[HIGH COURT OF AUSTRALIA.]

TONGKAH COMPOUND NO LIABILITY . APPELLANT; PLAINTIFF,

AND

MEAGHER . . . . . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 28, 29.

SYDNEY, *July* 23.

Dixon, McTiernan, Webb, Fullagar and Kitto JJ.

Companies—Reduction of capital—No-liability mining company—Return of capital to shareholders—Extinguishment of liability for uncalled capital—Power to make rules "for the management and purposes of the company"—Companies Acts 1938-1940 (*No.* 4602—*No.* 4790) (*Vict.*), Part II.*

Part II. of the *Companies Acts* 1938-1940 (Vict.) provides for the incorporation of no-liability mining companies and declares that companies incorporated under corresponding previous enactments for mining purposes on the "no-liability system" shall be deemed to be incorporated under the Part. By s. 450 (1) it authorizes a company to make rules "for the management and purposes of the company not inconsistent with" the Part. It gives a company power to increase capital and to consolidate and to subdivide its shares, but it does not expressly give or deny the power to reduce capital.

Held that such a company has not the power to reduce its capital by returning capital to shareholders or extinguishing the right to call up uncalled capital. Section 450 (1) does not authorize the making by the company of a rule purporting to give it power to reduce capital.

Decision of the Supreme Court of Victoria (*Lowe* A.C.J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Tongkah Compound No Liability was incorporated in 1910 as a no-liability mining company under Part II. of the *Companies Act* 1890 (Vict.); it was therefore deemed to be incorporated under Part II. of the *Companies Act* 1938 (Vict.): see s. 398 (1) thereof.

* Material provisions of this Part appear in the judgments, *post.*

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Under a provision which now appears as s. 450 (1) of the 1938 Act it made rules which included the following :—" (7) The company may by special resolution reduce its capital by paying off capital, cancelling capital which has been lost or is unrepresented by available assets, reducing the liability on the shares, cancelling shares not taken or agreed to be taken by any person, or otherwise as may seem expedient, and capital may be paid off on the footing that it may be called up again or otherwise ". In purported pursuance of rule 7, a special resolution was passed in the following terms on 28th February 1951 : " (1) That the capital of the company be reduced from £250,000 divided into 250,000 shares of one pound each to £125,000, divided into 250,000 shares of ten shillings each and that such reduction be effected : (*a*) by paying off paid-up share capital which is in excess of the wants of the company to the extent of ten shillings a share on each of the 248,536 shares that have been issued ; and (*b*) by reducing the nominal amount of each of the said 250,000 shares from one pound to ten shillings each ; and (*c*) by extinguishing the liability in respect of uncalled capital on the said 248,536 shares that have been issued to the extent of ten shillings a share. (2) That Mr. Leo Carden Meagher be elected to represent himself and all other ordinary shareholders in proceedings to be taken before the Supreme Court of Victoria for the clarification by the court of the company's right to return capital ". There were no shareholders other than ordinary shareholders in the company, and no shareholder objected to the proposed return of capital.

The company applied by originating summons (to which L. C. Meagher was defendant in a representative capacity) pursuant to Order LIV(A). of the *Rules of the Supreme Court* (Vict.) for a determination of the questions :—

1. May Tongkah Compound No Liability return capital to its members in the manner proposed in the special resolution validly and in accordance with law ?
2. May Tongkah Compound No Liability extinguish liability in respect of uncalled capital in the manner proposed in the said special resolution validly and in accordance with law ?

Lowe A.C.J. answered both questions in the negative.

From this decision the company appealed to the High Court.

P. D. Phillips K.C. (with him *K. H. Gifford*), for the appellant. If this were an application made by a limited-liability company on petition pursuant to Part I. of the *Companies Acts* 1938-1940

(Vict.), it would be granted as a matter of course. The rules of this company provide for a reduction of capital, and the question is whether the particular rule is *intra vires* the company. *Lowe* A.C.J. reached his decision, not upon the general nature of incorporated companies, but upon specific provisions in the *Companies Act*. The " no-liability " principle emerged in its present form in 1871. Any partnership may be incorporated as a no-liability company, even though it has only two members ; and a no-liability company is little more than a partnership subject to statutory provisions. Subject to the bankruptcy provisions, a partnership may do what it will with its capital. A company limited by guarantee could return its capital without express statutory authority (*Re Borough Commercial & Building Society* (1)). Confusion has arisen because of a failure to distinguish between capital in the form of cash paid up by the shareholders and capital in the form of assets (*Ooregum Gold Mining Co. of India, Ltd.* v. *Roper* (2) ; *Trevor* v. *Whitworth* (3)). In *Welton* v. *Saffery* (4) a power to issue shares at a discount was held to be inconsistent with the nature of a company with an unchangeable memorandum ; but a no-liability company may issue shares at a discount (*New Good Hope Consolidated Gold Mines N.L.* v. *Stutterd* (5)). The power to return capital derives from the rule-making power in s. 450 (1) of the 1938 Act : see 18th Schedule thereof, rule 4 (*m*). The purpose of preventing a return of capital is to preserve the uncalled liability, and this does not exist in the case of a no-liability company. [He referred to *Lindley* on *Partnership*, 6th ed. (1893), p. 545 ; *Webb* v. *Federal Commissioner of Taxation* (6).]

G. H. Lush, for the respondent. The respondent does not oppose the appeal. Before 1862 partnerships on registration lost the power to reduce capital. This was put on the two grounds that the document constituting the partnership was unchangeable and that creditors' rights might be affected : See *Droitwich Patent Salt Co. Ltd.* v. *Curzon* (7). And companies formed after that date could not in the absence of express power return surplus moneys to shareholders : See *Holmes* v. *Newcastle-Upon-Tyne Freehold Abattoir Co.* (8). This case shows that a partnership could not reduce its capital without power (9) ; that the *Droitwich Case* (10) depended on the fact that the constituent document

(1) (1893) 2 Ch. 242.
(2) (1892) A.C. 125, at p. 133.
(3) (1887) 12 App. Cas. 409.
(4) (1897) A.C. 299.
(5) (1916) V.L.R. 580.
(6) (1922) 30 C.L.R. 450, at p. 475.
(7) (1867) L.R. 3 Ex. 35.
(8) (1875) 1 Ch. D. 682.
(9) (1875) 1 Ch. D., at p. 687.
(10) (1867) L.R. 3 Ex. 35.

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had been registered ; and that the interests of creditors are regarded as being involved when there is a public registration of the amount of the company's capital. The position after 1862 was that a limited company could not reduce its capital because it had an unchangeable memorandum and a registered share capital ; a company limited by guarantee could reduce its capital at will, a right of which it was deprived in 1901 (*Gore-Browne, Joint Stock Companies*, 40th ed. (1946), p. 86) ; an unlimited company was, and still is, able to reduce capital at will (*Re Borough Commercial and Building Society* (1)). Unlimited companies are not required to state the amount of their share capital (*Companies Acts* 1938-1940 (Vict.), s. 5 (4)). In the case of a no-liability company there is no memorandum, and no promise by the shareholders to provide future capital. In these circumstances the registered statement of share capital is of little or no significance to creditors.

P. D. Phillips K.C., in reply.

Cur. adv. vult.

July 23.

The following written judgments were delivered :—

DIXON J. This is an appeal from an order made on originating summons by *Lowe* A.C.J., which in effect declared that the appellant company may not return capital to its members and extinguish liability in respect of uncalled capital in the manner proposed by a special resolution adopted by the company at an extraordinary general meeting. The company was incorporated in Victoria in 1910. It is a mining company and it was incorporated on the no-liability principle. It is governed by the *Companies Acts* 1938-1940 (Vict.), Part II., under which, by virtue of s. 398 (1), it is deemed to be incorporated.

From time to time the capital of the company has been increased and it now consists of £250,000 divided into 250,000 shares of £1 each. All except 1,464 of the shares have been issued and they have been paid up to the amount of 16s. 8d.

The rules for the management and purposes of the company made under the power conferred by s. 450 of the Act upon a majority in number and value of the shareholders contain an article, No. 7, which purports to enable the company by special resolution to reduce its capital by paying off capital, cancelling capital which is lost or is unrepresented by available assets, reducing the liability on the shares, and cancelling shares not taken or agreed to be taken by any person, or otherwise as may seem

(1) (1893) 2 Ch., at pp. 252-255.

expedient. The rule goes on to say that capital may be paid off on the footing that it may be called up again or otherwise.

The resolution which has been held ineffectual was passed in purported pursuance of rule 7. By the first clause of the resolution it was resolved that the capital of the company be reduced from £250,000, divided into 250,000 shares of one pound each to £125,000 divided in 250,000 shares of ten shillings each and that such reduction be effected (*a*) by paying off paid-up share capital, which is in excess of the wants of the company to the extent of ten shillings a share on each of the 248,536 shares that have been issued, and (*b*) by reducing the nominal amount of each of the 250,000 shares from £1 to 10s. each, and (*c*) by extinguishing the liability in respect of uncalled capital on the 248,536 shares that have been issued to the extent of 10s. a share. By the second clause of the resolution the respondent was chosen to represent himself and all other ordinary shareholders in proceedings before the Supreme Court " for the clarification by the court of the company's right to return capital ".

Part II. of the *Companies Acts* 1938-1940 contains no provision dealing with the reduction of capital. It does, however, expressly confer a power of increasing capital and a power of consolidating shares and of subdividing shares (ss. 435, 436, 437). The question whether at common law a joint stock company, unincorporated or incorporated by charter, could reduce its share capital depended entirely on the provisions of its constating instruments by which the relations of the members *inter se* were regulated. There was no rule of positive law to prevent the reduction of capital; it affected only the relations of the members *inter socios*. But because it affected their mutual relations and formed the basis of the enterprise it could not be altered unless the documents under which the members associated provided for its alteration. " The amount of a company's capital is one of those things which, when fixed, cannot be varied without the consent of all who join the company, unless there is some special provision to the contrary in the statute by which a company is governed or in its charter or deed of settlement " (*Lindley: Partnership and Companies*, 4th ed. (1878), p. 612). This view of the matter was considered applicable to companies incorporated under *The Companies Act*, 1862 (Imp.) (25 & 26 Vict. c. 89), except where it encountered the then recent principle of liability limited by shares. That principle and the provisions of the Act carrying the principle into effect were held to be inconsistent with a reduction of share capital (*Droitwich*

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Patent Salt Co. Ltd. v. *Curzon* (1)). But by the *Companies Acts* of 1867 and 1877 the statutory power to reduce capital subject to confirmation by the court was conferred.

Companies registered under the Act of 1862 with unlimited liability or with a member's liability limited by guarantee, even though constituted with a fixed capital divided into shares, continued to be governed by the general principle obtaining at common law. These companies could reduce capital in any manner allowed by the memorandum and articles of association. But in the case of a company limited by guarantee the *Companies Act*, 1900 (Imp.), (63 & 64 Vict. c. 48), s. 27 (1), introduced regulations of its share capital, which meant that the fixed capital divided into shares of such a company could no longer be reduced except under the statutory provisions. See now ss. 66 and 21 of the *Companies Act* 1948 (Imp.) (11 & 12 Geo. 6 c. 38).

The question is whether the principle of the " no-liability system " and the provisions by which it is established and regulated are incompatible with the application to companies incorporated under that system of the general doctrine that a fixed capital divided into shares may be reduced in such manner as the constating instruments of the company may allow and prescribe.

Not a great deal of light is thrown on the question by the well-known decisions upon the status of share capital in a company limited by shares. The reasoning which determined *Trevor* v. *Whitworth* (2) ; *Ooregum Gold Mining Co. of India Ltd.* v. *Roper* (3) ; *Welton* v. *Saffery* (4) ; the judgment of *Jessel* M.R. in *Re Dronfield Silkstone Coal Co.* (5) ; and *Re Almada & Tirito Co.* (6) went so much upon the positive and negative side of the limitation of liability and upon the existence of a qualified statutory power to reduce capital, that these cases supply few basic analogies.

The first of these considerations is summed up in the description quoted more than once from *Buckley* on *Companies*, 11th ed. (1930) concerning the legislation governing limited liability, viz. : " The dominant and cardinal principle of these Acts is that the investor shall purchase immunity from liability beyond a certain limit on the terms that there shall be and remain a liability up to that limit ". The dominant and cardinal principle of the no-liability system is that the investor shall incur no personal liability at all and for default in paying calls upon his share shall suffer no more than the forfeiture of his share.

(1) (1867) L.R. 3 Ex. 35.
(2) (1887) 12 App. Cas. 409, at p. 417.
(3) (1892) A.C. 125.
(4) (1897) A.C. 299.
(5) (1880) 17 Ch. D. 76.
(6) (1888) 38 Ch. D. 415.

But there are two matters implicit in the reasoning which these cases pursue that are of importance in the solution of the present question. The first is the distinction which Lord *Watson* (1) emphasizes between, on the one hand, considerations affecting only the rights and liabilities *inter se* of the members of the company, "domestic matters in which neither creditors nor the outside public have any interest" and, on the other hand, statutory conditions the policy of which is concerned, wholly or in part, with the position of creditors or the interests of the outside public. The essence of the question whether a no-liability company can reduce its share capital is whether to do so affects only the rights and liabilities of the members of the company or touches matters provided for by statutory directions which do contemplate the position of creditors or of the outside public.

The second of the two matters suggested by the line of authorities mentioned is the importance attached to the preservation of the funds representing paid-up and subscribed share capital or expected to arise from a subscription of share capital, except in so far as they may be lost or depleted or the expectation may be defeated in the course of the carrying on of the business of the company or otherwise carrying out its purposes or by the forfeiture of shares or by a reduction of capital judicially confirmed under statutory authority. Whether logic or experience of practical affairs may tend against such a view of the significance of a company's nominal or subscribed or paid-up capital is beside the point. For it is a matter which, in the view of the House of Lords, should be regarded as a significant part of legislative policy.

The no-liability system was adopted in the colony of Victoria by *The Mining Companies Act* 1871 (No. 409), Part IV. That Act contained provisions for the incorporation of mining companies on the principle of limited liability. The provisions were of a special character, doubtless considered fitted for the purpose of mining companies. Part IV. expressed the principle of no-liability, but for the most part dealt with no-liability companies by incorporating *mutatis mutandis* the provisions affecting limited-liability mining companies. In the *Companies Act* 1890, Part II., the provisions introduced in 1871 were reproduced. In the *Companies Act* 1896 an experiment was made. A no-liability system for trading companies was provided. This was dropped in the consolidation made by the *Companies Act* 1910, but that consolidation did not cover the mining-company law. The consolidations made by the *Companies Acts* 1915 and 1928 did, however, include mining companies. The special pro-

(1) (1897) A.C., at pp. 308-310.

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visions for mining companies incorporated with limited liability remained until the enactment of the *Companies Act* 1938, which contains a recension and consolidation of the statute law relating to trading companies. The special provisions for limited-liability mining companies were then discarded and as a consequence the provisions relating to the no-liability system for mining companies ceased to incorporate provisions by reference to limited-liability mining companies, but the provisions were written out in full. The *Companies Act* 1938 embodied the provisions relating to mining companies in Part II.

An examination of the development since 1871 of the no-liability provisions has given little assistance towards the solution of the problem raised by the present case. There have been changes in the form of some of the provisions, and a considerably greater regulation of no-liability companies is contained in the present Act than in that of 1871. But it is the provisions of the present Act which supply the material upon which a conclusion must be reached and an inquiry into their history has disclosed nothing which should modify or vary the meaning and effect which otherwise would be given to them.

The leading provision in Part II., concerning mining companies incorporated on the no-liability system, is s. 397, which provides that " The acceptance of a share in any such company, whether by original allotment or by transfer, shall not be deemed a contract on the part of the person accepting the same to pay any calls in respect thereof, or any contribution to the debts and liabilities of the company, and such person shall not be liable to be sued for any such calls or contributions ; but he shall not be entitled to a dividend upon any share upon which a call is due and unpaid ". Section 403 expresses the conditions entitling a mining company to incorporation upon the no-liability principle. The material conditions are first that at least twenty-five per cent of the shares in the company must have been subscribed for ; second that at least five per cent of the subscribed capital must have been paid up and third that a memorandum and declaration must be filed with the Registrar-General containing the matters indicated by a form in the Fifteenth Schedule. Among these matters is a statement of the value of the company's property, including its mining claim and its machinery. What is of great importance for present purposes is that the memorandum must record the capital structure of the company by giving the number of shares and their denomination, the number of shares subscribed for (being not less than twenty-five per cent of the entire number of shares of the

company) and the amount of the subscribed capital which is paid up (being not less than five per cent of the subscribed capital).

The memorandum and declaration must be published in the daily Press and the *Government Gazette* (s. 403 (2) (*c*)). Upon registration the persons whose names are contained in the memorandum together with the persons who thereafter become members are constituted a body corporate with power to carry into effect the business and objects of the company as set out in the rules (s. 404). The shares unsubscribed for and the shares transferred to the company are, until re-issued, to be the property of the company. They are to be registered in the name of the company or in the name of a trustee appointed for the purpose : see s. 407. Shares forfeited and offered at public auction may be purchased by the company (s. 443). A prospectus issued by a company or an intended company must state the value of the company's property, the number of shares in the company and the minimum subscription on the receipt of which the directors may proceed to allotment, and it must state the amounts payable on application and allotment of each share (s. 401 (2) (*a*) (i.) and (ii.)).

The foregoing provisions appear to import an intention that the fixed capital of the company shall be part of the foundation of the body not only for the purpose of actual and proposing members but also for the purpose of those dealing with the company. For that reason the filed memorandum must set it out, but it must be advertised. It is not enough that the nominal amount of the capital must thus be stated and made public. It is necessary also that specified percentages respectively be subscribed and paid up. On the other hand, the capital structure of a no-liability mining company may be altered or affected by an exercise of the powers to increase capital expressly conferred by the Acts (ss. 435 and 436) and the powers so conferred to consolidate and divide share capital into shares of larger amount (s. 437 (1) (*a*)) and to subdivide shares into shares of smaller amount (s. 437 (1) (*b*)). It is to be noted that when the last power is exercised the proportion must be preserved between the amount paid up and the amount unpaid on each share (s. 437 (1) (*b*)). The capital structure may be affected practically also by forfeiture, but formally the shares forfeited retain their identity and remain in the hands of the company. It is not useful to state in detail the effect of the statutory provisions for forfeiture. It is enough to notice that upon forfeiture for non-payment of calls, the share must be offered for sale by public auction, that up to the day before the sale it may be redeemed by the shareholder, that it may be offered as

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paid up to the extent of the payments already made in respect of the share together with calls made and unpaid at the date of the sale, that the company may purchase the share at a price not exceeding the unpaid calls and that the proceeds of a sale of the shares after satisfying the difference between the amount actually paid up and the amount credited as paid up for the purposes of the sale and meeting expenses are to be paid to the shareholder who incurred the forfeiture (ss. 441-449). The absence of any statutory power to reduce capital is no doubt a matter requiring consideration. It might have been expected that in the course of years a subject to which so much attention was directed in the case of trading companies would have been dealt with by the legislature in relation to no-liability companies, the statutory provisions as to no-liability mining companies having been repeatedly before it. But it must be remembered that it was not until the *Companies Act* 1896 conferred a power to reduce capital subject to confirmation, that limited-liability companies in Victoria could effect a reduction of capital. From the omission in 1871 of a power to reduce capital in the case of no-liability mining companies no inference can safely be drawn that it was intended that no such power should exist. The whole matter in the end comes back to the implications in the no-liability system and in the requirements in connection with its capital imposed upon a company as conditions of registration and incorporation under that system.

In Victoria the Supreme Court has considered that the no-liability system is consistent with the issue of shares at a discount (*New Good Hope Consolidated Gold Mining N.L.* v. *Stutterd* (1)). It may be argued that if shares may be issued on terms that the full amount need not be paid up, so that they may be retained free of any liability to forfeiture on payment of a less sum than their full value, it is the same thing in substance as if capital already paid were returned or the face value of the shares were reduced. But such an argument places too little weight upon the nature of the requirements imposed by the Act on a company seeking registration and too much weight on the supposed logical equivalence of a return of capital and an issue of shares at a discount. It is therefore not necessary to consider the correctness of the Victorian decision.

The requirements imposed on a company seeking registration under the no-liability system are very distinct in their insistence on a statement of the share capital, the minimum subscription and the minimum payment of capital. The system relieves the shareholder of personal liability to pay the amount of his share, but it

(1) (1916) V.L.R. 580.

prescribes a method of securing, as far as can be done consistently with the absence of personal liability, that the amount of the share is raised by the company. The provisions for forfeiture supply an incentive to the shareholder himself to pay up the amount of his share and the requirement that the share be offered for sale serves, among other purposes, the purpose of seeking to raise the amount by which the shareholder is in default.

It will be seen, therefore, that the amount of the share is regarded as possessing a significance that goes beyond the relations *inter se* of the members of the company. A purpose of requiring a filed memorandum stating the amount of the share capital, the amount of the share capital subscribed for and the amount paid up as well as the value of the property, is to inform members of the public of the financial position of the company at its inception. That is shown by the requirement that the contents of the memorandum shall be advertised. The information is to be made available to members of the public because they may deal with the company in more than one way. It is information which the legislature regarded as material to persons who may give credit to the company, who may acquire shares in the company or who may be otherwise concerned to know how the company is constituted. Any resolution for increasing the capital of the company or consolidating and dividing or subdividing the shares must be recorded with the Registrar-General (s. 435 (5) and s. 437 (2)). It is evident, therefore, that the company's share capital is treated as a matter which concerns more than the shareholders *inter se* and as something that should be publicly recorded.

The inference appears to be reasonably clear that while the legislature was prepared in the case of mining companies to relieve shareholders from personal liability to contribute the full face value of their shares, it did so upon the footing that, subject to the possibility of increasing capital, there should be a definite nominal capital which should continue and that at the inception there should be a minimum subscription and a minimum payment up of capital. Since these are clearly treated as matters going beyond the relations *inter se* of the members, it appears to follow that a reduction of capital is excluded.

In a work by Sir *George Rich* and the late Judge *Rolin* upon the *Companies Acts of* 1874 *and* 1888 (N.S.W.) published in 1890 the following passage appears in relation to the increase and reduction of capital of no-liability companies under the legislation of New South Wales which contained no express power to do either :—

" the power of a no-liability company to increase its capital at all must depend on whether the statement of the capital of the

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company in the memorandum is to be regarded as fixing the amount of that capital under the Act; whether, in fact, the company is registered and incorporated upon the basis of having its capital as there stated, and not otherwise. If so, there is certainly no power conferred by the Act to increase the capital. And it is submitted that that view of the statement in the memorandum is correct. The Act requires certain statements to be made as the basis of the right of the company to registration and incorporation; of these some, such as the place where the company's mine is situated, and the amount of capital of the company, are in their nature statements of permanent and continuing facts; and thus, by implication, it may be said that the amount of capital is fixed by the statute incorporating the company: it follows that, as the legislature has given no power to increase that capital, no such power exists, and the capital cannot be increased, even by the express assent of every member of the company. . . . The same considerations apply, and perhaps more strongly, to the question of the power of a company to reduce its capital" (*Rolin & Rich Companies Acts of* 1874 *and* 1888 (1890), p. 298).

This view of the memorandum and its function and effect appears sound.

It follows that the appellant company cannot reduce its capital and the resolutions for the purpose are ineffective.

The appeal should be dismissed.

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

The appellant was formed for mining purposes and, in 1910, was incorporated on the no-liability system under Part II. of the *Companies Act* 1890 (Vict.). It is deemed by reasons of the provisions of s. 398 of the *Companies Acts* 1938-1940 (Vict.) to have been incorporated under Part II. of the latter Act.

The company passed a special resolution to reduce its capital in a manner which would involve the repayment of money to its shareholders, the reduction of its paid-up capital by the like sum and, in addition, the reduction of the nominal value of each share. The company has a rule which provides that it may by special resolution reduce its capital in various ways. The reduction upon which the company has resolved is within the terms of this rule.

The question is whether the company has power to carry out the terms of the special resolution. *Lowe* A.C.J. said, and I agree, that the question comes down to this: "Whether Rule 7 (the rule in question) is *intra vires* the company and the answer to this

question depends on the proper limits of the rule-making power of the Company". Section 450 of the *Companies Acts* 1938-1940 defines these limits. It is a power to make and alter rules for the management and purpose of the company which are not inconsistent with Part II. of the Act. Part II. neither gives nor expressly denies the power to reduce capital. *Lowe* A.C.J. decided that Rule 7 is invalid because it is inconsistent with Part II. There was no argument that the rule was not related to management and purposes. His Honour assumed, without deciding, that the rule was of that description.

Part II. of the Act gives power to a company to increase its capital (s. 435) and to consolidate or subdivide its shares (s. 437). *Lowe* A.C.J. drew attention to the conditions laid down by these sections respectively for carrying out these operations. If reduction of capital is consistent with Part II., it is not possible to discern anything in Part II. which requires the operation to be carried out with any such safeguards. His Honour concluded that the provisions of Part II. as to capital are exhaustive and hence the necessary intendment of the Part is to deny the power to reduce capital. There is much force in the view that what is expressly provided by ss. 435 and 437 in regard to the capital structure of the company necessarily implies that a company incorporated under Part II. is denied any other power to alter that structure especially by reducing it.

The conclusion, however, that such a company has no power to reduce its capital is one that can be clearly drawn from s. 403. This section prescribes how a company may obtain registration under Part II. It is an essential step that a memorandum be advertised and lodged with the Registrar-General. The memorandum must contain the several matters set forth in the Fifteenth Schedule. These include the number of shares, the number subscribed for and the amount of the subscribed capital which is paid up. The company is an artificial creature owing its structure to the Act and it cannot do anything opposed to Part II. The memorandum fixes and notifies to the public the capital. The provisions of s. 403 in regard to the publishing and filing of a memorandum fixing the capital of the company would be deprived of their utility if the company were at liberty to reduce the capital. It is a necessary implication from the provisions of s. 403 that the capital of the company as fixed by the memorandum is not to be reduced. There is no provision in the Act for altering the memorandum in consequence of the reduction of capital. This circumstance supports the view that the reduction of capital as fixed

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by the memorandum from time to time could not be reconciled with the provisions of s. 403. A statutory power is necessary to authorize the company to reduce its capital and it would be necessary for the company to carry out this operation in accordance with the terms of the power. Its own rule, without the support of a statutory power, is not sufficient to authorize the company to reduce its capital, notwithstanding its meticulous adherence to the terms of the rule.

WEBB J. I would dismiss this appeal for the reasons given by *Dixon* J.

FULLAGAR J. This is an appeal from a judgment of *Lowe* A.C.J. given in chambers on an originating summons under Order LIV (A). of the *Rules of the Supreme Court* (Vict.). Speaking quite broadly and generally, the case raises the question whether a no-liability mining company, whose corporate existence is governed by and subject to Part II. of the *Companies Acts* 1938-1940 (Vict.), may lawfully reduce its capital. The particular reduction contemplated by the plaintiff company involves both a return of paid-up capital to members and an extinguishment of liability in respect of uncalled capital. The company has purported to authorize the proposed reduction by a special resolution duly passed in accordance with its registered rules on 28th February 1951. The question arises because Part II. of the Act—unlike Part I., which deals with limited liability companies—contains no express provision relating to reduction of capital. *Lowe* A.C.J. answered the question in the negative.

The plaintiff company was incorporated as a no-liability mining company on 3rd May 1910 under the provisions of Part II. of the *Companies Act* 1890 (Vict.). There is express statutory authority for increasing capital and it increased its capital on two occasions. At the date of the special resolution its capital was £250,000, divided into 250,000 shares of £1 each, of which 248,536 had been issued. All the issued shares are paid up to 16s. 8d. Rule 7 of the company's registered rules provides that "the company may by special resolution reduce its capital by paying off capital, cancelling capital which has been lost or is unrepresented by available assets, reducing the liability on the shares, cancelling shares not taken or agreed to be taken by any person, or otherwise as may seem expedient, and capital may be paid off on the footing that it may be called up again or otherwise". The special resolution, which is in question, is in the following terms:—"(1) That the capital

of the company be reduced from £250,000 divided into 250,000 shares of one pound each to £125,000 divided into 250,000 shares of ten shillings each and that such reduction be effected: (*a*) by paying off paid-up share capital which is in excess of the wants of the company to the extent of ten shillings a share on each of the 248,536 shares that have been issued; and (*b*) by reducing the nominal amount of each of the said 250,000 shares from one pound to ten shillings each; and (*c*) by extinguishing the liability in respect of uncalled capital on the said 248,536 shares that have been issued to the extent of ten shillings a share. (2) That Mr. Leo Carden Meagher be elected to represent himself and all other ordinary shareholders in proceedings to be taken before the Supreme Court of Victoria for the clarification by the court of the company's right to return capital."

The history of the relevant legislation may be briefly referred to. So far as ordinary trading companies with limited liability are concerned, *The Companies Act*, 1862 (Imp.) (25 & 26 Vict. c. 89) gave no express power to reduce capital. The power was first given by the Act of 1867, and more elaborate provisions were contained in the Act of 1877. In Victoria the power was first given by the Act of 1896. Both in England and in Victoria the statutory power has always been subject to strict conditions, and judicial approval has been required. In England the "no-liability" company is, so far as I am aware, unknown. In Victoria the *Companies Act* 1896 contained provisions for the incorporation of ordinary trading companies on a "no-liability" basis, but these provisions were repealed by the *Companies Act* 1910, and have never been re-enacted. It would appear that the provisions of the Act of 1896 authorizing reduction of capital were applicable to companies generally, including no-liability companies incorporated under that Act, but nothing in that Act was applicable to mining companies. Mining companies had already been made the subject of special provision in *The Mining Companies Act* 1871, although that was by no means the first legislation on the subject. The Act of 1871 dealt primarily with the incorporation of mining companies as companies with limited liability, but Part IV. provided that companies might be incorporated under the Act for mining purposes on a system to be called the "no-liability system". The distinctive feature of the system was and is that, although shares are automatically forfeited for non-payment of a call and no dividend may be paid on any share on which a call is due and unpaid, a member is not liable to be sued for a call and is not liable to contribute to the debts and liabilities of the company,

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even to the limited extent to which a member of a "limited" company is so liable. Practically speaking, the provisions of the Act of 1871 were reproduced in the consolidating Acts of 1890, 1915 and 1928, but the consolidating Act of 1938 (which is the Act at present in force) made a change. It omitted all the special provisions relating to limited-liability mining companies, and Part II. of the Act, although it incorporates most of the provisions which had formerly related to such companies, deals exclusively with no-liability companies formed for mining purposes. Although the plaintiff company in this case was incorporated under the Act of 1890, s. 398 of the Act of 1938 provides that it shall be deemed to be incorporated under the latter Act. In so far, therefore, as the question raised depends on statutory enactment, it is to the Act of 1938 that we must look. At no stage has an express statutory power to reduce capital been given to a no-liability mining company.

The question raised for determination is a question of power, not merely in the loose sense in which it is sometimes used but in the true sense of that word. The resolution of 28th February 1950 is either *intra vires* or *ultra vires* the company. If it is *ultra vires*, it is void and gives no authority for the reduction of capital which it purports to approve: it would, therefore, afford no defence to a claim in the future by a creditor, or by a shareholder who was not actually a party to it, for an order that directors replace capital moneys paid away by them in pursuance of it. When the nature of the question at issue is thus understood, it is seen at once, I think, that it can in no way depend on rule 7 of the company's rules. Section 450 of the *Companies Acts* 1938-1940, which authorizes the making of rules "for the management and purposes of the company", cannot be construed as enabling the company to confer upon itself by means of a rule a power which it does not otherwise possess. A power to reduce capital, like any other power of the company as such, is not a mere matter of the management of the company or the conduct of its business or the regulation of the rights of shareholders as between themselves or as between them and the company. It is a matter of concern to persons dealing with the company and in particular to creditors. The truth is that the question whether rule 7 is a valid rule cannot be determined until we have determined the question whether the company has power to reduce its capital apart from the rule. If it has, then rule 7 will be valid in so far as it prescribes that a reduction otherwise lawful must be effected by special resolution. If it has not, then rule 7 will be wholly invalid.

The argument that a company could, by its rules, equip itself with a power to reduce capital was supported partly by reference to the great breadth of the word " purposes " and partly by reference to rule 4, and in particular to paragraph (*m*) of rule 4, of the " sample " rules contained in the Eighteenth Schedule. As to the first argument, it is sufficient to say that, wide as is the scope of the word " purposes ", it cannot properly be stretched to embrace any purposes except purposes which are otherwise within power. As to the second argument, it is undoubtedly legitimate to look at the Eighteenth Schedule : in the case of a limited company authority to do things which it might otherwise have been held unable to do has been inferred from provisions contained in " Table A ". But, when we look at the Eighteenth Schedule, we find, I think, that it does not support the argument. The schedule, like " Table A ", contains a set of rules or articles which may be adopted by a company. With two exceptions the rules are such as one would expect to find in articles of association (though some of them do not appear to have been very carefully considered : it is doubtful, for example, whether rule 73 (1) is consistent with s. 451 (*a*) of the Act). The two exceptions are rules 4 and 5. Rule 4 sets out the " purposes " of the company, and corresponds to the " objects clause ", which is, of course, always found in the memorandum, and not in the articles, of a limited company. Some of its paragraphs, though by no means all, accordingly relate to what are undoubtedly " powers " of the company in the strictest sense. Paragraph (*m*) reads :—" To distribute among the members in specie or kind any property of the company or any proceeds, shares, or rights arising from the sale or disposal of any property or assets of the company ". Rule 5 provides that " The initial capital of the company shall be ".

The rules of a company may, under s. 450, be altered from time to time by its members. But it would be quite wrong, in my opinion, to conclude from the nature of rules 4 and 5 in the Eighteenth Schedule that the company may lawfully add to its powers by making rules, or from the terms of par. (*m*) of rule 4 that a particular power is or may be given to reduce capital. A no-liability company may only be incorporated for " mining purposes ", and, while it is required to file a " memorandum ", the form provided contains no " objects clause ". On the one hand, no rule could authorize a no-liability company to enter a field of business outside the scope of " mining purposes ". On the other hand, rule 4 serves the doubtless useful purpose of indicating that such a company may do many things incidental

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to the pursuit of mining operations and the carrying on of its lawful business. It is still customary to include many such incidental matters in the objects clause of the memorandum of a limited-liability company despite the criticism of such a course by the learned Lords in *Cotman* v. *Brougham* (1). Rule 5 is sufficiently accounted for by the fact that the Act gives, by s. 435, a power to increase capital, and doubtless, if the capital were increased, rule 5, if it had been adopted, could be amended accordingly. There is no justification for saying that rule 5 could be amended by providing for a reduced capital, unless we can discover a power to reduce capital. Similar considerations apply to par. (*m*) of rule 4. Such a provision is commonly found in the memorandum of a limited-liability company. Its purpose is explained in *Palmer's Company Precedents*, 15th ed. (1938), vol. 1, p. 473. The predicative words are the words "*in specie*", and all that the provision means is that, if a distribution out of the assets of the company is authorized by law, that distribution may be made *in specie* instead of money.

All that has been so far determined is that the rules of the company do not, and cannot, confer on the company a power to reduce its capital. The rules cannot serve as a source of power. But the power may nevertheless exist. The question whether it exists or not would, in the absence of authority, have to be approached on the same basis on which the courts approached the great questions which arose in the years shortly after the incorporated joint stock company having the liability of its members limited came to be a common phenomenon. It would be a matter of deduction from the inherent nature of the new creature, which owes its existence to the statute, and the inquiry would be whether the act or transaction in question was consistent or inconsistent with essential implications of the statute. On the whole, I would think that, if there were no indication whatever one way or the other, the question ought to be resolved in favour of the existence of the power, but the passages cited by *Lowe* A.C.J. from *Bonanza Creek Gold Mining Co. Ltd.* v. *The King* (2), and what is said to the same effect in *Guinness* v. *Land Corporation of Ireland* (3) and *Ashbury Railway Carriage & Iron Co. Ltd.* v. *Riche* (4) may be of more general application than I am inclined to think they are. I am inclined to think that they represent rather a particular conclusion as to the nature of the business activities which a company may

(1) (1918) A.C. 514.
(2) (1916) 1 A.C. 566.
(3) (1882) 22 Ch. D. 349.
(4) (1875) L.R. 7 H.L. 653.

lawfully carry on than an assumed general starting-point for all cases in which a power is in question.

Actually I am of opinion that the question in the present case is, in effect, covered by authority. It has, of course, been held in numerous cases that a limited-liability company cannot reduce its capital except in the manner and subject to the conditions prescribed by the relevant *Companies Act*. But, where an Act contains an express power to do a thing subject to conditions, it is an easy enough conclusion that the thing cannot lawfully be done except upon compliance with the conditions. It does not necessarily follow that, if the Act were silent on the specific subject, the thing could not be done at all. There is, however, one case which was decided in the absence of specific provisions in the Act. That case is *Droitwich Patent Salt Co. Ltd.* v. *Curzon* (1). The actual decision was given after the Act of 1867, which gave power to reduce capital, had come into force, but the resolutions for reduction were passed long before that Act became law. The company had been originally established in 1826 under a deed of settlement, and could have reduced its capital just as could an ordinary partnership. In 1864, however, it became registered under the Act of 1862 as a company the liability of whose members was limited. In order to become registered, it was required to file, and it did file, a memorandum of association in accordance with the Act, which stated (*inter alia*) the amount of its capital and the manner of division into shares. In 1866 it passed resolutions in accordance with its articles for reducing capital, and it was the validity of these resolutions that was in question. The Court of Exchequer (*Kelly* C.B., and *Bramwell*, *Channell* and *Pigott* BB.) held that they were invalid. It appears indeed to have been conceded that a new company formed under the Act could not reduce its capital, and the argument was rested mainly on the proposition that an existing company which obtained registration was not in the same position. But *Kelly* C.B. (2) gave reasons why the capital of a limited company could not be reduced without express statutory authority.

I have said that I regard the present case as, in effect, covered by the *Droitwich Case* (1) because I am quite unable to see anything resembling a satisfactory ground of distinction in the relevant respect between the case of a limited-liability company in England before the passing of the Act of 1867 and the case of a no-liability company under Part II. of the *Companies Acts* 1938-1940 (Vict.). Indeed there are two reasons which might well be advanced for

(1) (1867) L.R. 3 Ex. 35. (2) (1867) L.R. 3 Ex., at p. 41.

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regarding the latter as an *a fortiori* case. The first is that the very same Act deals with two classes of company, and gives the power in the one case while omitting to give it in the other. The second is that, from the point of view of persons dealing with a no-liability company, the absence of even a limited liability to be sued for calls would make it seem not less important but more important that such capital as was in fact paid up should not be capable of being returned to members.

Mr. *Phillips* said that, wherever a power to reduce capital without express statutory sanction was denied to a limited-liability company, the denial was really based on the requirement that a memorandum of association stating the company's capital should be filed and on what he described as the general principle of the " immutability " of the memorandum. And this is, in substance, I think, the basis on which *Kelly* C.B. founded himself in the *Droitwich Case* (1). But, while it is not called a memorandum of association, the filing of a " memorandum " is a condition precedent to the registration and incorporation of a no-liability company under Part II. There is no mutability about this memorandum, and it must show not only the number and denomination of the shares in the company (which necessarily means stating its capital), but the number of shares subscribed for and the amount of the subscribed capital which is paid up: see s. 403 and the Fifteenth Schedule. Moreover, the company cannot be registered unless twenty-five per cent of the shares have been subscribed for and five per cent of the subscribed capital has been paid up. The memorandum must also state the value of the company's property. All these considerations tend to negative, rather than support, a distinction in the relevant respect between the two classes of companies. Again the Act (s. 435) provides for increase of capital, prescribing the manner in which it is to be effected and requiring notice of an increase to be filed with the Registrar-General. It also (s. 437) expressly authorizes the consolidation and subdivision of shares, again prescribing the procedure and requiring notice to be filed with the Registrar-General. The presence of these provisions makes the silence of the Act on the subject of reduction appear all the more significant when one reflects that a reduction is far more likely to affect outsiders than an increase, and that, whenever a power to reduce has been conferred, it has always been made subject to stringent prescribed conditions. If the power to reduce exists here, it can be exercised (in the absence of any rules—and there need be no rules on the subject) by ordinary resolution, and no notice need be given to the Registrar-General.

(1) (1867) L.R. 3 Ex. 35.

Attention was called to the peculiar features of a no-liability company, the suggestion being that the practical considerations which might dictate a denial of the power to a limited-liability company were absent in the case of a no-liability company. It was pointed out that a member could not be sued for calls in any case, and it was said that a reduction of the amount unpaid on a share could therefore be a matter of no significance to anyone dealing with the company. There are, I think, two answers to this. The first is that, although a member cannot be sued for calls, there are inducements to him to pay calls in the shape of forfeiture and incapacity to receive a dividend. Nor should it be forgotten in this connection that, in the case of a no-liability company no less than in the case of a limited company, moneys may be made actually payable by the terms of allotment. The provisions of the Act as to " calls " do not apply to moneys so made payable, and they may be recovered by action at law, as in *New Good Hope Consolidated Gold Mines N.L.* v. *Stutterd* (1), a case to which I will refer again in a moment. If capital could be reduced, a liability to pay such moneys could be cancelled. The second answer is that the argument does not touch a reduction of capital which involves a repayment of paid-up capital, and, if the one mode of reduction is lawful, the other must be lawful also.

Section 31 of the Act of 1871, which applied both to limited-liability mining companies and to no-liability mining companies, enabled a member " desirous of freeing himself from a share in a company " to transfer the share to the company. This section is not reproduced in the Act of 1938, doubtless because it would give no real advantage to a member whose shares carried no liability. Section 444, however, enables the directors on behalf of a company to purchase at auction, at a price not exceeding the amount of calls due, any share which has been forfeited and advertised for sale, and s. 407 refers to shares " which may be transferred to the company ". But again, while this shows that one of the fundamental conceptions applicable to ordinary companies is inapplicable to no-liability companies, what is contemplated is a radically different thing from the return of capital to members. There is one section which does seem to contemplate a return of capital to shareholders, and that is s. 409. But this section applies only where the company has ceased to carry on business, and its purpose seems to be merely to enable a dissolution to be effected after payment of creditors without a formal winding up.

In the case, mentioned above, of *New Good Hope Consolidated Gold Mines N.L.* v. *Stutterd* (1), each of the three learned Judges

(1) (1916) V.L.R. 580.

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who constituted the Full Court expressed the opinion that shares in a no-liability mining company might lawfully be issued at a discount, and the appellant naturally placed reliance on this view. In that case the company had allotted to the defendant at the price of 3s. each a number of shares of 10s. as paid up to 5s. Stutterd paid only part of the 3s. Some time later the company went into liquidation and the liquidator sued for the balance of the 3s. which had not been paid. The defence raised was that the contract to allot the shares at a discount was illegal and void and imposed no obligation on the defendant. The court held that the contract was valid and distinguished *Re Almada & Tirito Co.* (1). The decision that the balance of the amount payable on allotment was recoverable because the provisions of the Act as to "calls" did not apply to it seems undoubtedly correct. But, speaking with great respect, I would regard the view that the shares were lawfully issued at a discount as of very doubtful soundness. Actually one would have thought that the defendant's argument was perfectly correct in itself, but that the only result of its acceptance would have been to establish that he could have been sued for an unpaid balance of 5s., and not merely an unpaid balance of 3s.: the company was in liquidation, as was the company in *Welton* v. *Saffery* (2). The view that the contract constituted by the allotment at a discount was valid according to its tenor is open to grave objection, for the fact that a member is under no liability for calls would seem to make it not less important but much more important than in the case of a limited company that creditors should be able to rely on the actual payment of what purports to be paid up on a share. The decision in *Stutterd's Case* (3) has stood for many years, and its *ratio decidendi* perhaps ought not now to be overruled, but at least the case ought not to be held to carry any extended consequences. It certainly does not follow from it that a no-liability company may repay paid-up capital, nor does it, in my opinion, follow from it that it may cancel unpaid capital.

I would add this in conclusion. If the power claimed exists, it is an unrestricted power subject to no conditions, and its exercise would be unchallengeable by a creditor unless he could prove fraud. Such a power would, in my opinion, be inconsistent with the rule, adopted at a very early stage by the English Courts and embodied in both Part I. and Part II. of the *Companies Acts* 1938-1940 (Vict.), that no dividend can be paid except out of profits:

(1) (1888) 38 Ch. D. 415.
(2) (1897) A.C. 299.
(3) (1916) V.L.R. 580.

See ss. 367 and 440. The latter section indeed goes beyond the former, providing that no dividend shall be paid except out of profits arising from the business of the company. The rule adopted by the courts has been stated in various ways which have not escaped criticism. The word " dividend " itself in common understanding connotes that profits are being distributed, and it would mean little or nothing to say that no distribution of profits shall be made except out of profits. Probably the common statement of the rule owes its origin to the fact that in the typical case which it is intended to cover directors falsely pretend that a distribution is being made out of profits. But what the rule really means, in my opinion, is that a company cannot, apart from special statutory provision, make any distribution of its assets to its members except out of profits. Apart from special statutory provision, a repayment of capital to members would, in my opinion, violate this rule, and a release of liability on contributing shares can hardly stand in a different position.

In my opinion the decision of *Lowe* A.C.J. in this case was correct, and the appeal should be dismissed.

KITTO J. The appellant company is a mining company formed on the no-liability system and governed by the provisions of Part II. of the *Companies Acts* 1938-1940 (Vict.). It has passed a special resolution for the reduction of its capital in a manner which includes the return to members of a portion of their paid-up capital. Its rules purport to authorize such a reduction. By s. 450 (1), which is contained in Part II., authority is given for the making and altering of " rules for the management and purposes of the company not inconsistent with this Part ". The question to be decided is whether a return of paid-up capital may be made consistently with the provisions of Part II.

There is no provision in Part II., or in the schedules to which it refers, conferring any express power to return paid-up capital to shareholders, except in a winding-up or in a case where all the liabilities of the company are discharged and the company has ceased to carry on business without being wound up (ss. 492, 409). In s. 450 (5) (*a*) there is a reference to return of capital, but the context shows that a return of capital in winding up is referred to. In the Eighteenth Schedule, which contains a model set of rules, a rule is provided for which includes, among the " purposes " of the company, " to distribute among the members *in specie* or kind any property of the company or any proceeds, shares, or rights arising from the sale or disposal of any property or assets

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of the company " ; but this, I think, is directed to sanctioning a variety of methods by which distributions which themselves are within the powers of the company may be made.

The implications of the provisions of Part II. concerning share capital appear to me to be all against the existence of any power to return paid-up capital. I agree with what has been said by *Dixon* J. in this connection, and I refer to a few additional considerations which appear to me to support the conclusion his Honour has stated.

A provision which I think important is that contained in s. 440 (1). It is there provided that " no dividend shall be payable to the shareholders in any company except out of the profits arising from the business of the company ". Even if this provision should be understood as directed only to prohibiting the payment of dividends out of capital profits, it would be difficult to suppose that the legislature had regarded the payment of dividends out of paid-up capital as consistent with Part II. as a whole. But the section according to its terms forbids also the payment of dividends out of paid-up capital. I should have thought that this section provides a direct answer to the question with which this case is concerned ; for in a prohibition of the payment of dividends otherwise than out of profits the word " dividends " cannot mean a distribution of profits, and therefore must be used in its broader sense of a share of a fund to be divided : see *Staples* v. *Eastman Photographic Materials Co.* (1) ; *Slingsley* v. *Westminster Bank* (2). The use of the word as including a distribution made out of capital is not without precedent in legislation *in pari materia*, for s. 121 of *The Companies Clauses Consolidation Act*, 1845 (Imp.) (8 & 9 Vict. c. 16), provides : " The company shall not make any dividend whereby their capital stock will be in any degree reduced : Provided always, that the word ' dividend ' shall not be construed to apply to a return of any portion of the capital stock, with the consent of all the mortgagees and bond creditors of the company, due notice being given for that purpose at an extraordinary meeting to be convened for that object ". But even if " dividends " in s. 440 be understood as referring only to distributions which are ostensibly distributions of profits, the section remains of no little significance in relation to the question in this case ; for it is too much to suppose that the legislature would have specifically forbidden a return of paid-up capital disguised as a dividend while intending to leave a company free to make such a return without any disguise. Part I. of the Act, dealing with limited-liability companies, also has a provision,

(1) (1896) 2 Ch. 303, at pp. 307, 308. (2) (1931) 1 K.B. 173, at p. 188.

in s. 367 (1), forbidding the payment of dividends to shareholders except out of profits, and it seems clear that this provision is but a statutory adoption of a proposition, a commonplace in company law, which states one aspect of the rule that paid-up capital may not be returned except in accordance with specific provisions made by the Act for the reduction of capital.

This brings me to another consideration, which I think of some importance. Part I. provides for reduction of capital by limited-liability companies, subject to stringent provisions designed to safeguard the interests of both creditors and shareholders. Part II., although it adopts some provisions of Part I. (see s. 399 (3)), abstains from adopting the provisions relating to reduction of capital, and makes no provision of its own upon that matter. The difference thus made between the two Parts is particularly significant in view of the fact that Part II. does make its own provision for the increase of capital and for the consolidation or subdivision of shares. The omission to provide for reduction of capital can hardly have been other than deliberate. The conclusion that it was deliberate is strengthened by the fact that, although the Act was passed after the enactment of the *Companies Act* 1936 of New South Wales, and the draftsman obviously had that Act before him, the example of s. 44 of that Act, which, *inter alia*, makes the reduction-of-capital provisions in respect of limited-liability companies applicable to no-liability companies, was not followed. The inference seems clearly to be that a power to reduce capital was regarded by the Victorian legislature as inappropriate to the no-liability system. In particular it would seem impossible to suppose that, although elaborate precautions against capital being returned to the prejudice of creditors were enacted in the case of limited-liability companies, the return of capital by no-liability companies was tacitly permitted without any such precautions being provided. Such a conclusion would indeed be remarkable, for the main difference between the two kinds of companies lies in the fact that creditors of a limited liability company, if deprived of resort to paid-up capital, can at least look to the shareholders' liability for any amounts uncalled or unpaid on their shares, whereas the creditors of a no-liability company cannot.

It is worth remarking that Part II. derives from the *Mining Companies Act* 1871 (Vict.), which was enacted at a time when the subject of the reduction of capital by limited-liability companies had recently received legislative attention in England. *The Companies Act*, 1862 (Imp.) (25 & 26 Vict. c. 89) had made no provision for reduction of capital, and a company incorporated under that Act,

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even though before incorporation it had been governed by a deed of settlement which permitted a reduction of capital, was disabled by the Act from making such a reduction: *Droitwich Patent Salt Co.* v. *Curzon* (1). The 1867 Act introduced for the first time a provision conferring a carefully limited power to reduce capital subject to approval by the court. Even in respect of limited-liability companies this example was not followed by the Victorian Parliament until 1896; yet if the appellant be right in this case a power to reduce capital, including a power to return paid-up capital, was allowed by the Victorian Parliament as early as 1871 to a class of companies distinguished from limited-liability companies by nothing so much as by a feature, namely, the exemption of shareholders from liability to pay anything on their shares, which made it not less important but more important that paid-up capital, so far as not expended in the company's business or lost, should remain in the business to meet external liabilities.

An indication that the legislature intended to set its face against the return of capital is to be found in s. 450 (5) (*a*). Rules are authorized enabling any share to be issued with preferred, deferred or special rights or with restrictions in certain respects. Provision is made for the issue of such a share on the terms that, when fully paid but not otherwise, it is, or at the option of the company is to be liable, to be redeemed; but redemption is restricted to redemption out of profits.

In my opinion the proper conclusion from the provisions of the Act to which *Dixon* J. has referred is that the paid-up capital of such companies must be taken to be devoted to the objects of the company and to be incapable of diversion from those objects by way of repayment to shareholders: cf. *Flitcroft's Case* (2); *Guinness* v. *Land Corporation of Ireland* (3); *Trevor* v. *Whitworth* (4).

The view that a return of paid-up capital is beyond the powers of a no-liability company has been expressed before in this Court. In *Webb* v. *Federal Commissioner of Taxation* (5) *Isaacs* J. (referring to the *Companies Act* 1915, which in Part II. contained provisions similar to those of Part II. of the 1938 Act), said: "Part II. of the Act does not contemplate capital being returned, except in winding up"; and *Higgins* J. (6) said: "The fact that a going company distributes anything among its shareholders is treated as showing that it is a distribution out of the company's income;

(1) (1867) L.R. 3 Ex. 35.
(2) (1882) 21 Ch. D. 519.
(3) (1882) 22 Ch. D. 349.
(4) (1887) 12 App. Cas. 409, at pp. 415, 433.
(5) (1922) 30 C.L.R. 450, at p. 475.
(6) (1922) 30 C.L.R., at pp. 483, 484.

for the company cannot distribute any of its capital to the share holders. This is the law as to such companies, even if there were not the express provision in r. 99 that 'no dividend shall be payable *except out of the profits arising from the business of the company*'".

In my opinion *Lowe* A.C.J. correctly held that a no-liability company to which Part II. of the *Companies Acts* 1938-1940 applies cannot, while a going concern, validly return to its shareholders any of their paid-up capital.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Haden Smith & Fitchett.*

Solicitor for the respondent, *L. C. Meagher.*

E. F. H.