[HIGH COURT OF AUSTRALIA.]

AUTOTERMS LIMITED . . . . . APPELLANT;
APPLICANT,

AND

CANDY . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

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MELBOURNE, *Oct.* 14, 15, 28.

Latham C.J., Starke, McTiernan and Williams JJ.

Company—Charge on shares—Validity—"Charge for . . . calls due on . . . any share"—Acknowledgment by shareholder of debt to company in respect of unpaid shares—Covenant to pay debt "as and when required"—Lien on shares given to company by shareholder—Companies Act 1938 (*Vict.*) (*No.* 4602), *s.* 44*, *Second Schedule, Table A, art.* 7.

Eleven thousand shares of one pound each in the capital of a company were allotted to C. subject to the payment of the full amount thereof in cash. C. did not pay any moneys on application or allotment, but by an indenture as of the date of allotment he acknowledged that he was indebted to the company in the sum of £11,000 in respect of the shares allotted to him and covenanted to pay that sum to the company "as and when required to do so." By a subsequent indenture he acknowledged the debt of £11,000 and gave the company a general lien over the shares and covenanted that the shares should not be transferred, assigned, disposed of, or encumbered by him. The company had not adopted Table A of the Second Schedule to the *Companies Act* 1938 (Vict.) for the purposes of its articles of association, and, in particular, had not adopted article 7.

Held that the lien did not create a charge for "calls . . . on" the shares within the meaning of s. 44 of the *Companies Act* 1938 (Vict.) and therefore did not operate to create any valid charge on the shares.

Decision of the Federal Court of Bankruptcy affirmed.

* Section 44 (1) of the *Companies Act* 1938 (Vict.) contains the following provision:—"Except as provided in this Part," (no company shall) "have a charge on any share in the company belonging to a shareholder other than a charge for a call or calls due on any share in such company belonging to him . . ."

APPEAL from the Federal Court of Bankruptcy.

By an indenture dated 15th July 1937 between Hugh Gavan Crawford (who subsequently died bankrupt) and Autoterms Ltd. it was recited that, of 45,000 fully paid up shares of one pound each in the company which had been allotted to Crawford, 11,000 had been so allotted in error; Crawford agreed that 11,000 of his shares were not paid up in whole or in part, and undertook when required to surrender the share certificates and to accept other share certificates in order to give effect to the true intent of the parties; he also acknowledged that he was indebted to the company in the sum of £11,000 in respect of the shares, and covenanted and agreed that he would "pay the said sum to the company as and when required so to do." Crawford surrendered 11,000 of his fully paid shares, and new scrip was issued to him in respect of 11,000 shares carrying full liability.

By an indenture of 21st February 1938 between Crawford and the company the debt of £11,000 was recited; Crawford covenanted that seventy-five per cent of all future dividends payable to him should be applied in liquidation of the debt until it was extinguished, and "that until the . . . debt of eleven thousand pounds shall have been extinguished the company shall have a general lien over the . . . forty-five thousand ordinary shares held by . . . Crawford in the company and the said . . . shares shall not be transferred assigned disposed of or encumbered by" him.

At Crawford's death £4,522 was owing to the company in respect of the debt. After his death the company made a call of one pound a share on Crawford's unpaid shares and gave notice of the call to his executor. The company also lodged a proof of debt with Edwin Carne Candy, the trustee of his bankrupt estate, claiming a lien pursuant to the indenture of 21st February 1938. The trustee moved the Federal Court of Bankruptcy for an order declaring that the lien claimed was void. Judge *Clyne* expressed doubt as to the effect of the "general lien" purported to be conferred by the indenture, in particular, whether it was anything more than a possessory lien. With some hesitation, he concluded that the indenture created, and was intended to create, an equitable charge, and observed that, whatever might be the difference between an equitable charge and an equitable lien, each afforded the same protection to a creditor. Nevertheless, he concluded that the indenture created no charge on shares which was valid under s. 44 of the *Companies Act* 1938 (Vict.). He accordingly rejected the company's proof of debt.

From this decision the company appealed to the High Court.

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Fullagar K.C. (with him *Dethridge*), for the appellant. Section 44 of the Victorian Act does not appear to have any counterpart in the English Act. Apparently it was taken from the Canadian Act. The charge here was in respect of a call or calls within the meaning of s. 44 (*Cameron* v. *Federal Commissioner of Taxation* (1)). The Second Schedule, Table A, article 7, shows that the widest meaning should be given to " calls " in s. 44 : any liability whatever in respect of a share which is capable of being called, certainly when it has been called ; and the call made after Crawford's death was sufficient to crystallize the liability. " Call " is used in two other parts of the Act : ss. 108 (3) (*c*)-(*e*) and 206.

[STARKE J. referred to ss. 22 (as the foundation of liability for calls), 49 (*b*), 79 (2).]

It is conceded that the appellant company did not adopt Table A for its articles of association, but the Table may be used in construing s. 44 (*Lock* v. *Queensland Investment & Land Mortgage Co.* (2), per Lord *Herschell* ; *New Balkis Eersteling Ltd.* v. *Randt Gold Mining Co.* (3), per Lord *Davey*). In s. 44 " calls due " does not mean calls presently due and payable ; such a construction does not fit in with the Act as a whole, and the legislature could easily have said so if that was what was meant.

P. D. Phillips, for the respondent. There was no call due when the indenture was executed. There is nothing in s. 44 to provide for a charge coming into existence when a call is made at some future date. On a strict interpretation of the section it validates only a charge for a call presently due—i.e., a call which is in existence, though its incidence may not be immediate. But there is justification in the words of the section for saying that the call must be presently payable. It is not unreasonable to read the section as postponing immediate payment by giving a charge to be enforced in the future ; but there must be some present basis for the charge. Equity does not give effect to a purported assignment of future property unless by the creation of a fiduciary relationship. There is the further question whether the liability for the £11,000, in the present case, was a liability for call money at all. That liability depended on the application and allotment, and, for what it is worth, on the indenture also. A call represents money payable on demand of the company by a member and which is payable on demand in the performance of the member's contract as a member. Application money is not call money : the £11,000 was application money,

(1) (1941) 64 C.L.R. 361.
(2) (1896) 1 Ch. 397, at pp. 406, 407 ; (1896) A.C. 461, at pp. 467, 468.
(3) (1904) A.C. 165, at p. 167.

not call money. It is not correct that Table A may be used to cut down the terms of the Act. Article 7 of Table A may be inconsistent with s. 44, but that is not material in this case. " Call " in s. 108 has the same meaning as in s. 44, the ordinary commercial sense. [He referred to *New Good Hope Consolidated Gold Mines* v. *Stutterd* (1).]

Fullagar K.C., in reply, referred to *Halsbury's Laws of England*, 2nd ed., vol. 5, p. 242 ; *Bradford Banking Co.* v. *Henry Briggs & Son* (2) ; *In re Sneesby and Ades and Bowes' Contract* (3).

Cur. adv. vult.

Oct. 28.

The following written judgments were delivered :—

LATHAM C.J. Upon a proof of debt by the appellant company, Autoterms Ltd., in the bankrupt estate of H. G. Crawford deceased, the company claimed to be a secured creditor by virtue of a lien over shares created by an agreement between Crawford and the company. The trustee in bankruptcy, who is the respondent to this appeal, moved before the Bankruptcy Court for an order declaring that the lien claimed was void and of no effect. His Honour Judge *Clyne* held that the lien was void by reason of the provisions of s. 44 of the *Companies Act* 1938 (Vict.), which, so far as relevant, provides that no company " shall . . . have a charge on any share in the company belonging to a shareholder other than a charge for a call or calls due on any share in such company belonging to him." The company has appealed to this Court.

The evidence showed that on 15th July 1937 an agreement was made between Crawford and the company which recited that 11,000 shares had been issued to Crawford as fully paid up shares by mistake, and that Crawford agreed that 11,000 of the shares held by him were not paid up in whole or in part, and undertook when required to surrender the share certificates and to accept other share certificates in order to give effect to the true intent of the parties. Crawford also acknowledged that he was indebted to the company in the sum of £11,000 in respect of the shares, and covenanted and agreed that he would " pay the said sum to the company as and when required so to do."

Crawford surrendered the 11,000 fully paid shares and new scrip was issued to him in respect of 11,000 shares carrying full liability.

(1) (1916) V.L.R. 580, at p. 592.
(2) (1886) 12 App. Cas. 29, at pp. 30, 35, 36
(3) (1919) V.L.R. 497, at pp. 505, 506.

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On 21st February 1938 an indenture was executed by Crawford and the company which recited the debt of £11,000 and provided that seventy-five per cent of all future dividends payable to him should be applied in liquidation of the debt until it was extinguished. Clause 2 of the indenture was in the following terms :—" 2. The said Hugh Gavan Crawford further covenants with the Company that until the said debt of Eleven thousand pounds shall have been extinguished the Company shall have a general lien over the said Forty-five thousand ordinary shares held by the said Hugh Gavan Crawford in the Company and the said Forty-five thousand ordinary shares shall not be transferred assigned disposed of or encumbered by the said Hugh Gavan Crawford." The debt of £11,000 was reduced to £4,522 by payments on account. In September 1942 the company gave notice of a call of one pound a share to Crawford's executor.

If the last-mentioned indenture did not create a charge upon Crawford's shares, the claim of the company must fail. If, on the other hand, it is assumed in favour of the company that it did create a charge, then the question is whether it is a charge for a " call or calls due " on shares in the company. Unless it is such a charge it is invalid under s. 44 of the *Companies Act*.

The appellant contends that the charge was a charge in respect of calls which might thereafter be made and that when the calls were made it certainly became a charge in respect of calls due.

In my opinion this argument cannot succeed. The charge when given, and at all times thereafter, was a charge for £11,000 (or the unpaid balance thereof) whether or not calls were made. The charge could, if valid, have been enforced, irrespective of the making of any call. The charge therefore cannot be described as a charge for a call or calls. It is a charge to secure the debt of £11,000 created by the agreement of 15th July 1937.

A further question which has been argued is whether a charge to secure the payment of future calls can be regarded as a charge for calls *due*. It is not necessary to determine this question in the present case. Nor is it necessary to consider the question which arises as to a conflict between s. 44 of the Act and Table A, article 7. Article 7 permits a company to have a lien on shares in the company for all moneys presently payable by a shareholder or his estate to the company. This article is not included in the articles of association of the appellant company and therefore it is unnecessary to consider in this case whether, in the case of a company which has adopted Table A, the provisions of article 7 would be effective notwithstanding

s. 44 of the Act. The legislature might well give consideration to the desirability of clarifying the law in respect of these matters.

In my opinion the appeal should be dismissed.

STARKE J. Appeal from the Federal Court of Bankruptcy.

The *Companies Acts* of Victoria (No. 3659, s. 273; No. 4602, s. 44) contain provisions restricting dealings by a company registered under the Act or an existing company in its own shares. One of these provisions is as follows:—" nor shall any company have a charge on any share in the company belonging to a shareholder other than a charge for a call or calls due on any share in such company belonging to him."

The words suggest that the charge allowed by the Act is in respect of a call or calls actually due, which I take in the context to mean payable (See *Re Stockton Malleable Iron Co.* (1)), but that gives a very restricted meaning to the words, which are capable of and should be construed as extending as well in respect of a call or calls actually due as in respect of a call or calls as and when the same become due, or, in other words, that a charge may be made in respect of a future call or calls as and when the same become due. But it should be remembered that the authority to make such a charge must be found in the memorandum or articles of association of the company (*Newton* v. *Debenture-holders &c. of Anglo-Australian Investment Co.* (2)).

In the present case one Crawford, a deceased bankrupt, in February 1938 gave a general lien to the appellant company over 45,000 ordinary shares of one pound each held by Crawford in the company and he agreed that the shares should not be transferred, assigned, disposed of or encumbered by him. Thirty-four thousand of these shares were fully paid up, but eleven thousand of the shares were not paid up and the sum of one pound per share was owing in respect of each of these shares. Crawford acknowledged that he was indebted to the appellant in the sum of £11,000 in respect of the 11,000 shares. And it should be mentioned that in July of 1937 Crawford had also acknowledged that he was indebted to the company in the sum of £11,000 in respect of the 11,000 shares and covenanted to pay the said sum to the company " as and when required so to do." All but 4,522 of these 11,000 shares were subsequently paid up in full, but in respect of the 4,522 shares there still remains payable a sum of one pound per share, or £4,522.

In September of 1942 the directors of the appellant made a call of one pound per share upon these 4,522 shares payable in October

(1) (1875) 2 Ch. D. 101. (2) (1895) A.C. 244.

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1942 and notice was given to Crawford's executor. Crawford's estate has been sequestrated in bankruptcy and in proceedings in bankruptcy the general lien above mentioned was declared void and of no effect by reason of the provision of the *Companies Acts* also already mentioned.

The learned Judge in Bankruptcy held with some hesitation that the general lien given by Crawford created and was intended to create an equitable charge and was not merely a possessory lien. The argument before this Court proceeded on the assumption that this view was correct, and I shall therefore also assume its correctness for the purposes of this case and without further investigation. It was argued that the Act only allowed a charge upon shares in respect of which a call or calls was due, but that view cannot be sustained, for the Act sanctions a charge for a call or calls on any share in the company belonging to the shareholder.

The general lien or equitable charge, as I assume it to be, was rightly, however, in my judgment, declared to be null and void. It is not a charge upon any share in the company for any call or calls actually due and payable nor is it a charge in respect of any call or calls as and when the same become due or conditioned upon any such call or calls becoming due. Payment of the moneys unpaid in respect of the 4,522 shares might be required under the covenant in the July agreement to pay " as and when required," which would not be a " call or calls due on any share " in the ordinary connotation of that phrase in relation to companies under the *Companies Acts*, for calls under those Acts in respect of moneys unpaid on shares have, ordinarily, a special procedure and relate to requirements of the company or its directors pursuant to powers contained in the memorandum or articles of association and not to powers contained in special agreements with its shareholders. And the charge is not conditioned upon any call or calls becoming due. No doubt a call might be and was made in respect of the moneys unpaid on the shares. But at the critical time, that is, when the charge was created, calls might or might not be made in respect of the moneys unpaid in respect of the shares; the charge was not conditioned upon any call or calls becoming due; indeed, it was wholly within the discretion of the company or its directors whether any call or calls should ever be made in respect of the unpaid shares.

In my opinion, therefore, the so-called equitable charge cannot be described as a charge for a call or calls due on any shares in the appellant company belonging to the shareholder Crawford who executed the charge. It is accordingly avoided by the *Companies Acts*. And this appeal should be dismissed.

McTIERNAN J. In my opinion the appeal should be dismissed.

It appears that on 21st February 1938, the date on which Crawford made the indenture giving a lien to the company on his shares in the company, he was the holder of 45,000 shares, and that he was indebted to the company in the sum of £11,000 in respect of 11,000 of these shares. By the indenture Crawford covenanted with the company for the application of seventy-five per cent of all future dividends payable by the company to him "in the liquidation of the said debt of eleven thousand pounds until the same shall have been extinguished," and that "until the said debt of eleven thousand pounds should have been extinguished the company shall have a general lien over the said forty-five thousand shares" which Crawford held in the company and that these shares should not be dealt with by Crawford. By s. 44 of the *Companies Act* 1938 (Vict.) it is provided that a company shall not "have a charge on any share in the company belonging to a shareholder other than a charge for a call or calls due on any share in such company belonging to him." The question to be decided is whether the foregoing indenture gave a charge for a call or calls due on any share in the company belonging to Crawford. At the time the indenture was made the company had not made a call on any share in the company belonging to Crawford. There was then no call or calls due from him to the company. The indenture charged Crawford's shares with the payment of money due from him to the company otherwise than in respect of a call or calls due on any of his shares. The taking by the company of the charge infringed the prohibition in s. 44 and the charge is therefore invalid.

WILLIAMS J. The facts are set out in the judgment of the learned Judge in Bankruptcy. It is sufficient for me to state that on 15th July 1937 11,000 shares of one pound each in the capital of the company were allotted to Crawford subject to the payment of the full amount thereof in cash. Crawford did not pay any moneys on application or allotment, but, by an indenture made on 15th July 1937, he acknowledged that he was indebted to the company in the sum of £11,000 in respect of the 11,000 shares which had been allotted to him, and covenanted to pay the sum to the company as and when required to do so. He therefore became liable to pay the debt under a covenant, and independently of a call or calls being made under the articles of association of the company.

By an indenture made on 21st February 1938 Crawford covenanted (1) that seventy-five per cent of all future dividends payable on the shares should be applied in liquidation of the debt until it should be satisfied; (2) that until the debt was paid the company should have a lien over 45,000 ordinary shares (which included the 11,000

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shares) which he held in the company, and that he would not transfer, assign, dispose of or encumber the 45,000 shares until the debt of £11,000 had been extinguished.

The first covenant in this indenture provides, therefore, for payments in discharge of the debt, not as calls are made, but as dividends become payable from time to time. The second covenant creates an immediate charge to secure an existing debt of £11,000. It does not create a charge to secure so much of the sum of £11,000 as shall become due on calls made under the articles of association from time to time.

Apart from agreement a shareholder is not actually indebted to the company for any balance of money owing on his shares. Usually there is an agreement to pay certain moneys on application and allotment, but otherwise a shareholder's liability under the *Companies Act* 1938 (Vict.) and the memorandum and articles of association of a company is contingent upon calls being made, and only ripens into an actual debt as calls are duly made in accordance with the articles of association (*Alexander* v. *Automatic Telephone Co.* (1)). If a shareholder transfers shares which are not fully paid, then, apart from his liability to be placed on the B list of contributories if the company goes into liquidation within a year, he ceases to be liable to the company for subsequent calls. But under the indentures Crawford remained liable to pay the £11,000 irrespective of his ownership of the shares. Whilst he remained a shareholder, the £11,000 could no doubt be called up in accordance with the articles of association of the company, but the lien does not relate to or even contemplate that there should be calls. It is solely referable to the covenant to pay the acknowledged debt of £11,000.

The question is whether such a lien is invalidated by s. 44 of the *Companies Act* 1938, which provides, so far as material, that a company shall not have a charge on any share in the company belonging to a shareholder other than a charge for a call or calls due on any share in such company belonging to him. Mr. *Fullagar* submitted that the word " call " in the section included any moneys callable or demandable by a company by way of payment for a share irrespective of whether a call had been made or not. But at the date of the Act money due on a call had a well-accepted meaning. Whilst a company was a going concern, it meant that the formalities of the articles of association such as the passing of a valid resolution of the board of directors that a call of a stated amount should be made, and the due service of notice to pay the call upon the shareholders, which are conditions precedent to the making of a valid call, had been complied with.

(1) (1900) 2 Ch. 56, at pp. 63, 64.

Application and allotment moneys which are still owing under a contract to acquire shares in a company are not moneys that have been called up, although, under an article that allows a board of directors to make calls in respect of all moneys that are unpaid, such moneys if unpaid could also be called up. Mr. *Fullagar* is therefore right in my opinion when he says that all moneys that are demandable on shares can, by appropriate articles, be made the subject matter of calls. But the section only allows a charge for moneys due on calls. Assuming that this means moneys due or to become due on calls, it is a condition precedent to the validity of a charge under the section that it should be confined to moneys due or to become due as the result of the making of a call or calls.

It is true that a conflict exists between this construction of s. 44 and Table A, but the charge given by Table A is so wide that it cannot be reconciled with any meaning of the word " call " in s. 44, which must at least refer to moneys payable in respect of shares. Table A has statutory force, so that, where a company adopts Table A or article 7 thereof, it can have the charge provided by article 7 in spite of the provisions of s. 44. This charge is confined to shares which are not fully paid. But Table A is excluded from the articles of association of the present company, and it is clear that, where a company excludes Table A and adopts its own articles, it must comply with s. 44. Moreover, the present charge is not even contained in the articles, but in a separate indenture. Such an indenture, in my opinion, could not, without a breach of the section, charge shares with moneys owing except those owing or to become owing under calls made in accordance with the articles of association.

The lien created by the second covenant in the indenture of 21st February 1938 is therefore invalid.

The appeal has shown the necessity for an amending Act to remove the conflict between s. 44 and article 7 of Table A, to define exactly what shares can be charged under s. 44, because it is doubtful whether these shares are confined to the partly paid shares on which a call has been made, or to all shares, whether fully paid or not, owned by a shareholder in a company, and to make it clear whether the charge can be made to apply to calls to be made in the future as well as calls already made at the date of the charge.

The appeal should, in my opinion, be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *Dudley A. Tregent.*

Solicitor for the respondent, *Alan Wainwright.*

E. F. H.