which sufficiently complies with the requirements of sec. 176. Upon the grammatical construction of the words " his dissent . . . in writing, addressed to the liquidator, and left at the registered office of the company, not later than seven days after the date of the meeting at which such resolution was passed," if those words are

considered alone, they fix only a point of time before which the notice must be given and do not express a requirement that it must be given after the actual passing of the special resolution. In terms these words contain nothing inconsistent with the validity of a notice given before the commencement of the period of seven days upon the expiry of which the power to dissent so as to acquire the rights given by sec. 176 ends. This appears to have been the view of *Chitty* J. in *Re London and Westminster Bread Co.* (1). But it does not follow that sec. 176 allows a notice of dissent to be given as from a mere proposal for a special resolution conferring authority on the liquidator to receive shares, &c., in compensation for a transfer of assets. The notice can be given only by a member "who has not voted in favour of the special resolution passed by the company of which he is a member at the meeting held for the passing of the same." The condition precedent which this statement expresses implies that the resolution has been passed, and that at its passing the member has not voted for its adoption. The next condition precedent stated by the section is that he "expresses his dissent from . . . such special resolution." The description "special resolution" connotes a proposal which has been resolved upon, not one which is still undecided. These considerations, however, do not require the conclusion that a paper containing a notice is ineffectual unless left at the registered office at a time in fact after the date of the meeting. The conclusion which they do require is that the notice must express more than mere disagreement from a proposal, mere opposition to a course supported by the proponents. It may anticipate the passing of the resolution, but it must express dissidence from it as from a decision actually taken, and state an intention to withdraw if it is carried into effect. It follows that the notice to be a good one must be intended to operate in respect of a resolution as and when passed by the company, but it does not follow that it may not be communicated to the liquidator before the actual adoption of the resolution to which it relates. What the section makes essential is that the liquidator shall be informed in writing that the member dissents from the resolution notwithstanding its adoption, and requires him either to abstain from

(1) (1890) 59 L.J. Ch. 155.

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carrying it into effect, or to purchase his interest at a price determined in the prescribed manner. Substantial compliance with this requirement is enough. Acceptance by the liquidator of a notice left with him elsewhere than at the registered office satisfies the provision (*Brailey* v. *Rhodesia Consolidated Ltd.* (1)). It is a sufficient compliance if the notice of dissent is sent to the liquidator at the company's office before the company goes into liquidation, and so before a liquidator is appointed (*Re Needhams Ltd.* (2), per *Tomlin* J.). In the present case the resolution was passed at an adjourned meeting. An adjourned meeting is a continuation of the original meeting (*Scadding* v. *Lorant* (3)). The meeting at which it was passed should be considered as one commencing on 19th December 1932 and terminating on 19th January 1933. The notice of 20th December 1932 was therefore given after the commencement of the meeting at which the resolution was adopted, but before its actual adoption (Cf. *Neuschild* v. *British Equitorial Oil Co.* (4)). It would, in our opinion, be a substantial and therefore sufficient compliance with the provision if a notice so given unmistakably expressed to the liquidator the member's unconditional dissent from the resolution if and when passed, and his requirement that the liquidator should either refrain from carrying it into effect, or purchase his interest in the appropriate manner.

The question remains whether the notice of 20th December 1932 amounted to such an expression of dissent. It is clearly based upon the mistaken assumption that the special resolution had been passed, and accordingly describes it as carried at a meeting held on 19th December 1932. In strictness this description can be justified, because, in point of law, the meeting commenced on that day, and is therefore correctly identified (*Neuschild* v. *British Equitorial Oil Co.* (4)). But the belief that the meeting had carried the resolution, and not a desire for technical accuracy, is the source of the description. Nevertheless the notice unequivocally intimates dissent from the proposal when resolved upon. In the circumstances it appeared from the terms of the notice itself that the appellant had acted not upon, but in anticipation, of advice that the resolution had been

(1) (1910) 2 Ch. 95.
(2) (1923) 130 L.T. 256.
(3) (1851) 3 H.L. Cas. 418; 10 E.R. 164.
(4) (1925) Ch. 346.

passed. The liquidator knew from what it contained that the appellant meant to dissent, if the resolution was adopted by the meeting pursuant to the notice of 3rd December 1932 summoning the meeting. If before the seven days commenced to run the liquidator had rejected the notice, perhaps the appellant could no longer have relied upon it. But this he did not do. The appellant might reasonably suppose that the liquidator accepted the notice as intended to operate in case the resolution was adopted before the meeting which had been adjourned closed.

In these circumstances we think the notice sufficiently complied with all the essential requirements of sec. 176.

For these reasons we think the appeal should be allowed, and the order of the Supreme Court should be discharged. In lieu thereof it should be declared that the appellant expressed his dissent in accordance with the provisions of sec. 176 of the *Companies Act* 1893 to the special resolutions passed at the extraordinary general meeting held on 19th December 1932 and adjourned to 19th January 1933, and is entitled to be treated as a dissentient member under secs. 176 and 178 of the said Act. The appellant should receive out of the assets of the company his costs of this appeal, of the appeal to the Full Court, and of the application to *Dwyer* J.

Appeal allowed. Discharge the order of the Full Court and the order of Dwyer J. In lieu of the order of Dwyer J., declare that the appellant expressed his dissent in accordance with the provisions of sec. 176 *of the Companies Act* 1893 *to the special resolutions passed at the extraordinary general meeting held on* 19*th December* 1932 *and adjourned to* 19*th January* 1933, *and is entitled to be treated as a dissentient under secs.* 176 *and* 178 *of the said Act. Order that the costs of the appellant of this appeal, of the appeal to the Full Court and of the application to Dwyer J. be paid by the respondent liquidator out of the assets of the company.*

Solicitor for the appellant, *S. Howard-Bath*, agent for *Ingleby, Wallman & Kriewaldt.*

Solicitors for the respondent, *Dwyer & Thomas.*