[HIGH COURT OF AUSTRALIA.]

COMMONWEALTH HOMES AND INVESTMENT COMPANY LIMITED . . . APPLICANT, } APPELLANT;

AND

MacKELLAR . . . . . RESPONDENT. RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 26, 27, 29.

SYDNEY, *Nov.* 17.

Latham C.J., Rich, Starke, Dixon, and McTiernan JJ.

Company—Membership—Dispute as to membership—Compromise—Validity—Application for and allotment of shares—Contract that applicant should be sole architect on local board—Effect of contract—Breach by company—Discharge of contract—Cancellation of allotment—Validity of cancellation—Companies Act 1892 (*S.A.*) (*No.* 557), *secs.* 35, 226.

A bona-fide dispute between a company and a person whose name appears in its share register, arising out of a claim by that person that the allotment of the shares, or the agreement to take the shares, is void or is voidable by him, may, consistently with the provisions of the *Companies Act* 1892 (S.A.), be the subject of a compromise resulting in the cancellation of the allotment of the shares and the removal of his name from the share register.

M., a Sydney architect, was approached in Sydney by representatives of a company incorporated in South Australia under the *Companies Act* 1892 (S.A.) with a proposal that he should join a local board of directors which it was intended to establish in Sydney. The articles of association of the company contained no provision for such a board. M. was told that the qualification for a director of the Sydney board was holding 1,000 shares in the company, and he was invited to apply for shares accordingly. M., on the faith of an undertaking in express terms that he was to be the only architect on the Sydney board, agreed to become a director and take shares in the company. He applied for, and was allotted, 1,000 shares, and notice of allotment was given him. M., having learnt that another architect had been appointed to the Sydney board, wrote to the company complaining of a breach of contract,

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notifying it that he ceased to have any connection with it and requesting a refund of moneys paid by him and cancellation of his application form. The company denied M.'s allegation of a breach of contract, but a compromise was arrived at under which the company refunded portion of the moneys paid by M. in full discharge, satisfaction and termination of his contract with the company as embodied in his proposal for shares and the allotment notice. Some time later there was written across the entry of M.'s name in the company's register of shareholders the words "Shares cancelled. Application money refunded, less commission." The company having gone into liquidation, the liquidator claimed rectification of the register of members by entering M.'s name thereon as holder of 1,000 shares.

Held that there had been a bona-fide compromise of a dispute between M. and the company as to M.'s membership of the company and the liquidator could not destroy the compromise and reinstate M. as a member.

Decision of the Supreme Court of South Australia (*Richards* J.) affirmed on a different ground.

APPEAL from the Supreme Court of South Australia.

Commonwealth Homes and Investment Co. Ltd. was incorporated in South Australia on 16th September 1925 under the *Companies Act* 1892 (S.A.). Its nominal capital was 250,000 shares of £1 each. Early in its career it issued a prospectus which (*inter alia*) stated that the minimum subscription upon which the directors might proceed to allotment was 2,000 shares. More than this number were subscribed. In 1927 it embarked upon new share-selling campaigns and, in connection with these, prospectuses were prepared which did not state any minimum subscription. They did, however, expressly offer 25,000 shares for certain specified States, one of which was New South Wales.

As part of its share-selling campaign in 1927 the company proposed to establish in certain States (including New South Wales) local boards of directors. Such a board was established in New South Wales, although the company's articles of association contained no provision which contemplated a local board in any State outside South Australia. There was some evidence that the directors of the company had decided that the minimum shareholding for a member of what was called the Sydney board should be 1,000 shares, but the articles of association contained no such requirement.

In 1927 Crawfurd Hutcheson MacKellar, a Sydney architect, was approached in Sydney by representatives of the company. He was

told that the qualification for a director on the Sydney board was holding 1,000 shares, and he was invited to apply for shares in the company and to become a member of that board. A prospectus was shown to him which was not precisely identified but which MacKellar stated was in a form the same as, or similar to, documents which contained no reference to a minimum subscription. At all material times 25,000 shares in the company had not been applied for.

Discussion took place between MacKellar and the company's representatives as to professional benefits which he might derive by becoming a director of the company, and MacKellar agreed to become a director and to take out shares only upon being given an undertaking in express terms that he was to be the only architect on the Sydney board. On receiving this undertaking he signed an application, addressed to the directors of the company, in the following terms: "I hereby apply for 1,000 shares and herewith enclose the sum of £250 being a deposit of 5s. per share and I request you to allot me that number of shares upon the terms of the company's prospectus (dated 21st September 1925) and I agree to accept the same or any smaller number that may be allotted to me and to pay 5s. per share on allotment and I authorize you to register me as the holder of the said shares and I agree to be bound by the memorandum and articles of association of the company."

This application was dated 30th August 1927. The company received £250 from MacKellar and, on 3rd September 1927, allotted to him 1,000 shares and gave him notice of allotment. The shares allotted to MacKellar were numbered 26256 to 27255 (both inclusive).

In November 1927 MacKellar discovered that the company had appointed another architect a member of the Sydney board. He at once (on 8th November 1927) wrote a letter in relation to this appointment in which he said:—

"This appears to me to be most unbusinesslike and an extraordinary action considering it was distinctly understood that by statement made by your representative Mr. Tanser and confirmed later by Mr. Turner, in consideration of my taking 1,000 shares in your company I was to be appointed the sole architect on the board, it having been stressed how beneficial it would be to me in many ways. I consider this a gross breach of contract and notify you that from

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this date I cease to have any connection with the above company, and would ask you to refund the deposit on shares, viz., £250 and cancel my application form, which was made in good faith and on a distinct understanding which you as a company have failed to fulfil."

The company denied MacKellar's allegation that he had been promised that he would be the sole architect on the Sydney board and contended that the company was entitled to insist upon retaining him as a shareholder. It offered, however, without prejudice, to return his application money less the amount it had paid away for commission, namely, £100. This offer was contained in a letter dated 13th December 1927. MacKellar, on 28th December 1927, by letter accepted this offer provided that his application for shares was cancelled. On 14th January 1928 the sum of £150 was paid to MacKellar, who gave a receipt in the following terms: "Received from Commonwealth Homes and Investment Company Limited the sum of £150 being in full discharge, satisfaction and termination of the contract between myself and the company, as embodied in proposal for 1,000 shares made by me on 30th August 1927 and the allotment notice issued by the company." At some subsequent time MacKellar's name was removed from the company's register of shareholders by writing thereon in red ink the words "Shares cancelled. Application money refunded, less commission."

On 9th April 1929 1,000 shares numbered 26256 to 27255 (the same serial numbers as those originally allotted to MacKellar) were allotted to one Thiele.

Further facts appear in the judgments hereunder.

On 25th September 1934 an order was made for the winding up of the company, and, on 17th July 1936, the liquidator issued an originating summons out of the Supreme Court of South Australia asking that the register of members of the company be rectified by entering thereon the name of MacKellar as holder of 1,000 shares numbered 26256 to 27255 (both inclusive). In the Supreme Court *Richards* J. dismissed the company's application on the ground that MacKellar had made his application for shares upon the faith of a statement that he would be the only architect on the Sydney board and that this statement, and the arrangement between MacKellar

and the company's representatives based thereon, amounted to a condition precedent to MacKellar's becoming a member of the company. This condition not having been performed MacKellar was never properly on the share register of the company.

From this decision the company appealed to the High Court.

Reed K.C. (with him *R. G. Nesbit* and *Thelma Bleby*), for the appellant. There was no condition precedent, only a collateral agreement or a condition subsequent.

[McTIERNAN J. referred to *United Service Insurance Co. Ltd.* v. *Lang* (1).]

There was only a contract with terms on both sides, and the respondent became a shareholder. A condition precedent must be capable of complete performance before the main contract is effective (*Farmers' Mercantile Union and Chaff Mills Ltd.* v. *Coade* (2); *In re Southport and West Lancashire Banking Co.* (*Fisher's Case*) (3); *Elkington's Case* (4); *Bridger's Case* (5); *In re Australian Producers and Traders Ltd.* (6); *In re Yarra Pictures Ltd.* (7); *In re Renown Rubber Ltd.* (8)). The compromise was *ultra vires* of the company unless there was a bona-fide dispute as to whether or not the respondent was a shareholder. There was no such dispute. The compromise was not bona fide, because the reason which prompted it was, on the evidence, consideration of the desires of other persons who had since joined the Sydney board and had nothing to do with any dispute as to the respondent's membership of the company. If the compromise was illegal or invalid, the removal of the name from the register was a nullity (*In re Indo-China Steam Navigation Co.* (9)). There was no dispute as to whether or not the respondent was a shareholder, and, if there was no condition precedent, there was no room for any dispute. Then the company had no power to make a compromise which involved cancellation of shares, repayment of money or release of liability. As to the power to compromise, see *In re Norwich Provident Insurance Society* (*Bath's Case*) (10);

(1) (1935) 35 S.R. (N.S.W.) 487.
(2) (1921) 30 C.L.R. 113, at p. 117.
(3) (1885) 31 Ch. D. 120.
(4) (1867) 2 Ch. App. 511.
(5) (1870) 5 Ch. App. 305.
(6) (1906) V.L.R. 511, at p. 515.
(7) (1919) V.L.R. 667.
(8) (1933) Q.S.R. 324, at p. 335.
(9) (1917) 2 Ch. 100, at p. 107.
(10) (1878) 8 Ch. D. 334.

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Bellerby v. *Rowland and Marwood's Steamship Co. Ltd.* (1); *Trevor* v. *Whitworth* (2); *Rowell* v. *John Rowell & Sons Ltd.* (3); *Lord Belhaven's Case* (4); *In re London and Mediterranean Bank Ltd.* (*Wright's Case*) (5); *Stanhope's Case* (6); *Spackman* v. *Evans* (7); *Buckley* on *Companies*, 11th ed. (1930), pp. 693, 695; *Dixon* v. *Evans* (8).

[LATHAM C.J. referred to *In re Borough Commercial and Building Society* (9).

[DIXON J. referred to *First National Reinsurance Co. Ltd.* v. *Greenfield* (10); *Welton* v. *Saffery* (11).]

As to the shares bearing the same number having been subsequently allotted to someone else, there is no virtue in any particular numbers. The numbers are merely a method of tracing the shares (*Adams' Case* (12); *Nicol's Case* (13); *Colonial Bank* v. *Whinney* (14)). [Counsel also referred to *In re Charms Ltd.* (15).]

Mayo K.C. (with him *Brebner*), for the respondent. The liquidator's application is addressed to specific shares only, and the onus is on him (*Companies Act* 1892 (S.A.), sec. 37). The respondent's removal from the register is presumed to be duly authorized (*In re Indo-China Steam Navigation Co.* (16)), and no presumption arises from the absence of minutes authorizing the removal (*Clarke* v. *Imperial Gas Light and Coke Co.* (17); *In re Fireproof Doors Ltd.* (18)). The appellant must fail on many grounds. There was an unperformed condition precedent to any contract to take shares (*Halsbury's Laws of England*, 2nd ed., vol. 7, p. 224). If, however, there was a contract to take shares, the prospectus referred to in the application form (which is the offer) is not identified; therefore the contract is not sufficiently proved to be binding. Alternatively, if the contract is sufficiently proved, the allotment is not binding under sec. 226 of the *Companies Act* 1892 (S.A.) and by reason of *Commonwealth*

(1) (1902) 2 Ch. 14.
(2) (1887) 12 App. Cas. 409, at p. 423.
(3) (1912) 2 Ch. 609.
(4) (1865) 34 L.J. Ch. 503.
(5) (1871) 7 Ch. App. 55.
(6) (1866) 1 Ch. App. 161.
(7) (1868) L.R. 3 H.L. 171.
(8) (1872) L.R. 5 H.L. 606.
(9) (1893) 2 Ch. 242.
(10) (1921) 2 K.B. 260.
(11) (1897) A.C. 299.
(12) (1872) L.R. 13 Eq. 474.
(13) (1885) 29 Ch. D. 421.
(14) (1886) 11 App. Cas. 426.
(15) (1933) S.A.S.R. 356, at pp. 366, 372.
(16) (1917) 2 Ch. 100.
(17) (1832) 4 B. & Ad. 315 [110 E.R. 473].
(18) (1916) 2 Ch. 142.

Homes and Investment Co. Ltd. v. *Smith* (1). The applicant must show that there was a specifically enforceable contract to take shares, and he does not do that without proving the prospectus (*Price* v. *Griffith* (2)). The contract was voidable through misrepresentation to the respondent as to the share-qualification of a member of the Sydney board or, alternatively, by reason of mistake. Either of these bases is sufficient to support the repudiation of the contract which in fact was made. A further point is that there was a bona-fide compromise of the dispute as to whether or not the respondent was a shareholder (*In re Cole* (3)). The result of the compromise may be supported on other grounds: (*a*) a voidable contract to take shares; (*b*) a valid surrender of shares as a short cut to forfeiture (*Kirby* v. *Wilkins* (4)). The compromise cannot now be treated as a nullity, because the company has re-allotted the same shares to someone else (*Nicol's Case* (5); *In re Electric Telegraph Co. of Ireland* (*Cookney's Case*) (6); *Wolverhampton New Waterworks Co.* v. *Hawksford* (7); *Platt* v. *Rowe* (8); *Re Murray Engineering Co. Ltd.* (9); *Ind's Case* (10); *Re Financial Corporation* (11)). The re-allotment of the same shares to a stranger also makes it impossible for the liquidator to obtain the relief claimed in the originating summons. A final ground is that there is no equity in the company or in the liquidator to put the court in motion in these proceedings (*Trevor* v. *Whitworth* (12); *Bellerby* v. *Rowland and Marwood's Steamship Co. Ltd.* (13); *Nicol's Case* (14)). [Counsel also referred to *In re Shortland Flat Gold-Mining Co.* (15); *Borland's Trustee* v. *Steel Bros. & Co. Ltd.* (16).]

Reed K.C., in reply. As to *Commonwealth Homes and Investment Co. Ltd.* v. *Smith* (1), the allotment on the respondent was binding until got rid of by him. This he has not done. Indeed, he affirmed his membership of the company when he expressed his demand that

(1) (1937) 59 C.L.R. 443.
(2) (1851) 1 DeG.M. & G. 80 [42 E.R. 482].
(3) (1931) 2 Ch. 174.
(4) (1929) 2 Ch. 444.
(5) (1885) 29 Ch. D. 421.
(6) (1858) 3 DeG. & J. 170 [44 E.R. 1233].
(7) (1860) 7 C.B.N.S. 795 [141 E.R. 1028].
(8) (1909) 26 T.L.R. 49.
(9) (1924) S.A.S.R. 121.
(10) (1872) 7 Ch. App. 485.
(11) (1867) 2 Ch. App. 714.
(12) (1887) 12 App. Cas. 409.
(13) (1901) 2 Ch. 265; (1902) 2 Ch. 14.
(14) (1885) 29 Ch. D. at pp. 444, 445.
(15) (1910) 29 N.Z.L.R. 931.
(16) (1901) 1 Ch. 279.

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his connection with it should cease. The only ground that he assigned was the promise that he would be the sole architect on the Sydney board. Further, it is for the respondent to show what was the prospectus on which he relied, and this he has failed to do.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of the Supreme Court of South Australia (*Richards* J.) dismissing an application to rectify the register of members of the Commonwealth Homes and Investment Co. Ltd. by entering the name of the respondent, MacKellar, as the holder of a specified one thousand shares in the company.

The company was incorporated in South Australia on 16th September 1925 and was ordered to be wound up by the court on 25th September 1934. The application to rectify the register was made by the company under sec. 35 of the *Companies Act* 1892 of South Australia, the provisions of that Act being retained in relation to pending liquidations by the *Companies Act* 1934, sec. 6. Sec. 35 of the Act of 1892 provides that, where the name of any person is without sufficient cause entered in or omitted from the register of members of any company, the company may apply to the court for an order that the register may be rectified. The respondent, MacKellar, was entered on the register in 1927 as the holder of one thousand shares numbered 26,256 to 27,255. His name was removed from the register by the directors on 18th July 1929. The liquidator contends that his name was properly entered on the register but was improperly removed therefrom. The respondent, on the other hand, contends that his name should never have been entered on the register at all and, alternatively, that if it were properly entered, it was subsequently properly removed.

From time to time the directors of the company considered whether the operations of the company should be extended to other States. In 1927 MacKellar was approached in Sydney by representatives of the company and was informed that it was proposed to constitute a board of directors in New South Wales and that the

qualification for a director on the board would be the holding of one thousand shares. The articles of association of the company made no provision for boards in States other than South Australia. The so-called board would really be a committee exercising such powers as the directors were prepared to confer upon it. The share-qualification for directors of the company was two hundred and fifty shares. F. V. Turner was the managing director of the company. With the authority of the board he went to Sydney and interviewed MacKellar, and MacKellar agreed to take up one thousand shares and to become a Sydney "director." MacKellar was an architect, and it is clear that discussion took place as to the professional benefit which he might derive by becoming a director of the company and thus obtaining publicity which could not properly be obtained by advertising. MacKellar's evidence was to the effect that he agreed to become a director and to take up shares only upon being given an undertaking in express terms that he was to be the only architect on the board. The evidence adduced by the liquidator was directed to show that no promise was made that MacKellar should be the only architect on the board. The learned judge accepted the evidence of MacKellar. There was ample evidence to support this finding of fact, and it was not really challenged, argument being principally directed towards the significance and legal effect of the acceptance of MacKellar's evidence on this point.

The question which first arises is whether the result of what took place between MacKellar and Turner in Sydney was that MacKellar agreed to become a shareholder in the company and that the company became bound to appoint him as the sole architect director on the Sydney board, or whether the appointment of MacKellar as such a director was a condition precedent to the formation of any agreement between him and the company. Upon the first view MacKellar became a shareholder having a remedy against the company, for what it was worth, for any breach by the company of the agreement that he should be the sole architect director; upon the second view the company was not entitled to accept the application for shares from him or to allot any shares to him unless and until what is alleged to be the condition precedent of appointment as sole architect

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director had been fulfilled. *Richards* J. accepted the second view and accordingly dismissed the summons.

Before considering this question and the other questions which will arise if it is answered otherwise than as by the learned judge, it is necessary to state some further facts.

The agreement between MacKellar and Turner was made about 30th August 1927, and on that day MacKellar made an application for one thousand shares in the following form :—

" To the Directors of

Commonwealth Homes and Investment Co. Ltd.,

25, 26, 27, 2nd floor Liberal Club Buildings,

North Terrace, Adelaide.

Gentlemen,—I hereby apply for 1,000 shares, and herewith enclose the sum of £250 being a deposit of 5s. (five shillings) per share and I request you to allot me that number of shares upon the terms of the company's prospectus (dated 21st September, 1925) and I agree to accept the same or any smaller number that may be allotted to me and to pay five shillings (5s.) per share on allotment and I authorize you to register me as the holder of the said shares and I agree to be bound by the memorandum and articles of association of the company.

Signature—C. H. MacKellar.

Name in full—Crawfurd Hutcheson MacKellar.

Address—72B King Street.

Occupation—Architect, M.I.A.

Date—30th August 1927 Witness—C. R. Tanner.

Jnl. 26."

The company received the sum of £250 from MacKellar and on 3rd September 1927 allotted to him one thousand shares of one pound each and gave notice of allotment to him.

Then difficulties arose with regard to the personnel of the Sydney board. It is not necessary to trace the course of events in detail. The ultimate result was that the board of directors in Adelaide, for various reasons, thought it desirable to appoint one Thompson, who was an architect, as a member of the Sydney board. When MacKellar heard of this proposed appointment he objected strongly and, on 8th November 1927, wrote a letter in which he stated that

it was distinctly understood that " in consideration of my taking one thousand shares (1,000) in your company I was to be appointed the sole architect on the board, it having been stressed how beneficial it would be to me in many ways. I consider this a gross breach of contract and notify you that from this date I cease to have any connection with the above company, and would ask you to refund deposit on shares viz., £250, and cancel my application form, which was made in good faith and on a distinct understanding which you as a company have failed to fulfil."

The company denied MacKellar's statement that it was promised that he should be the sole architect on the board and further contended that, as a matter of legal right, the company was entitled to insist upon retaining him as a shareholder even though he was not prepared to become a director. The company, however, made an offer without prejudice to return the application money (£250) less an amount of one hundred pounds which had been paid as commission. MacKellar accepted this offer. On 14th January 1928 he signed a receipt in the following form : " Received from Commonwealth Homes and Investment Company Ltd. the sum of one hundred and fifty pounds (£150) being in full discharge, satisfaction and termination of the contract between myself and the company, as embodied in proposal for one thousand (1,000) shares made by me on 30th August 1927 and the allotment notice issued by the company." His name was removed from the register on 18th July 1929, and at some time a note was made on the entry in the share register stating that the shares were cancelled and the application and allotment money refunded less commission. It has already been stated that the liquidator's summons asked that MacKellar be entered on the register as the holder of one thousand shares specifically described as bearing certain numbers. On 9th April 1929 shares bearing these numbers were allotted to Mr. F. C. Thiele. The respondent bases upon this circumstance a contention that it is impossible for the liquidator to succeed upon the terms of the summons as it stands, and also argues that no amendment can be made which would entitle the liquidator to succeed.

The first question for determination is whether MacKellar ever became a member of the company. The *Companies Act* 1892, sec.

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26, provides that every person who has agreed to become a member of the company and whose name is entered on the register of members shall be deemed to be a member of the company. MacKellar's name was entered on the register. If he had agreed to become a member of the company, he was a member of the company for the purposes of the *Companies Act*. He contends that he never agreed to become a member of the company but only agreed that, if a condition as to his appointment as sole architect director was satisfied, he would then apply to become a member in respect of one thousand shares.

The law was stated in *Elkington's Case* (1) by Lord *Cairns* L.C. in the following terms :—" The real point for determination in this case might be said to be this, did Messrs. Elkington intend and agree to become members and shareholders *in praesenti*, with a collateral agreement as to what should be the effect of their so becoming shareholders ? or, on the other hand, did Messrs. Elkington agree that if and when a certain preliminary condition should be performed, and not otherwise, they would become members and shareholders ? "—See *Farmers' Mercantile Union and Chaff Mills Ltd.* v. *Coade* (2), where *Elkington's Case* (1) was followed, and *In re Australian Producers and Traders Ltd.* (3), where *Cussen* J. explains the words used in *Elkington's Case* (1) by showing that " collateral agreement " does not mean an agreement apart from the transaction, and that the terms " condition precedent " or " preliminary condition " refer to conditions precedent or preliminary to the formation of a contract, and not to terms which are precedent to a right of action or to a right to claim further performance of a contract. In considering the question whether there was in this case a condition precedent in the sense stated it is important to remember that, as *Higgins* J. said in *Farmers' Mercantile Union and Chaff Mills Ltd.* v. *Coade* (4), " to create a condition precedent there must be very clear words."

The evidence given by MacKellar in his affidavit and believed by the learned judge is as follows :—" I said to the said Frank Valentine Turner ' If I am to be the only architect on the board and my associates are to be business men I will agree to become a director

(1) (1867) 2 Ch. App. 511, at p. 522.
(2) (1921) 30 C.L.R. 113.
(3) (1906) V.L.R. 511, at p. 515.
(4) (1921) 30 C.L.R., at p. 121.

and take up the shares.' The said Frank Valentine Turner agreed to this and on the faith of his so doing and on the representations that had been made to me I signed an application for shares."

In my opinion these words in their natural interpretation mean that MacKellar agrees to take up one thousand shares and that the company through Turner agrees that MacKellar is to be on the board and is to be the only architect upon the board. It is an agreement containing terms to be performed by each party. MacKellar immediately signed an application for shares and sent to the company £250 as application money. The company allotted shares to him and so informed him. He made no objection. At that time he did not suggest that the company was not entitled to deal with his application until he had been appointed a director and had become the sole architect director. MacKellar's letters, the most important of which has already been quoted, adopted the same position, namely, that a contract had been made between him and the company but that the company had broken the contract so that MacKellar was entitled to be released. In his letter of 8th November 1927 he referred to the action of the company in appointing Thompson, an architect, as a gross breach of contract. His letter went on to state: "from this date I cease to have any connection with the company." He then asked for a refund of his deposit and a cancellation of his application form. Thus, he admitted the existence of a contract, but asked that it be set aside by reason of the breach of the contract by the company and that he be reinstated in his original position. It is not to be expected that the parties would have in their mind any distinction between, on the one hand, a term of a contract and, on the other hand, a condition precedent to the formation of any contract between the parties. But it is, in my opinion, clear that MacKellar did not at the time when the agreement was made believe, or at the time when the dispute arose contend, that the company was not entitled to accept his application for shares and to allot shares to him. There is nothing to show that the company regarded the application as being subject to any condition precedent. Thus, the conduct of the parties at the time when the agreement was made and thereafter was not such as to support

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the proposition that the term in question was intended by the parties to be a condition precedent in the relevant sense.

But in this case it is not necessary to have recourse to any evidence extrinsic to the agreement of the parties for the purpose of deciding whether an apparently unconditional agreement was subject to a condition precedent. (As to extrinsic evidence, see *Pattle* v. *Hornibrook* (1).) What is here alleged to be a condition precedent to the formation of a contract cannot reasonably be so construed when it is considered in itself, independently of any other evidence of intention. The agreement that MacKellar was to be the sole director architect would not, in my opinion, be satisfied by a momentary and illusory appointment of MacKellar as a sole architect director. The fair meaning of this arrangement was, in my opinion, that so long as MacKellar was on the Sydney board he should be the only architect on that board. If the term is construed in this manner, then it is clear that it could be performed only by the company forbearing, during the period while MacKellar was director, from appointing any other architect as a director in Sydney. It cannot reasonably be said that the parties meant that MacKellar's application for shares could not be accepted until his period of directorship had expired, no other architect having during that period been appointed to the board. Thus, the term was to be performed *in futuro*, after MacKellar had become a director and had taken up 1,000 shares. Such a term could not be a condition precedent to his becoming a shareholder: Cf. *Bridger's Case* (2); *Fisher's Case* (3).

Thus, I am of opinion that the arrangement that MacKellar was to be the sole architect on the Sydney board should not be regarded as a condition precedent to his becoming a member of the company, and that the liquidator has established that MacKellar became a member of the company.

But the respondent further contends that he was entitled to have his name removed from the register on the ground of fraud. He alleges that Turner, the duly authorized agent of the company, was guilty of fraudulent misrepresentation when he said that the qualification for membership of the Sydney board was the holding of one thousand

(1) (1897) 1 Ch. 25.
(2) (1870) 5 Ch. App. 305.
(3) (1885) 31 Ch. D., at p. 126.

shares. The articles of association contain no such requirement. But it does not appear that Turner made any representation as to the contents of the articles of association of the company.

The evidence is, in my opinion, consistent with the view that all that Turner did was to repeat the decision of the Adelaide board that there should be a certain minimum shareholding in the case of any person invited to become a member of what was called the Sydney board. Upon the evidence as it stands I would not be prepared to hold that there was any misrepresentation.

When the liquidator initiated these proceedings the name of the respondent was not upon the register of shareholders. Unless the liquidator can show that his name ought to have been on the register, the respondent is entitled to succeed. MacKellar's name was taken off the register as the result of a compromise between him and the company. The facts leading up to and constituting the compromise have already been stated. It is objected by the liquidator that the compromise was invalid as *ultra vires* the company because a company cannot purchase its own shares or, without the leave of the court, reduce its capital. The return to a shareholder of money paid by him for his shares is a reduction of capital. The release of a shareholder from future liability in respect of his shares is a reduction of capital. The case of *Trevor* v. *Whitworth* (1) is the leading authority which supports these propositions. Thus, it was held in *Bellerby* v. *Rowland and Marwood's Steamship Co. Ltd.* (2), that a surrender of shares in a limited company where the company released the shareholder from further liability in respect of the shares amounted to a purchase by the company of the shares, and was accordingly illegal. This rule is unaffected by the case of *Rowell* v. *John Rowell & Sons Ltd.* (3), where the court upheld a surrender which was held not to involve any reduction of the capital of the company or any purchase of shares by the company, but to consist in an exchange of shares without any alteration of the capital of the company. In the present case the company repaid to MacKellar £150, being portion of the money which he subscribed for his shares, and the company also cancelled the entry of his name in the shareholders' register.

(1) (1887) 12 App. Cas. 409: See especially at pp. 415, 423, 424.
(2) (1902) 2 Ch. 14.
(3) (1912) 2 Ch. 609.

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It is contended by the liquidator, on the authority of the cases cited, that the transaction was *ultra vires* the company.

But it has long been established that a company has power to make a bona-fide compromise of a dispute (*Dixon* v. *Evans* (1); *Bath's Case* (2)). It is also well settled that in certain cases, of which the most common is the case of fraud, a shareholder may repudiate his contract to take shares and may, if he acts in due time, get his money back. This rule is so well established that it is hardly necessary to cite authority, but I refer to the discussions in the leading cases of *Oakes* v. *Turquand & Harding* (3) and *Directors &c. of Central Railway Co. of Venezuela* v. *Kisch* (4) and to the other cases cited in *Buckley* on *The Companies Acts*, 11th ed. (1930), at pp. 218 et seq., and *Palmer's Company Precedents*, 14th ed. (1931), vol. 1, at pp. 168 et seq.

Where a claim for rectification succeeds upon the ground of misrepresentation the contract is avoided *ab initio* and the shareholder's name is removed as from the time when it was put on the register (*Pulbrook* v. *Richmond Consolidated Mining Co.* (5)). But where as in this case (upon the opinion which I have stated) rectification is sought upon the ground, not of the absence of or the avoidance of contractual obligation, but upon the ground of the breach of an essential term of a contract under which the shares were taken, it cannot be said that the contract is avoided *ab initio*. It is a case of discharge, not of avoidance, of contract. But MacKellar's claim was that he was entitled to be restored to his original position. The company challenged this contention, but, instead of engaging in litigation with an uncertain prospect of success, compromised the dispute. If a company acts bona fide in settlement of a dispute as to whether or not an alleged shareholder is really a shareholder, it is not *ultra vires* the company to compromise the dispute by removing his name from the register. I refer to cases in which a company, in order to settle a dispute as to whether a shareholder's name should remain on the register, removed his name from the register and in which it was held that the removal was effective:

(1) (1872) L.R. 5 H.L., at pp. 618, 619.
(2) (1878) 8 Ch. D. 334.
(3) (1867) L.R. 2 H.L. 325.
(4) (1867) L.R. 2 H.L. 99.
(5) (1878) 9 Ch. D. 610, at p. 615.

Hartley's Case (1) (a case of mistake); *In re Railway Time Tables Publishing Co.*; *Ex parte Sandys* (2) (a case of a shareholder being originally entitled to repudiate shares because they were issued at a discount); *In re London Suburban Bank* (3) (an informal surrender); *First National Reinsurance Co. Ltd.* v. *Greenfield* (4) (where a shareholder has a right to avoid a contract, the company may assent to rescission and may rectify the register).

I agree that in the present case the compromise between the company and MacKellar was made upon the basis that he had actually become a shareholder, and that he did not, when he raised his objection, base it upon an allegation that he had never become a shareholder. His complaint was that the contract which he had made had not been carried out by the company and that the company had repudiated it by appointing Thompson, who was an architect, to a seat upon the Sydney board. But the dispute between MacKellar and the company was whether it was just that he should be held to his contract in view of the alleged repudiation of it by the company, MacKellar's contention being that he was entitled to have the contract set aside and to be restored to his original position by reason of the company's breach of contract. The company yielded to this contention, which was bona fide raised, but, instead of returning the whole sum of £250 which MacKellar had paid, was able to content him by making a payment of only £150. MacKellar did not insist upon getting everything to which he considered he was entitled, but this circumstance does not affect the validity of the transaction: Cf. *Wright's Case* (5) (where a company agreed to release a shareholder without paying interest, to which perhaps he was entitled). The removal of MacKellar's name from the register can, in my opinion, be justified as a term in a bona-fide compromise of a real dispute relating to MacKellar's membership of the company.

I am of opinion that upon this ground the order of the Supreme Court should be affirmed.

The respondent also contended that the allotment was not binding upon MacKellar because the requisite minimum number of shares

(1) (1874) L.R. 18 Eq. 542; (1875) 10 Ch. App. 157.
(2) (1889) 42 Ch. D. 98, at p. 112.
(3) (1872) L.R. 15 Eq. 274, at p. 278.
(4) (1921) 2 K.B. at p. 279.
(5) (1871) 7 Ch. App. at p. 59.

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had not been applied for before an allotment was made to him (*Companies Act* 1892, sec. 226 (*a*)). Upon the view which I have taken, it is not necessary to deal with this argument, or with other points raised on behalf of the respondent.

RICH J. The respondent relied upon many independent grounds in support of the judgment of *Richards* J. against which this appeal is brought. I think it is sufficient to deal with one of them only—a ground which seems to me to be unanswerable. While it has long been a commonplace of company law that the holder of partly paid-up shares cannot be extricated from his contingent liability thereon by any attempt on the part of the company to rescind, cancel or destroy the allotment of shares or his consequent membership, at the same time it has also been a commonplace of company law that where an alleged member claims that he is not a member or that his agreement to take shares is liable to avoidance for misrepresentation a bona-fide compromise between himself and the company of his claim will be supported notwithstanding that under the compromise his name is removed from the share register (*Wright's Case* (1) ; *Dixon* v. *Evans* (2) ; *Bath's Case* (3) ; *First National Reinsurance Co. Ltd.* v. *Greenfield* (4)). The respondent took up shares in the appellant company on the faith of an assurance that he would be appointed to the local board of directors and that no other member of his profession would form a member of the board. The company then proceeded to appoint another member of his profession to the local board. He protested and claimed a return of his allotment money and a severance of his connection with the company. Neither he nor the directors knew, so far as appears, anything about the difference between conditions and collateral agreements annexed to applications for shares, nor about the distinction between conditions precedent and conditions subsequent. *Richards* J., who did, said that there was a condition precedent. The appellant company says that his Honour's view is an erroneous application of these legal refinements. Be this as it may, the company and the respondent without understanding precisely on what the validity of his application and allotment of shares depended

(1) (1871) 7 Ch. App. 55.
(2) (1872) L.R. 5 H.L. 606.
(3) (1878) 8 Ch. D. 334.
(4) (1921) 2 K.B. at p. 279.

considered that the case could best be met by returning portion of his allotment money and removing his name from the register. This was done seven years before the winding up, in the plenitude of the company's hopes. It was as honest as any other transaction in the ordinary course of the company's affairs and was certainly not done for the purpose of absolving the respondent from the liability to which he was properly subject. In my opinion it was a bona-fide compromise of a claim that the allotment of shares was not binding on the respondent put forward by him on grounds which were far from absurd. It is not open to the liquidator to rip up the compromise and reinstate the respondent as a member of the liquidating company.

In my opinion the appeal should be dismissed.

STARKE J. An originating summons was issued out of the Supreme Court of South Australia by the appellant company and its liquidator seeking an order that the register of members be rectified by entering on such register the name of the respondent, MacKellar, as the holder of 1,000 shares numbered 26,256 to 27,255, both inclusive. The summons was dismissed: hence this appeal.

The appellant was a company incorporated under the *Companies Act* 1892 as a limited liability company with a capital divided into 250,000 shares of £1 each. An order was made in September 1935 that the company be wound up under the Act; later an official liquidator was appointed. The respondent, it appears from the evidence, was approached in 1927 by agents of the company who suggested that he should take up 1,000 shares in the company and become a member of a local board of directors in Sydney. It was stated that the share-qualification for such a director was 1,000 shares. The respondent said he would take up the shares if he were to be the only architect on the board and his associates were business men. The agents of the company agreed to this. In August of 1927 the respondent made a written application for the shares in the following form:—"I hereby apply for 1,000 shares and herewith enclose the sum of £250 being deposit of 5s. (five shillings) per share and I request you to allot me that number of shares upon the terms of the company's prospectus (dated 21st

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September 1925) and I agree to accept the same or any smaller number that may be allotted to me and to pay 5s. (five shillings) per share on allotment and I authorise you to register me as the holder of the said shares and I agree to be bound by the memorandum and articles of association of the company." Pursuant to this application, the company allotted 1,000 shares to the respondent, and his name was entered in the register of shareholders as the holder of 1,000 shares numbered 26,256 to 27,255 both inclusive. The shares were not actually issued to the respondent, but he seems to have been advised of the allotment in September 1927—in any case it was not disputed that he knew of the allotment to him. The articles of association did not provide for local boards of directors nor state any share qualification for the membership of such boards. The board which the respondent agreed to join was, I gather, an advisory body set up by the directors of the company.

In November of 1927 the respondent discovered that one Lindsay Thompson, an architect, had been appointed a director of the Sydney board. He wrote to the company as follows: "This appears to me to be most unbusinesslike and an extraordinary action considering it was distinctly understood that by statement made by your representative . . . in consideration of my taking one thousand shares (1,000) in your company I was to be appointed the sole architect on the board, it having been stressed how beneficial it would be to me in many ways. I consider this a gross breach of contract and notify you that from this date I cease to have any connection with the above company and would ask you to refund the deposit on shares viz. £250 and cancel my application form which was made in good faith and on a distinct understanding which you as a company have failed to fulfil." The company resented, so it said, the position taken up, but offered, as an act of grace and without prejudice, to return the respondent's application money less the amount paid away for commission to an agent of the company. In December of 1927 the respondent accepted this offer. Across the entry of the respondent's name in the share register was written: "Shares cancelled. Application money refunded less commission," and a like memorandum was made on

the respondent's application for shares. In April of 1929 the company entered the name of Frederick Charlie Thiele in its share register as the holder of the shares numbered 26,256–27,255 both inclusive, and £1,000 appears to have been paid to the company in respect of the shares so registered in the name of Thiele.

It is now contended that the *Companies Act* prohibits the return of capital by a company to its members except in the few cases recognized by the Act (*Trevor* v. *Whitworth* (1)): Consequently, that the arrangement made between the appellant and the respondent in the present case was *ultra vires* and void and that the respondent's name should be restored to the register of shareholders (*York Corporation* v. *Henry Leetham & Sons Ltd.* (2); *Bellerby* v. *Rowland and Marwood's Steamship Co. Ltd.* (3)). Still a bona-fide dispute whether a particular act of a company is within its powers or whether a person agreed to take shares in a company or was induced to take them by fraud or misrepresentation may be the subject of compromise between a company and any of its members (*Bath's Case* (4); *Belhaven's Case* (5); *Dixon* v. *Evans* (6); *Woodgers and Calthorpe Ltd* v. *Bowring* (7)). And in *Fisher's Case* (8), *Fry* L.J. is thus reported: "It may well be that Mr. Fisher may have had a right to call upon the company while it was a going concern to perform the condition which he imposed when he took these shares or to rescind and put an end to the agreement." And that is precisely the position of the respondent in this case. It may be that the condition he imposed, namely, that he was to be the only architect on the local board, was not a condition precedent to his agreement to take shares in the company, but still it may well have been regarded by both the appellant and the respondent as a term going to the root of the contract, the breach of which entitled the respondent to repudiate and rescind his contract to take shares. The parties may have taken an erroneous view of the law of the case, but it is no objection to the validity of a compromise that the claim of either party is unfounded in law or in fact provided that it be bona fide and not manifestly beyond the capacity

(1) (1887) 12 App. Cas. 409.
(2) (1924) 1 Ch. 557.
(3) (1902) 2 Ch. 14.
(4) (1878) 8 Ch. D. 334.
(5) (1865) 3 DeG.J. & Sm. 41 [46 E.R. 553.]
(6) (1872) L.R. 5 H.L. 606.
(7) (1935) 35 S.R. (N.S.W.) 483, at p. 484.
(8) (1885) 31 Ch. D. at p. 128.

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of either party. The claim of the appellant in the present case was undoubtedly bona fide, and it is difficult in the face of the statement of *Fry* L.J. and the cases already mentioned to say that the compromise or arrangement with the company was manifestly beyond its power and capacity.

A number of other grounds were also relied upon in support of the judgment of the Supreme Court, but it is, I think, undesirable to express any opinion upon them in the view I have taken.

The appeal should be dismissed.

DIXON J. During the nine years through which the company's not very wholesome life was protracted, its chief preoccupation seems to have been the sale of its own bonds and shares. The early efforts to sell shares were conducted upon a prospectus which, after attempting in the familiar manner to combine respect for the requirements of the law with an attractive and enticing statement of the company's prospects, ended with the information that the minimum subscription upon which the directors might proceed to allotment was 2,000 shares. More than the required number were subscribed, and two years later new share-selling campaigns were determined upon. Apparently it was thought desirable to conduct the campaigns by States and, in New South Wales and South Australia at all events, to offer in each State a further 25,000 shares. At some stage in the course of these later efforts prospectuses were prepared which did not state any minimum subscription but expressly offered 25,000 shares for the specified State. By the then law of South Australia, under which the company was incorporated, this meant that, unless the whole number offered was subscribed for, no allotment of any of the shares offered could be made which would not be voidable at the option of the allottee: See *Commonwealth Homes and Investment Co. Ltd.* v. *Smith* (1) and sec. 226 of the *Companies Act* 1892 (S.A.).

Part of the plan of campaign in each State was to establish there a local board of directors. The articles of association contained no provisions contemplating local boards in the States outside South Australia, but, notwithstanding the lack of justification in the

(1) (1937) 59 C.L.R. 443.

articles for the statement, some, if not all, of those who received invitations to join the company and form the New-South-Wales board of directors were told that the qualification for membership of the local board was 1,000 shares.

MacKellar, the respondent, was one of these. He accepted the invitation. He is an architect, and he says that he did so on the faith of a statement that he would be the architect and the sole architect on the board. He applied for his 1,000 shares, shares of £1 each, and paid 5s. application money, £250. Out of this sum, £100 was paid by way of commission to the share-seller who induced MacKellar to apply for the shares. But, not very long after the shares had been allotted to MacKellar, another architect was discovered who was willing to take up a thousand shares in order to become a member of the New-South-Wales board of directors. He was honoured with an invitation which he accepted. On learning that another architect was to be one of the New-South-Wales board, MacKellar at once wrote to the Adelaide office of the company complaining that the appointment was a gross breach of contract and stating that from that date he ceased to have any connection with the company. He demanded a refund of the deposit on the shares (£250) and the cancellation of his application form, which, he said, was made in good faith and on a distinct understanding which the company had failed to perform. The managing director replied denying the facts, but, after consulting the other aspirants to the Sydney directorship and the share-seller, he finally wrote a letter to MacKellar, which, while protesting that the latter had no ground for seeking to be relieved of his shares and to be repaid his money, offered to return the application money less the commission paid away. MacKellar accepted the offer, provided that his application for shares was cancelled. Thereupon, across the entry in the share register recording his membership in respect of 1,000 shares of specified serial numbers, there was written in red ink the words "Shares cancelled. Application money refunded, less commission." MacKellar was paid £150, the receipt of which he acknowledged as being in full discharge, satisfaction and termination of the contract between himself and the company as embodied in his proposal for a thousand shares and the company's allotment notice.

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Six months later, 1,000 shares bearing the same serial numbers were allotted to a stranger, and this allotment was recorded in the share register.

What was the actuating reason for relieving MacKellar of his membership and repaying him part of his allotment money is the subject of dispute. The managing director, in writing to Sydney, professed that he was guided only by his preference for the other Sydney architect and by the latter's unwillingness to serve on the Sydney board with an objecting colleague, and that he disregarded MacKellar's assertion that he had been told that he would be the only architect on the board. But, in an affidavit, the chairman of directors of that time deposed that at a meeting of the directors in Adelaide at which the course taken was decided upon, he himself had stated that, in his view, an action for rescission by MacKellar would be certain to succeed and that it only remained to decide how the matter should be handled. How far the testimony of this gentleman was accepted by the learned judge, whose judgment is under appeal, is uncertain. For his Honour found it unnecessary to go beyond one ground for his decision. That ground consisted in a finding that MacKellar had made his application upon the faith of a statement that he would be the only architect on the Sydney board, or, in other words, that no other of the persons to form the board was an architect, and that this statement amounted to or involved a preliminary condition, or condition precedent, to membership. On that ground his Honour refused an application to restore MacKellar's name to the register of members as a shareholder in respect of the 1,000 shares. The application was made by the official liquidator as a first step towards placing MacKellar's name on the list of contributories in respect of the shares.

There are, in my opinion, sounder grounds for this conclusion than that upon which the learned judge proceeded. An application for shares may be turned into a contract of membership by allotment and notice of allotment, notwithstanding that it was made upon the faith of a promise or stipulation of an executory nature which is unperformed. Acceptance of the application may constitute a contract of membership unless the application is made subject to a condition which, according to the intention of the

parties, must be fulfilled before the applicant becomes a member of the company. The promise, stipulation, or statement must amount to a condition preliminary or precedent to membership; otherwise it forms no obstacle to an immediate and effective allotment of shares. There is no difficulty in framing such a condition as would have preserved MacKellar from membership until he was assured that the board he meant to join contained no other architect. For instance, he might have imposed a condition that, before shares were allotted to him, all the other places on the Sydney board should be filled by directors none of whom was an architect. But the stipulation upon which he relies as a condition precedent was expressed in a very different way. It was expressed as a restriction upon the company's choice of local directors, observance of which was required for an indefinite future time. The letters, too, in which he complains of breach of faith and the receipt he signed for the £150, speak in terms which assume that immediate allotment was not only justifiable, but effective, to create membership, although, no doubt, a membership liable to avoidance or defeasance.

There is so much weight in these objections to the view that there never was a contract of membership because MacKellar's application was controlled by an unfulfilled preliminary condition, that I prefer to rest my decision upon other grounds which appear to me, not only to justify, but to require, the same conclusion.

In the first place, it seems to me that a valid compromise was made of Mackellar's claim that he was entitled to treat his membership of the company as avoided or brought to an end. It is, no doubt, true that a company cannot validly include in an agreement of compromise an *ultra-vires* term or condition. It is also true that an attempt to rescind an allotment of shares once effectively made is, speaking generally, *ultra vires* and void. But it is clearly settled that, if a claim is made that an allotment of shares or an agreement of membership is void or voidable, at all events if the grounds of the claim are not in law clearly untenable and insufficient, then it is open to the company as part of a compromise to treat the purported allotment of all or some of the shares as cancelled and to remove the name of the allottee from the share register. There is a wide distinction between, on the one hand, compromising a claim on the

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part of a person whose name appears in the share register that in truth he never became a member, or, if he did, that he is nevertheless lawfully entitled to treat his membership as avoided, and, on the other hand, compromising some merely pecuniary demand made by a shareholder whose membership is not in dispute. In the latter case there is an evident objection to an attempt, by way of compromising the money claim, to relieve him of some or all of the liabilities arising from membership by rescinding the allotment of the whole or part of his shares and cancelling or amending the registration of his shareholding. By such an attempt the company would seek to do, as consideration for the compromise of a disputed money claim, a thing which it has no power to do, viz., relieve an admitted shareholder of his liability to contribute his just proportion of share capital. But when the matter in dispute is the existence or voidability of membership itself, the law must either altogether deny to the company the capacity to deal with the question or else concede to the company the power to capitulate to or compromise the claim that membership was never brought about, or is open to avoidance.

The law has taken the latter course. "There is no reason why the directors, if they bona fide agree that a shareholder has a right to avoid the contract, should not thereupon assent to the rescission of the contract and rectify the register in the appropriate manner" (per *McCardie* J. in *First National Reinsurance Co. Ltd.* v. *Greenfield* (1)). In *Dixon's Case* (2) *Giffard* L.J., though admitting that on a controversy between the alleged member, on the one hand, and the company, on the other, as to whether he was or was not a shareholder, the company might in a compromise validly remove his name from the share register, yet decided that the attempt in question to relieve him of membership was ineffectual because he had admitted his membership and complained only that he had been promised that he should not be required to sign the deed of settlement or be responsible as a shareholder unless and until the company, which was registered before 1862, obtained an Act of Parliament limiting the liability of its members. The decision of Giffard L.J. was reversed in the House of Lords on the ground that

(1) (1921) 2 K.B., at p. 279. (2) (1869) L.R. 5 Ch. App. 79.

there was an adequate foundation for a compromise, inasmuch as the facts disclosed enough ground for reliance upon the assurance as a condition precedent. Lord *Westbury* said :—" My Lords, under these circumstances, although you would be slow to encourage persons to come here, after a winding-up order has been made, to bring forward claims which they might have brought forward but did not, during the currency of the company, yet there can be no reason in the world why you should hesitate to give effect to a just, a reasonable, and a truthful agreement, bona fide entered into many years before it was contemplated or supposed that this company would be reduced to insolvency, and would become the subject of a winding-up order. That is the case in the present instance " (1). Lord *Cairns* said :—" Without scrutinizing whether that would have been the decision arrived at or not, it appears to me it was a fair case to urge on the part of Mr. Dixon, and a fair case for compromise on the part of the directors. And, my Lords, I do not think it was the less a fair case for compromise because the matter had not gone to the length of a letter from his solicitor or legal agent, and because upon the mere representation being made to the directors they saw the justice of what was demanded, and, without much correspondence, agreed to the arrangement that was proposed. Beyond all doubt the directors had authority to compromise, and if your Lordships are satisfied, as certainly I am satisfied, that there was here a case containing all the elements for a compromise, and that the compromise was entered into bona fide, truthfully, and really, not for any sinister object, or for the purpose of disguising under the name of a compromise a different transaction, one *ultra vires* of the directors ; if, I say, your Lordships are satisfied of this, as I certainly am satisfied, your Lordships have, as it appears to me, ample ground for holding that that compromise should not, after this lapse of time, be disturbed " (2).

In *Wright's Case* (3) the question was whether Wright was liable to be put on the list of contributories either as a present or a past member of the London and Mediterranean Bank, which had been

(1) (1872) L.R. 5 H.L. at pp. 619, 620.
(2) (1872) L.R. 5 H.L., at pp. 622, 623.
(3) (1871) 7 Ch. App. 55.

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registered under the Act of 1862 as a company limited by shares. He had been allotted shares pursuant to his application and he had been entered upon the company's register. But, on learning that the Stock Exchange refused to place the company on its list, he sought the return of his allotment money and the cancellation of the registration. The company resolved that shareholders in his position might, if they desired it, have their allotments cancelled and their money returned. Though he was unaware of it, a representation in the prospectus that a stated number of shares had already been subscribed was false, and it was for this reason that the Stock Exchange refused the company a place on its list. It was held that Wright was not liable either as a present (1) or as a past member (2). Lord *Hatherley* put the decision upon the ground that, although Wright based his claim to be relieved of his shares on an insufficient foundation, the directors, being conscious of the existence of a solid foundation of which he was unaware, might validly accede to it and effectually remove his name from the share register. The case can be regarded as an instance of a valid compromise or of the application of the general rule that, where a legal justification in fact exists for a course taken, it will suffice to support its validity though the parties or one of them acted for other reasons and in ignorance of its existence: Cf. *Shepherd* v. *Felt and Textiles of Australia Ltd.* (3).

In *Bath's Case* (4) shares had been issued to raise capital for the purpose of extending the existing undertaking of the company so as to include a new class of business. Bath had taken up some of the shares. The company was advised that the new enterprise was beyond its powers, and it promoted a subsidiary company to take it over. Shares in the subsidiary company were allotted to Bath in common with others who had taken up the new capital in the parent company. The allotment was in substitution of such capital, the issue of which was cancelled. Bath's name was accordingly removed from the parent company's share register, and in the books of the subsidiary company he was credited with

(1) (1868) L.R. 12 Eq., at p. 335, n.
(2) (1871) 7 Ch. App. 55.
(3) (1931) 45 C.L.R. 359, at pp 371 and 377, 378.
(4) (1878) 8 Ch. D. 334.

the amount he had paid to the parent company. On the latter's going into liquidation he was placed on the list of contributories. He had repudiated his shares in the subsidiary company on the ground of misrepresentation. The Court of Appeal, nevertheless, held that he could not be liable as a present member of the parent company because there had been a compromise which was valid and effectual and resulted in his being no longer a member. But the court held that he was liable as a past member, because the compromise, which took place within the year, had the effect only of bringing to an end a membership in fact validly created, since the issue of capital had been regular and not *ultra vires*. This meant that the compromise was valid, notwithstanding that the claim to be relieved of shares to which it gave effect was ill-founded in law.

These cases were decided before *Trevor* v. *Whitworth* (1), but the grounds upon which they proceed are not at variance with the doctrine of that case. For it is only where there is a bona-fide compromise of a dispute as to the existence or binding character of the party's membership that the act of the company is effectual as an annulment or rescission of the contract of membership. It is, perhaps, open to question whether it is logical to regard the matter as was done in *Bath's Case* (2) and to treat the compromise as terminating a membership theretofore validly subsisting and not as conclusively rescinding or invalidating the agreement *ab initio*. But this is unimportant in the present case. The question raised here is whether the transaction really amounted to a compromise of a disputed membership. I think it clearly fell within that description. MacKellar claimed a right to be relieved of the shares allotted to him and did so in express reliance upon a set of facts, which, although he was unaware of the legal criterion applicable, did provide some reasonable ground for his claim. The precise motives which prompted the company to agree to compromise are in dispute, but, whichever view of them is accepted, they were bona fide, and a motive for agreeing to a bona-fide compromise cannot matter.

In my opinion MacKellar is entitled to succeed because the compromise was valid and effectual.

(1) (1887) 12 App. Cas. 409. (2) (1878) 8 Ch. D. 334

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Dixon J.

In the second place, independently of the effect of the compromise, I think that MacKellar is entitled to resist the restoration of his name to the register on the ground that his contract of membership was voidable for misrepresentation and that he obtained from the company, though for other reasons, the rescission of the contract and the removal of his name from the register.

The misrepresentation consisted in the statement to him that the qualification for a director of the New-South-Wales board was 1,000 shares. This would be naturally understood to mean that the articles of association prescribed the qualification, not that the directors in Adelaide stipulated that such a number of shares should be taken up by an aspirant to membership of the local board. So understood there is no doubt of its falsity. It does not matter that MacKellar was unaware of the falsity of the representation at the time when he disowned the transaction and his name was struck off the share register. It is true that the learned judge did not deal with the ground of misrepresentation on which MacKellar now relies, but which, as I gather, was not discussed in the court below. Caution must be used in allowing even a respondent to raise new matter on appeal, but I am bound to say that I am unable to see what answer can be available to the appellant upon the facts as they appear from the affidavits and evidence.

In the third place, it appears quite clearly that, when the shares were allotted to MacKellar, a subscription had not been obtained of the full number of 25,000 shares that, according to the prospectus to which he points, were offered to the public of New South Wales. It would follow that his contract of membership was voidable at its inception. To this ground two answers are made for the appellant. It is said that MacKellar is wrong in his identification of the prospectus and that in a matter where the burden of proof is upon him he has failed to discharge it. The question so raised is not of a description which calls for a full discussion. It is enough to say that my examination of the record and of the documents leads me to the conclusion that, while none of the four prospectuses is precisely a copy of that upon which the shares were offered, yet it appears that MacKellar is probably right in his statement in par. 11 of his affidavit. He there says that the prospectus he saw was in a form

the same as or similar to documents which contain no reference to a minimum subscription. At all events, I do not think the effect of his statement is displaced. Next it is said that MacKellar elected to affirm the contract of membership by the manner in which he expressed his demand that his connection with the company should cease and assigned as the ground that a promise had been made that he would be the sole architect on the New-South-Wales board.

There is, I think, no foundation for this contention. For MacKellar at the time was unaware of the failure of the company to comply with sec. 226 (*a*) of the *Companies Act* 1892 (S.A.), and, further, even if he had known it, to assert that he ought to be relieved from membership and to assign one ground only, and that a wrong ground, would not amount to an election to affirm or preclude him from setting up the good ground.

For these three independent reasons I think the order under appeal was rightly made.

I find it unnecessary to enter upon the further ground upon which reliance was placed, namely, that, while the shares identified by the serial number assigned to those allotted to MacKellar remained on the register in the name of the shareholder to whom they were issued after the cancellation of the allotment to MacKellar, an application to restore the latter's name to the register must fail.

In my opinion the appeal should be dismissed with costs.

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

In my opinion, a valid compromise of the respondent's claim that he was entitled to have his membership of the company cancelled was made. I concur in the reasons of my brother *Dixon* for this conclusion and have nothing to add.

Appeal dismissed with costs.

Solicitor for the appellant, *R. G. Nesbit.*

Solicitors for the respondent, *Fisher, Jeffries, Brebner & Taylor.*

C. C. B.