[HIGH COURT OF AUSTRALIA.]

KING . . . . . APPELLANT;

AND

TAIT AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1936.

BRISBANE, *June* 18, 19, 22.

SYDNEY, *Dec.* 7.

Starke, Dixon, Evatt and McTiernan JJ.

*Company—Winding up—Distribution of assets—Articles of association—Assets to be distributed in proportion to shares held—Validity of article—Agreement to distribute in proportion to amount paid up on shares—Inconsistency—Shares distributed in accordance with agreement—Adjustment—Priority of payments of uncalled capital on shares—Priority of debentures—Companies Act* 1863 (*Q.*) (27 *Vict. No.* 4), *secs.* 27, 28, 37.

Although shareholders cannot by an article of association or by any other contract with a company be relieved of their liability, in a winding up, to calls for the amounts unpaid on their shares for the purposes of paying the debts and liabilities of the company, of defraying the costs of the winding up, and of adjusting the mutual rights of contributories or members, there is complete freedom to prescribe, by articles of association, in what manner those mutual rights are to be adjusted and hence to provide for an adjustment whereby the necessity of resorting to uncalled capital to work them out is excluded.

Certain shares in a banking company which was being wound up voluntarily subject to the supervision of the Supreme Court of Queensland were fully paid up; in respect of the remainder, only a small amount had ever been required to be paid, although some of the holders had made payments in anticipation of calls. Debentures, expressed to be subject to a prior right on the part of all shareholders to the repayment of paid-up capital, had also been issued. During the winding up an agreement sanctioned by the court was made with another company, whereby that company acquired certain assets of the banking company and allotted certain fully paid shares to the shareholders of the banking company in proportion to the amount paid up by them

H. C. OF A. 1936. KING v. TAIT.

in the capital of that company. These shares were allotted and dealt with by the allottees, many of them being transferred to bona fide purchasers for value. The mode of distributing the shares was determined without advertence to an article of association of the banking company whereby, in a winding up, the assets (exclusive of uncalled capital) remaining after payment of debts, liabilities, costs and expenses were to be distributed among the shareholders in proportion to the number of shares held irrespective of the amount paid up on them. On the sale of the remaining assets of the banking company, the jurisdiction of the court was invoked to determine the rights of the various classes of persons whose interests were affected.

*Held*:—

(1) That the article of association was valid and that the distribution of assets of the liquidation should be carried out in accordance therewith.

(2) That the distribution of the shares allotted in the purchasing company could not now be disturbed but that the assets undistributed should be divided so as to adjust the rights of the shareholders.

(3) That the debenture holders should be paid after an amount representing the share capital paid up had been appropriated to the shareholders.

*Held*, further, by *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that the shareholders who had paid money in advance of calls were not entitled to priority in respect of such advances but ranked equally with the other shareholders in the distribution under the article of association.

Decision of the Supreme Court of Queensland (Full Court): *In re Federal Deposit Bank Ltd.*, (1937) Q.S.R. 282, reversed.

APPEAL from the Supreme Court of Queensland.

The Federal Deposit Bank Ltd. with a capital of £500,000 divided into 500,000 shares of £1 each was being wound up voluntarily subject to the supervision of the Supreme Court of Queensland. In the year 1926 the total subscribed capital of the company was 250,000 shares of £1 each. These shares were fully paid up at the date of the liquidation. In 1927 the capital of the company was increased to £500,000 by the creation of 250,000 new shares of £1 each which were issued subject to the payment of 2s. 6d. per share on application. It had always been the practice of the directors to receive money from shareholders in advance of calls. In connection with the 1927 issue of shares it was decided at a meeting of directors that shareholders should be allowed to pay capital in advance of calls but in cases where the capital was paid in advance, the dividend was to be limited to six per cent per annum and a circular letter to this effect was issued by the directors to the

shareholders. Many of the shareholders paid money in advance of calls, some to the full nominal value of the shares and some to a lesser amount. The payment at the rate of six per cent per annum made to these shareholders was debited in the books of the company to an appropriation account as a dividend and in the annual report and balance-sheets this amount was included in the amount set aside for payment of dividends and from 1927 onwards at the annual general meetings the resolution passed sanctioned the declaration by the directors of a dividend at the rate of six per cent per annum on the capital paid in advance of calls. No further call over and above the 2s. 6d. per share was ever made in respect of the shares issued in 1927.

In the year 1908, debentures representing the total sum of £222,290 15s. were issued to the Federal Building Land and Investment Co. Ltd. or its nominees as part of the consideration for the transfer of assets in that company to the Federal Deposit Bank Ltd. The debentures were subject to a prior right on the part of all shareholders of the Deposit Bank Ltd. to the repayment of paid-up capital.

On 15th October 1931 at an extraordinary general meeting of the company it was decided that the company be wound up voluntarily and on the 6th November 1931, following the application to the Supreme Court, it was ordered that the voluntary winding up be continued, but subject to the supervision of the court, and liquidators were appointed. The liquidators on 10th March 1932 agreed conditionally to sell certain assets of the company to the Brisbane Permanent Building and Banking Co. Ltd. By this agreement the Brisbane Permanent Building and Banking Co. Ltd. undertook the discharge of certain liabilities of the Federal Deposit Bank Ltd. and promised to allot 200,000 fully paid-up shares in its capital to the shareholders of the Federal Deposit Bank Ltd., such shares to be allotted in proportion to the amount paid up in the capital of the Federal Deposit Bank, and to be deemed to be of a value of £1 each and the shareholders in the Federal Deposit Bank to be entitled to hold such shares allotted to them on the basis of the amount actually paid up as capital, whether in respect of fully paid or partly paid-up shares. The agreement, subject to

H. C. OF A. 1936. KING v. TAIT.

a minor variation, was sanctioned by an order of the Supreme Court made by *Blair* C.J., after it had been considered and approved at meetings of shareholders and of creditors; but no extraordinary resolution in respect thereof was ever passed by the company. The Brisbane Permanent Building and Banking Co. Ltd. duly allotted the 200,000 shares and on the 22nd July 1932 gave notice to the liquidators of such allotment. No scrip certificates were, however, issued to the allottees but many of the shares were dealt with on the open market, some being purchased by persons who were not shareholders, the transfers being effected by proper documents. Dividends declared by the Brisbane Permanent Building and Banking Company Ltd. on the 200,000 shares were duly paid to the allottees of the shares or their transferees. The remaining assets of the company were in May 1935 sold by the liquidator with the approval of the shareholders for £145,000. After making provision for expenses of liquidation there was a residue apart from dividends paid and to be paid of £135,000 distributable amongst the shareholders and debenture holders.

When the agreement of 10th March 1932 was made and sanctioned by the court, the provisions of an article of association, No. 118, was overlooked and not brought to the attention of the shareholders or of the court. Art. 118 provides:—"If the company shall be wound up, the liquidators (whether voluntary or official) may, with the sanction of an extraordinary resolution, divide among the contributories in specie any part of the assets of the company and may with the like sanction vest any part of the assets of the company in trustees upon such trusts for the benefit of the contributories as the liquidators with the like sanction shall think fit. If the company shall be wound up, the assets of the company (exclusive of uncalled capital) after payment of the debts and liabilities of the company and of the costs and expenses of the winding up of the company, shall be distributed amongst the members of the company in proportion to the number of shares in the company, whether paid up or partly paid up, held by them, and all such shares, whether paid up or partly paid up, shall rank equally for the purpose of the distribution of such assets, as though* all the

* Misprinted "although" in the original article.

shares in the company had been already paid up to the same amount and no call shall be made upon the holders of partly paid shares except for the purpose of paying and discharging the debts and liabilities of the company and the costs and charges of winding up the same, or of such part of the said debts and liabilities and of such costs and charges as the other assets of the company shall be insufficient to meet and discharge."

On questions arising thereon, the liquidator sought the advice and direction of the court as to the following matters :—

1. As to the order of payment and/or of distribution of the assets in or to come into his hands or over which he has or may obtain control particularly having regard to—(*a*) debenture indebtedness, (*b*) money paid in advance of calls, (*c*) paid-up capital in respect of which there was at the time of liquidation a liability remaining on the shares, (*d*) fully paid-up capital.
2. As to whether in relation to the aforesaid order of distribution referred to in the preceding par. 1, the distribution or purported or proposed distribution of the 200,000 shares can or should be taken into account or nullified or varied, and if so to what extent and in what manner.
3. As to whether the liquidator may now distribute the scrip certificates for the said 200,000 shares to be issued by the Brisbane Permanent Building and Banking Co. Ltd. and to whom and if not how should he deal with the same.
4. As to the manner and extent (if any) to which dividends paid or to be paid to allottees or their transferees of the said 200,000 shares in the Brisbane Permanent Building and Banking Co. Ltd. are to be taken into account by the liquidator in relation to the aforesaid order of distribution referred to in par. 1 of this clause.
5. Should the liquidator take any and if any what steps in connection with future dividends on the 200,000 shares ?
6. What order should be made or acts done for the purposes of carrying the opinion of the court into effect ?
7. By whom and out of what fund or funds should the costs of this motion be paid or borne ?

H. C. OF A. 1936. KING v. TAIT.

The Supreme Court of Queensland upheld the distribution of the 200,000 shares on the ground that art. 118 was contrary to law and of no effect and gave directions accordingly: *In re Federal Deposit Bank Ltd.* (1).

From this decision the holders of the shares paid up to 2s. 6d., by their representative, Stephen Geoffrey King, appealed to the High Court. The respondents were A. H. Tait, as representative of the shareholders fully paid up to £1, and the liquidator.

At the hearing of the appeal it was intimated by the High Court that the representative of the holders of the 1927 issue of shares paid to 2s. 6d. per share who had paid amounts in advance of calls, and the representative of the debenture holders should be joined as parties and heard. This was done instanter and the appeal proceeded.

*Fahey* (with him *Philp*), for the appellant, S. G. King, representative of holders of the 1927 issue of shares paid to 2s. 6d. who had not paid capital in advance. There is nothing in the *Companies Act* 1863 to prevent shareholders by regulations made amongst themselves from distributing surplus assets. The regulation or arrangement is purely domestic. Sec. 37 is a direct statement that members are liable to contribute to assets for the purposes of adjustment among contributories. (See sec. 123 (1) and (9) as to a voluntary winding up.) The regulations of the company govern the distribution of assets not required for debts. There is power under sec. 123 (9) to make a call but it is necessary to ascertain the rights of contributories before a call is made. (See *Companies Act Amendment Act of* 1889, secs. 28, 29.)

[DIXON J. Sec. 29 is peculiar to Queensland. It was put in to meet *In re Almada and Tirito Co.* (2).]

By sec. 28 a share must be fully paid for by cash. The section refers to the mode of payment. Sec. 29 was put in the Act after *In re Almada and Tirito Co.* (2). (See per *Cotton* L.J. (3)) so that shares might be issued at a discount. Sec. 28 is directed only to the mode of payment and imposes no fresh liability. In *Welton* v. *Saffery* (4) (See per Lord *Davey* (5)) shares were issued at a

(1) (1937) Q.S.R. 282.
(2) (1888) 38 Ch. D. 415.
(3) (1888) 38 Ch. D., at p. 422.
(4) (1897) A.C. 299.
(5) (1897) A.C., at pp. 327-329.

discount, and the issue was bad so far as it purported to relieve the holders of such shares from liability for calls to the amount unpaid on their shares. Shareholders cannot be relieved from liability to pay up to the nominal value of their shares if the contract so to relieve them is illegal; but as between the shareholders *inter se* they may be relieved. If the remarks of Lord *Davey* are divorced from the context they have a different meaning from that which they have when considered with the context. He means that under no circumstances can shares be issued which could not be called up or might not be fully paid up. *Welton* v. *Saffery* (1) is not a decision that shareholders may not do away by articles with equalization of surplus assets. That judgment was not a decision on the point now before the court (*Welton* v. *Saffery* (2); *Ooregum Gold Mining Co. of India* v. *Roper* (3); *In re Driffield Gas Light Co.* (4); *In re Kinatan* (*Borneo*) *Rubber Ltd.* (5); *In re Australian Group & General Assurance Co. Ltd.* (6); *In re Federal Portland Cement Co. Ltd.* (7); *Halsbury's Laws of England*, 2nd ed., vol. 5, p. 701; *Buckley* on *The Companies Acts*, 11th ed. (1930), p. 446; *In re Shotover Consolidated Ltd.* (8) ). On a proper construction, art. 118 in express terms does not prevent the liquidator from making calls for the payment of debts, but it does so prevent him for anything besides the payment of debts, costs, and winding up. Equalization is a domestic matter. There is no absolute prohibition against making calls. As to the orders made by the Chief Justice of Queensland, the court had no power to sanction the rights of parties *inter se* and the order is void, and of no effect, particularly in a proceeding to which shareholders were not parties. If the court had such power this was not a valid exercise of the power. Conditions precedent necessary to the exercise of the power were not observed. (See *Companies Act* 1863, secs. 126, 150, as to winding up; *Companies Act Amendment Act of* 1889, sec. 35; *Companies Act of* 1893, sec. 2; *Companies Act of* 1896, secs. 2 and 3; *Palmer's Company Precedents*, 14th ed. (1933), vol. 2, p. 893.)

(1) (1897) A.C. 299.
(2) (1897) A.C., at pp. 306, 311, 317.
(3) (1892) A.C. 125, at pp. 138, 143, 144, 147, 148.
(4) (1898) 1 Ch. 451, at pp. 454, 455.
(5) (1923) 1 Ch. 124.
(6) (1932) 32 S.R. (N.S.W.) 435, at p. 442; 49 W.N. (N.S.W.) 111.
(7) (1905) 24 N.Z.L.R. 813.
(8) (1931) G.L.R. 433.

H. C. OF A. 1936. KING v. TAIT.

There is no power in Queensland to compromise the rights of members. A meeting of shareholders as directed was held, called by advertisements in newspapers. No notice was sent out and many shareholders did not attend. That meeting could not bind anybody. No one represented the shareholders as a class; the order was made *in absentia*. There is no power in the court to interfere with the rights of shareholders *inter se* (*Griffith* v. *Paget* (1); *Wall* v. *London and Northern Assets Corporation* (2); *Simpson* v. *Palace Theatre Ltd.* (3)). The court will rectify orders made under mistaken rights of all shareholders (*Companies (Winding-up) Act of* 1892, sec. 23; *Insolvency Act of* 1874, sec. 14). The court will relieve against mistake where administering funds (*In re Robinson*; *McLaren* v. *Public Trustee* (4); *In re Mason* (5)). In *Livesey* v. *Livesey* (6) the court adjusted the rights of a *cestui que trust* and trustees (*Daniell* v. *Sinclair* (7); *Dibbs* v. *Goren* (8)). The court will compel an officer of the court to do justice where the mistake is a mistake of law (*Ex parte James*; *In re Condon* (9); *Ex parte Simmonds*; *In re Carnac* (10); *In re Thellusson*; *Ex parte Abdy* (11); *Official Assignee* v. *Goldstein* (12); *In re Opera Ltd.* (13)). The liquidators have control. Scrip certificates should be with the liquidators. It is a case for rectification by the court (*In re Birkbeck Permanent Benefit Building Society* (14)). The people to whom shares in the Brisbane Permanent Benefit and Banking Co. Ltd. have been transferred should account and retransfer —alternatively future dividends could be paid to shareholders in the Federal Deposit Bank Ltd. who were not allotted shares— the meeting of shareholders could not destroy rights given to the shareholders by the articles of association. There should be restoration, the allottees of shares should account, and there should be readjustment.

*Macrossan*, for F. C. Macnish, the representative of the holders of the 1927 issue of shares paid to 2s. 6d. per share who had paid

(1) (1877) 5 Ch. D. 894, at pp. 899, 900.
(2) (1898) 2 Ch. 469.
(3) (1893) 69 L.T. 70, at p. 72.
(4) (1911) 1 Ch. 502, at p. 513.
(5) (1928) Ch. 385, at p. 394.
(6) (1827) 3 Russ. 287; 38 E.R. 583.
(7) (1881) 6 App. Cas. 181, at p. 190.
(8) (1849) 11 Beav. 483; 50 E.R. 904.
(9) (1874) 9 Ch. App. 609.
(10) (1885) 16 Q.B.D. 308.
(11) (1919) 2 K.B. 735.
(12) (1921) 29 C.L.R. 377, at p. 393.
(13) (1891) 2 Ch. 154.
(14) (1915) 1 Ch. 91.

amounts in advance on any further call on such shares. The shareholders who have paid in advance of calls are entitled to be repaid the amount paid in advance of calls with interest at six per cent, in priority to the rights of other shareholders, and thereafter they are in the same position as shareholders who have not paid calls. They share equally with all other shareholders in the remaining assets of the company. Debenture holders are entitled to be paid their money as a debt in priority to any payment to shareholders. The directors had no power to make a contract with shareholders to pay a dividend. They had general power under the articles to make calls in advance with interest. They have power under the articles to borrow or raise money at interest. As to the meaning of the word "dividend," see *Henry* v. *Great Northern Railway Co.* (1). The meaning is affected by the context. Sometimes a payment is called "dividend" and sometimes "interest" (*In re Exchange Drapery Co.* (2); *In re Wakefield Rolling Stock Co.* (3); *Lock* v. *Queensland Investment and Land Mortgage Co.* (4); *Stiebel's Company Law and Precedents*, 3rd ed. (1929), vol. 1, p. 198). A power given to directors to receive calls in advance and pay interest out of capital is valid. The relation is then debtor and creditor and not company and member. Repayment cannot be claimed by a shareholder while the company is a going concern (*In re United Provident Assurance Co. Ltd.* (5)). There is a presumption of regularity as to indorsement on scrip certificates. The indorsement is evidence of a contract on which money has been paid. The important part of art. 118 is the second sentence "if the company shall be wound up" etc. The article is valid and there is nothing in *Welton* v. *Saffery* (6) to make it invalid (*Re Sheppard's Corn Malting Co. Ltd.*; *Ex parte Lowenfeld* (7); *Welton* v. *Saffery* (8); *In re Holyford Mining Co. Ltd.* (9)). The question is what is the actual contract and how the rights of contributories are to be adjusted (*In re Ramel Syndicate Ltd.* (10)). Assuming that the distribution to allottees cannot be set aside, future dividends on shares are still under the control of the liquidators and

(1) (1857) 1 DeG. & J. 606, at pp. 642, 648; 44 E.R. 858, at pp. 873, 875.
(2) (1888) 38 Ch. D. 171.
(3) (1892) 3 Ch. 165.
(4) (1896) A.C 461, at pp. 467, 468.
(5) (1910) 2 Ch. 477.
(6) (1897) A.C. 299.
(7) (1893) 70 L.T. 3.
(8) (1897) A.C., at p. 323.
(9) (1869) I.R. 3 Eq. 208, at p. 216.
(10) (1911) 1 Ch. 749.

H. C. OF A. 1936. KING v. TAIT.

could be used for the purpose of adjusting rights between contributories.

*J. S. Hutcheon*, for A. H. Tait, representative of shareholders fully paid to £1. The memorandum imposes a direct liability on all shares. For the first six months of the liquidation the only question was whether shareholders paid to 2s. 6d. were going to escape calls. After 5th April 1932 the only question was whether those shareholders were to get the Brisbane Permanent Building and Banking Co. shares and dividends. These Federal Deposit Bank shares were £1 shares, on which under the memorandum there is full liability; they were not issued at a discount within sec. 29 of the *Companies Act Amendment Act of* 1889. There was no registered contract within sec. 28 and no special resolution within sec. 19. Under art. 118 no calls were to be made. That was a prohibition of calls on 2s. 6d. shares; the article was therefore inconsistent with the *Companies Act* and invalid (secs. 6, 7, 11, 37 (4) of the *Companies Act* 1863; sec. 28 of the *Companies Act Amendment Act of* 1889; *In re Almada and Tirito Co.* (1)). Shares cannot be issued at a discount (*In re London Celluloid Co.* (2)). A contract not to enforce calls on shares not effectually paid up is *ultra vires*. The *Companies Act Amendment Act of* 1889 was passed after those two decisions and Queensland law is stronger against the shareholders paid to 2s. 6d. than English law. Art. 118 is *ultra vires* (*Ooregum Gold Mining Co. of India* v. *Roper* (3); *Welton* v. *Saffery* (4)). Due provision would have to be made in the memorandum to enable a company to make such an article as art. 118 (*Australian Investment Trust* v. *Strand and Pitt Street Properties* (5); *Re Provision Merchants' Co. Ltd.* (6); *Bellerby* v. *Rowland & Marwood's Steamship Co. Ltd.* (7); *Bisgood* v. *Henderson's Transvaal Estates Ltd.* (8); *Buckley* on *The Companies Acts*, 10th ed. (1929), p. 259). The issue of shares at a discount is a nullity (*Palmer's Company Precedents*, 14th ed. (1933), vol. 2, p. 517; *Palmer's Company Law*, 12th ed. (1924), p. 444). Uncalled capital is part of assets (*Stiebel's Company Law and Precedents*, 1st ed. (1912), p. 1253). Art. 118 is void

(1) (1888) 38 Ch. D. 415.
(2) (1888) 39 Ch. D. 190, at p. 204.
(3) (1892) A.C. 125.
(4) (1897) A.C., at pp. 307, 309, 321, 323, 329.
(5) (1932) A.C. 735.
(6) (1872) 26 L.T. 862.
(7) (1902) 2 Ch. 14, at pp. 25, 31.
(8) (1908) 1 Ch. 743, at p. 758.

(*Lindley* on *Companies*, 6th ed. (1902), vol. 2, p. 846). Any article limiting liability of shareholders in a manner inconsistent with the memorandum is void (*Welton* v. *Saffery* (1) ). In *In re Eclipse Gold Mining Co.* (2) the question of validity was not discussed—in any case it cannot upset *Welton* v. *Saffery* (3) ; *Re Provision Merchants' Co. Ltd.* (4) ). Art. 118 is also in defiance of sec. 97 of the *Companies Act* 1863. Sec. 101 is also defied by the article. An article contrary to the provisions of the *Companies Act* is invalid (*Trevor* v. *Whitworth* (5) ). It is necessary sometimes for a company to make calls even if it has more than sufficient assets to cover payment of debts and costs (*Birch* v. *Cropper* (6) ). Art. 118 would prevent such calls being made. A prohibition of calls is in defiance of the statute and the memorandum. The article provides for one whole scheme of division; prohibition of calls is an integral part of that scheme and therefore the whole article goes. In *In re Kinatan* (*Borneo*) *Rubber Ltd.* (7), the article was obviously valid. The question was purely one of construction of a valid article, and neither *Welton* v. *Saffery* (3) nor *Bisgood* v. *Henderson's Transvaal Estates Ltd.* (8) was considered (*Palmer's Company Law*, 12th ed. (1924), p. 445 ; *Buckley* on *The Companies Acts*, 10th ed. (1929), p. 405 ; *Halsbury, Laws of England*, 2nd ed,, vol. 5, p. 701 ; *In re Federal Traders Ltd.* (9) ). Sec. 19 of the *Companies Act Amendment Act of* 1889 does not give power to make art. 118—and by inference it shows that it could not be made. The debenture debts are postponed until the return of all paid-up capital. Even if art. 118 were valid its effect is watered down by the debenture conditions. The order is (a) return of paid-up capital; (b) payment of debenture debts ; (c) division in terms of the article. Every shareholder is bound by the condition on the debentures. Debentures were required to be and were in fact registered and that involves notice to the shareholders (*Burkinshaw* v. *Nicolls* (10) ; *Oakes* v. *Turquand and Harding* (11) ). The order made by the Chief Justice of Queensland is valid. The court had full power. The order made in April

(1) (1897) A.C., at p. 322.
(2) (1874) L.R. 17 Eq. 490.
(3) (1897) A.C. 299.
(4) (1872) 26 L.T. 862.
(5) (1887) 12 App. Cas. 409, at pp. 422, 430.
(6) (1889) 14 App. Cas. 525, at pp. 537.
(7) (1923) 1 Ch. 124.
(8) (1908) 1 Ch. 743.
(9) (1934) S.A.S.R. 174.
(10) (1878) 3 App. Cas. 1004, at p. 1016.
(11) (1867) L.R. 2 H.L. 325.

H. C. OF A. 1936. KING v. TAIT.

was subject to liberty to apply, and not till 7th December was that order finalized. The court had power to sanction the sale and ascertained the wishes of shareholders and contributories (*Companies Act* 1863, secs. 94, 139; *Buckley* on *The Companies Acts*, 10th ed. (1929), p. 441; *Re Cambrian Mining Co.* (1); *In re Welsbach Incandescent Gas Light Co. Ltd.* (2) ). Shareholders can vary their legal rights (*Ho Tung* v. *Man On Insurance Co.* (3) ). In July 1932 shareholders had express notice of the meeting of 5th April, the agreement with the Brisbane Permanent Co., the court's order of 12th April 1932, the allocation of the Brisbane Permanent shares, and the liquidator's intention of asking for an order as to the distribution of the Brisbane Permanent shares to Federal Deposit Bank shareholders. They must, therefore, be taken to have acquiesced in the change of their rights, so as to ground the court's order of 7th December 1932. The court's order is final and binding (*Campbell's Case* (4) ). No shareholder has now any *locus standi* to object to the agreement or to the court's order. The order could only be challenged on appeal (*Companies Act* 1863, sec. 117; *Nicholl* v. *Eberhardt Co.* (5); *Re Hafod Hotel Co. Ltd.* (6) ). No appeal was ever lodged. No shareholder could now get leave to appeal against order (*Nicholl* v. *Eberhardt Co.* (7) ). The court must have regard to the state of facts which had developed by the time the order was finally made by the court. There was also subsequent acquiescence of shareholders which ratified the order of the court. Every shareholder is fixed with knowledge of the articles, and of their full effect (*Oakbank Oil Co.* v. *Crum* (8) ). All shareholders must be taken to have knowledge of the articles and memorandum (*Spackman* v. *Evans* (9); *Palmer's Company Law*, 12th ed. (1924), pp. 43, 44; *Campbell's Case* (10); *Ho Tung* v. *Man On Insurance Co.* (11) ). It is not necessary to prove absolute knowledge to establish acquiescence (*Evans* v. *Smallcombe* (12); *Phosphate of Lime Co.* v. *Green* (13); *Houldsworth* v. *Evans* (14); *Buckley* on *The Companies Acts*, 10th ed.

(1) (1882) 48 L.T. 114.
(2) (1904) 1 Ch. 87, at pp. 97, 101.
(3) (1902) A.C. 232.
(4) (1873) 9 Ch. App. 1, at p. 18.
(5) (1889) 61 L.T. 489, at p. 491.
(6) (1868) 18 L.T. 144.
(7) (1889) 61 L.T. 489.
(8) (1882) 8 App. Cas. 65, at p. 70.
(9) (1868) L.R. 3 H.L. 171, at p. 192.
(10) (1873) 9 Ch. App., at pp. 18, 22.
(11) (1902) A.C., at p. 235.
(12) (1868) L.R. 3 H.L. 249, at pp. 255, 256.
(13) (1871) L.R. 7 C.P. 43, at pp. 58, 62.
(14) (1868) L.R. 3 H.L. 263, at p. 276.

(1929), p. 12). From the circular sent out it must be inferred that the shareholders had notice of what was being done (*In re Beeston Pneumatic Tyre Co. Ltd.* (1); *In re North West Argentine Railway Co.* (2)). The shareholders were registered and many of the Brisbane Permanent shares have been dealt with by transfer (*Bell* v. *Blyth* (3)). The 2s. 6d. shareholders stood by when they might have taken proceedings and are not now entitled to raise the question; they are estopped (*In re Lart*; *Wilkinson* v. *Blades* (4)). (See *Spencer Bower* on *Actionable Misrepresentation*, 2nd ed. (1927), at pp. 138-143.) *In pari delicto potior est conditio possidentis* (*Broom, Legal Maxims*, 9th ed., p. 462). The cases cited for the appellant were cases of rectification where money was in the hands of the court's officer and it was held that there was jurisdiction to order him to pay it back to a person from whom he had got it by mistake (*In re Thellusson*; *Ex parte Abdy* (5)). The £1 shareholders are not court officers. Moreover the test in those cases was whether or not there was effective dishonesty. If it is a question of dishonesty, obviously the facts must be considered. As to payment by mistake, see *Fry* on *Specific Performance*, 6th ed. (1921), pp. 362, 376. As to the money paid in advance of calls, the documents show that this money was paid as capital and always treated as capital and that the payments made by the company in respect of it were and were intended to be dividends. The company had power to accept money in advance of calls as capital (*Companies Act Amendment Act of* 1889, sec. 27 (2) and art. 22; *Lock* v. *Queensland Investment and Land Mortgage Co.* (6)). The relation of debtor and creditor exists only as to "interest" agreed to be paid (*Dale* v. *Martin* (7)). The other shareholders are on the same footing as 2s. 6d. shareholders as regards capital (*Royal College of Music* v. *Westminster Vestry* (8); *In re Federal Traders Ltd.* (9); *Halsbury's Laws of England*, 2nd ed., vol. 5, p. 245, is not borne out by *Lock* v. *Queensland Investment and Land Mortgage Co.* (10); *Halsbury's Laws of England*, 2nd ed., vol. 5, p.

(1) (1898) W.N. 34; 14 T.L.R. 338.
(2) (1900) 2 Ch. 882.
(3) (1868) 4 Ch. App. 136, at p. 140.
(4) (1896) 2 Ch. 788, at p. 795.
(5) (1919) 2 K.B., at pp. 754, 756, 747, 750, 751.
(6) (1896) A.C., at pp. 466, 468.
(7) (1883) 11 L.R. Ir. 371; (1882) 9 L.R. Ir. 498.
(8) (1898) 1 Q.B. 809, at pp. 819, 820.
(9) (1934) S.A.S.R., at p. 196.
(10) (1896) 1 Ch. 397.

H. C. OF A. 1936. KING v. TAIT.

702). As to equality, see *In re Exchange Drapery Co.* (1); *In re Wakefield Rolling Stock Co.* (2); *In re United Provident Assurance Co. Ltd.* (3). The only principle to be extracted from these cases is the principle of equality which in the present instance is subject to the articles (especially 118, if it is valid), to the special arrangement under which the moneys were paid in advance, and to the manner in which the moneys have always been dealt with (*Palmer's Company Law*, 12th ed. (1924), p. 155). These moneys paid in advance of calls must be treated as capital; they are not to be returned first.

*E. T. Real*, for the debenture holders.

*G. L. Hart*, for the liquidators.

*Macrossan*, in reply. As the shareholders paid to 2s. 6d. accepted less than they were entitled to and the other shareholders have received more than they were entitled to, there is no detriment and no estoppel.

*Fahey*, in reply. If it is argued by the respondent, on the speech of Lord *Watson* in *Welton* v. *Saffery* (4), that the constitution of the company means its memorandum, that proposition is quite in conflict with the rest of the judgment (*British and American Trustee and Finance Corporation* v. *Couper* (5); *Andrews* v. *Gas Meter Co.* (6); *In re Hodges' Distillery Co.*; *Ex parte Maude* (7); *Quinn* v. *Leathem* (8)). As to estoppel, there was no representation by the 2s. 6d. shareholders. Silence is not a ground for estoppel. As to costs, this is a case in which costs as between solicitor and client may be paid by the company. King is representative of a large number of shareholders. It is a matter of great doubt and great difficulty (*In re Birkbeck Permanent Benefit Building Society* (9); *Sinclair* v. *Brougham* (10)).

*Cur. adv. vult.*

(1) (1888) 38 Ch. D. 171, at p. 175.
(2) (1892) 3 Ch., at p. 173.
(3) (1910) 2 Ch. 477.
(4) (1897) A.C. 299.
(5) (1894) A.C. 399, at pp. 416, 417.
(6) (1897) 1 Ch. 361, at pp. 368, 369, 370.
(7) (1870) 6 Ch. App. 51, at p. 57.
(8) (1901) A.C. 495, at p. 506.
(9) (1912) 2 Ch. 183, at p. 209.
(10) (1914) A.C. 398.

The following written judgments were delivered :—

STARKE J. The Federal Deposit Bank Limited is a company registered under the *Companies Acts* 1863 to 1896 of Queensland. Its share capital was £500,000 in 500,000 shares of £1 each. Of these shares, 250,000 had been issued as fully paid up, and the remaining 250,000 had also been issued and 2s. 6d. per share paid up on them. Some of the holders of the 250,000 shares paid up to 2s. 6d. had paid moneys in advance of calls amounting in the aggregate to about £48,122, upon which the bank endorsed on the share certificate of each person paying the following memorandum : "The sum of £ has been paid in anticipation of calls on the within-mentioned shares and is held by the bank for this purpose and is to carry dividend at 6 per cent per annum until called and due." The bank had acquired assets from a company called the Federal Building Land and Investment Society Ltd., and as part of the consideration for the transfer of such assets agreed to and did issue to the society or its nominees debentures for a total sum of about £22,290. Each debenture was subject (*inter alia*) to the following condition : "This debenture is subject to . . . prior rights on the part of all shareholders to the repayment of paid-up capital." A sum of about £2,126 is all that remains unpaid on these debentures. On 15th October 1931 the bank was wound up voluntarily, and an order was made on 6th November 1931 continuing the winding up subject to the supervision of the court. An agreement was made on 10th March 1930 between the bank, its liquidators, and the Brisbane Permanent Building and Banking Co. Ltd. (which I shall call the Brisbane company), whereby the bank, subject to the sanction of the court, sold and transferred certain of its assets to the Brisbane company. It was agreed that the purchase money payable under the agreement should be paid and satisfied as follows : "The purchaser shall allot 200,000 fully paid shares of £1 each in its capital in full satisfaction and discharge of the sum of £200,000 of such purchase money." It was also agreed that the shares so to be allotted by the purchaser should be allotted to shareholders of the vendor in proportion to the amount paid up by them in the capital of the vendor, and should be deemed to be of the value of £1 each. The scrip certificates for the shares were to be delivered to the

H. C. OF A. 1936. KING v. TAIT. Starke J.

liquidators of the bank, but such shares and all dividends and bonuses and other moneys in respect of such shares were charged with payment to creditors of the bank of the moneys due to them, and were not to be handed over or delivered up to the liquidators until the creditors had been paid. By an order of March 1932 the court directed meetings of creditors and shareholders for the purpose of considering the agreement and determining whether it should be assented to or not. The meetings were convened by public advertisement, and were held. The agreement was approved and adopted at each meeting, but many of the shareholders did not attend or were not represented at the meetings. By two orders made on 12th April 1932 and 7th December 1932 the agreement was sanctioned and confirmed by the court, subject to a minor variation, and directed to be carried into effect. The purchase was carried out pursuant to the terms of the agreement, and the purchaser, the Brisbane company, in March 1932 allotted the 200,000 shares to shareholders of the bank in the proportion of the capital in the bank (including moneys paid in advance of calls) respectively paid up by them as at that date, and so notified the liquidators of the bank. No scrip certificates, however, were issued to the allottees, but the shares have been dealt in on the market, and interests have been acquired by third parties. About the end of 1934, the Brisbane company made an offer to purchase the unrealised assets of the bank. It was proposed in this offer that (if it were accepted) the moneys arising from the purchase should be divided amongst the shareholders in proportion to the amount of capital paid up in the company, subject to the discharge of the bank's liabilities. But the method of division was challenged by some shareholders, who insisted that the moneys should be divided, and also that the 200,000 shares in the Brisbane company should have been divided amongst shareholders in the bank in accordance with art. 118 of its articles of association. The article is as follows :—" If the company shall be wound up, the liquidators (whether voluntary or official) may with the sanction of an extraordinary resolution divide among the contributories in specie, any part of the assets of the company, and may, with the like sanction, vest any part of the assets of the company in trustees upon such trusts for the benefit of the contributories as

the liquidators with the like sanction shall think fit. If the company shall be wound up, the assets of the company (exclusive of uncalled capital) after payment of the debts and liabilities of the company and of the costs and expenses of the winding up of the company, shall be distributed amongst the members of the company in proportion to the number of shares in the company, whether paid up or partly paid up, held by them, and all such shares, whether paid up or partly paid up, shall rank equally for the purpose of the distribution of such assets, as though* all the shares in the company had been already paid up to the same amount, and no call shall be made upon the holders of partly paid shares except for the purpose of paying and discharging the debts and liabilities of the company and the costs and charges of winding up the same, or of such part of the said debts and liabilities and of such costs and charges as the other assets of the company shall be insufficient to meet and discharge." The liquidators of the bank then moved the Supreme Court of Queensland for its advice, opinion and direction as to the order and distribution of the assets of the bank. The motion was referred to the Full Court. But before it was heard by the Full Court, an order was made appointing various representative respondents, and the motion was turned, somewhat irregularly, into an application under sec. 128 of the *Companies Act* for the determination of the rights of all parties before the court interested in the assets of the bank. By a majority the Full Court declared:—1. That the distribution of 200,000 shares in the capital of the Brisbane Permanent Building and Banking Co. Ltd. and the payments of dividends thereon were valid and do stand; 2. That the balance unpaid on any shares be treated as called up and that the holders of these shares be debited with the amount of such balance after allowing credit for moneys paid in advance of calls but not for interest on such moneys; 3. That subject thereto the paid-up capital be repaid to the shareholders; 4. That the debentures be then paid off; and 5. That any surplus then remaining be divided among all the shareholders according to the nominal value of their respective holdings. And the rights of the parties hereto be and they are hereby declared and determined accordingly. An appeal is now brought to this court.

* Misprinted "although" in the original article.

H. C. OF A. 1936. KING v. TAIT. Starke J.

It is well established that the assets of a company in a winding up are, subject to payment of debts and costs, distributable amongst its members according to their rights and interests. Uncalled capital is treated as part of the assets. The memorandum and articles of association determine what those rights and interests are. In the absence of special provisions, the rule is that of equality. "Losses must be borne and profits shared by the shareholders in proportion to the nominal amount of their shares, and not in proportion to the amount paid up thereon" (*Maude's Case* (1); *Lindley* on *Companies*, 6th ed. (1902), vol. 2, p. 1174). But in the present case, art. 118 of the bank's articles of association, already set out, contains provisions for the distribution of the bank's assets in the case of its winding up. It is conceded that the allotment and distribution of the 200,000 shares in the Brisbane company were inconsistent with the provisions of art. 118. The agreement between the bank and its liquidators and the Brisbane company as to distribution of the shares cannot and does not alter the rights of the members of the bank *inter se*, as embodied in that article (*Griffith* v. *Paget* (2); *Wall* v. *London and Northern Assets Corporation* (3)). It has been argued, however, that art. 118 was beyond the capacity and powers of the bank. It is *ultra vires* for a company registered under the *Companies Act* to issue shares at a discount or by way of bonus, though authorised by the memorandum or articles of association, and the holders of such shares are liable to calls for the purpose of paying the debts of the company or adjusting the rights of the members of the company *inter se* (See *Welton* v. *Saffery* (4)). But the main support for the argument was found in a passage from the speech of Lord *Davey* in that case:—"In this case, however, there is no doubt after the decision in the *Ooregum Case* (5) that the obligation to pay up the amount of the shares flows from and is part of that which the Act requires to be stated in the memorandum, and the shareholders have a right to the performance of that condition. The social contract is to be found not in the articles alone, but in the memorandum and articles, and as much in the former document as in the latter. Therefore in the ultimate adjustment of their

(1) (1870) 6 Ch. App. 51.
(2) (1877) 5 Ch. D. 894.
(3) (1898) 2 Ch. 469.
(4) (1897) A.C. 299.
(5) (1892) A.C. 125.

rights *inter se* which takes place before the final dissolution of the company regard must be had to the primary obligation of every contributory to contribute the amount of his share to the assets of the company, and according to the ordinary principle of equity the contributories have the right to have the adjustment made on the basis that all have satisfied or will satisfy their primary obligation to the company. I do not think that any article or regulation of the company which ignores that primary liability, or purports to provide for the adjustment of their rights on any other basis, could validly be made, because it would be inconsistent with the memorandum as interpreted by this House. This opinion, I should observe, is perfectly consistent with a regulation being made for priority to certain shareholders on the distribution of surplus assets when ascertained and got in. But no contributory can take or retain anything out of the surplus assets until he has satisfied his primary obligation either by payment of, or being debited in account with, the amount remaining unpaid on his shares " (1).

It is not doubted that the memorandum and articles of association may regulate the rights of members *inter se* in respect of the distribution of assets in a winding up ; shares may be created with preference in repayment of capital and dividends or either. Art. 118 does not exempt the members of the bank from liability for the debts of the company or the costs of liquidation : it is a stipulation which regulates the rights of members *inter se*. It may or may not result in equality, according as capital is or is not required for payment of debts and costs. But the *Companies Acts* do not require that the assets of a company after payment of debts and costs should be distributed equally amongst the members ; they may make an unequal division if they choose. If after payment of debts and costs, there are surplus assets, art. 118 then denies to shareholders who have paid up more capital than other shareholders the right to receive the difference between the amount paid up on their shares and that paid up on other shares in the company : in other words, the equalization of the capital account of the company. " If the right of equality is excluded, a call to equalize the shares could not be made " (*Buckley, Companies Acts*, 8th ed. (1902), p. 335). Art. 118

(1) (1897) A.C., at pp. 329, 330.

H. C. OF A. 1936. KING v. TAIT. Starke J.

is a provision for the regulation of the rights *inter se* of the members of the company in its assets. It is thus a provision allowed by the *Companies Act*, and not prohibited as was the provision in *Welton* v. *Saffery* (1) (See *Eclipse Gold Mining Co. Case* (2); *Bangor Slate Co. Case* (3); *Mutoscope Syndicate Case* (4) ). The distribution of the 200,000 shares already mentioned is thus inconsistent with art. 118, and contrary to the right of the shareholders of the bank thereby established.

What is the result ? The agreement of 10th March 1930 between the bank, its liquidators, and the Brisbane company cannot in these proceedings—nor, so far as I can see, in any proceedings—be rescinded. No one indeed desires that it should be rescinded; it has been carried out with the sanction of the court, the position of the parties has altered and *restitutio in integrum* is impossible. The agreement, cannot, as I have already pointed out, affect or alter the rights of the shareholders under art. 118, but should an agreement nevertheless be inferred between the bank and its liquidators and shareholders to carry out the stipulation for the distribution of the 200,000 shares—though inconsistent with the rights of the shareholders under that article—or should the shareholders be deemed to have acquiesced in that distribution ? The shareholders have not repudiated the allotment of the shares to them, and they have also accepted dividends in respect of the shares so allotted. *In re Beeston Pneumatic Tyre Co. Ltd.* (5) was a case in which the court drew an inference from the facts that all parties concerned had agreed upon a mode of distribution not in accordance with the legal rights of the shareholders. (See also *In re North West Argentine Railway Co.* (6).) But I feel difficulty in the present case in drawing such an inference or inferring acquiescence on the part of the shareholders, for the provisions of art. 118 were apparently overlooked by all concerned, and never considered. Moreover, the meetings directed to be held to consider the agreement were convened by public advertisement, and many of the shareholders did not attend and were not represented. Some 165 shareholders were present, personally or by proxy,

(1) (1897) A.C. 299, at pp. 306, 309, 310, 323.
(2) (1874) L.R. 17 Eq. 490.
(3) (1875) L.R. 20 Eq. 59.
(4) (1899) 1 Ch. 896.
(5) (1898) 14 T.L.R. 338.
(6) (1900) 2 Ch. 882.

representing in round numbers 292,000 shares. The agreement, too, only affected the distribution of the 200,000 shares, and did not extend to the proceeds of the realization of other assets of the bank amounting to some £135,000. An agreement to alter the rights of the shareholders of the bank in its assets and to substitute another method of distribution should not on such facts be inferred—nor should acquiescence in that method of distribution. The result is that their rights must be adjusted to conform with the provisions of art. 118. It is possible with the sum in hand to do this, and to do it without disturbing the allotment and allocation of the 200,000 shares.

The next question is the position of the shareholders who have paid moneys in excess of calls. The advances were in suspense, and cannot be treated as the capital of the company until duly called. But the persons making the advances cannot rank as creditors of the company nor yet can they recover the moneys as a loan. Still, advances and interest agreed to be paid thereon should be taken into account in adjusting the rights of the shareholders *inter se*. The general rule is that if the company has treated the amount paid by some shareholders as an advance to it upon which it has been paying interest, these shareholders will be entitled to a return of this advance with interest up to the date of repayment before the other shareholders receive anything, and the surplus remaining will then be divisible between the shareholders in accordance with the provisions of the articles of association; or the rule of equality already mentioned (*Lock* v. *Queensland Investment and Land Mortgage Co.* (1); *London and Northern Steamship Co. Ltd.* v. *Farmer* (2); *Exchange Drapery Co. Case* (3); *Wakefield Rolling Stock Co. Case* (4); *Lindley* on *Companies*, 6th ed. (1902), vol. 2, pp. 1022, 1176). Now in the present case the advances do not carry interest, but a dividend at six per cent per annum until called and due. But I see no reason for excluding the application of the general rule to the moneys paid in excess of calls. The bank was authorised by art. 22 to receive from any member willing to advance the same all or any part of the moneys for the time being remaining uncalled on his

(1) (1896) 1 Ch. 397; (1896) A.C. 461.
(2) (1914) 111 L.T. 204.
(3) (1888) 38 Ch. D. 171.
(4) (1892) 3 Ch. 165.

H. C. OF A. 1936. KING v. TAIT. Starke J.

share, beyond the calls then actually made. It accepted the moneys on this footing, and treated them as an advance to it, upon which dividends at six per cent per annum were to be paid. The agreed dividend stands upon a somewhat different footing from interest. It is open to doubt whether the dividend of six per cent per annum is payable to the shareholders in their character of members within the meaning of sec. 37 (7) of the Queensland *Companies Acts* 1863 to 1913 (*Lock* v. *Queensland Investment and Land Mortgage Co.* (1) ). But the dividend is payable to them in a character, as already indicated, so analogous to that of members that the same rule should be applied. The sub-section provides: "No sum due to any member of a company in his character of a member by way of dividends profits or otherwise shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves." A dividend, however, presupposes a profit, and its declaration (art. 44) before it ripens into a debt. The agreed dividends, so far as they are unpaid, were never declared and did not ripen into any debt. Consequently they cannot be added to the advances.

Finally, the position of the debenture holders must be considered. Each debenture is subject to a prior right on the part of all shareholders to the payment of paid-up capital. The amount now involved is so small that none of the parties objects to the existing debenture debt being discharged in priority to the distribution of assets amongst the shareholders. But as a matter of construction the provision of the debenture is explicit, and gives shareholders a prior right to the repayment, not of their nominal capital, but of the capital actually paid up by them.

The result is that the appeal should be allowed, and declarations and orders made to the following effect:—

1. That art. 118 is valid.

2. That the advances made by shareholders in advance of calls but not dividends at the rate of six per cent per annum should be

(1) (1896) A.C. 461.

paid or provided for before any distribution is made to other shareholders.

3. That the debenture holders are postponed to shareholders until the amount of capital actually paid up by them is paid or provided for.

4. Subject to these declarations the assets of the company should be distributed in accordance with the provisions of art. 118, bringing into account for that purpose the 200,000 shares already distributed at their real value, but without disturbing the allotment and allocation of those shares already made.

The costs of all parties of this appeal should be paid out of the assets of the company, those of the liquidator as between solicitor and client.

DIXON J. This appeal arises out of the winding up of a banking company. It concerns the distribution of the assets remaining after providing for the payment of debts and liabilities except a deferred debenture debt and the discharge of costs, charges and expenses of winding up. The capital of the company, which is limited by shares, consists of £500,000 divided into 500,000 shares of £1 each. All the capital had been issued before the commencement of the winding up. Half the company's share capital, namely, 250,000 shares, had been issued before the year 1927, and those shares were fully paid up. The other 250,000 shares were issued in that year with 2s. 6d. payable on allotment. No further amount was called up in respect of the latter shares; but the directors received from many of the shareholders advances in anticipation of the amount unpaid upon them. The amounts advanced varied, but their total sum was £48,122 10s. 9d. Thus the paid-up and prepaid capital of the company amounted to £329,372 10s. 9d.

The deferred debentures consisted of a small unredeemed balance, amounting to £2,126 13s. 4d., of debentures which the company had issued on its establishment as part of the purchase price given for its business. They were not secured over the company's undertaking and were merely evidence of a debt. But, by a very unusual condition, the debentures were made subject to "a prior right on the part of all shareholders to the repayment of paid-up capital."

H. C. OF A. 1936. KING v. TAIT. Dixon J.

It is believed that, after the discharge of all liabilities and expenses, the assets will prove more than equivalent to the total amount of the paid-up and prepaid capital of the company. But one of the questions is whether, having regard to the articles of association, the net assets are distributable among the shareholders in proportion with their subscription of capital without regard to the varying amounts actually paid up. In such a method of distribution the assets would not suffice for the return of the whole amount of the fully paid-up shares.

At an early stage in the winding up, which was under supervision, a conditional agreement was made with the Brisbane Permanent Building and Banking Co. Ltd. for the sale of a large part of the assets. The purchasing company undertook the discharge of a balance of liabilities to depositors and some other creditors. The consideration included the allotment to the shareholders of the liquidating company of 200,000 fully paid-up shares of £1 in the purchasing company's capital. The assets retained by the liquidator and not included in this conditional sale are expected now to produce a net sum of about £138,000, after providing for the costs and charges of winding up and the claims of creditors not undertaken by the purchasing company, except the deferred debentures. Under the direction of the Supreme Court of Queensland, the conditional agreement was submitted for approval to a meeting of creditors and to a meeting of shareholders. Each meeting adopted or approved the agreement. Not quite three-fifths of the shares in number were represented at the meeting of shareholders. Afterwards the Supreme Court, subject to a modification, sanctioned and confirmed the agreement and directed it to be carried into effect. The court probably acted in its jurisdiction to sanction sales of property by liquidators and the doing of other things by them necessary for winding up the affairs of the company (secs. 95 and 151 of the English *Companies Act of* 1862 (Queensland Act of 1863, secs. 94 and 141) ). Perhaps it was exercising its general jurisdiction in winding up by the court or under its supervision. It was not sanctioning a compromise or arrangement under the provisions introduced by sec. 2 of the Act of 1870 (sec. 153 of the Act of 1929) for these provisions have not been enacted in Queensland.

The clause modified by the court was framed in the interests of creditors. As a result of the clause and its modification, it was provided, in effect, that the shares to be allotted by the purchasing company should be charged with payment of debts; that the share certificates should be delivered to the liquidators and the dividends on the shares paid to them or under their direction; and that, until the creditors were paid in full, neither the share certificates nor the dividends should be handed over to the allottees, except with the authority of the committee of inspection or of the court.

The agreement thus confirmed by the court contained a provision defining the proportions in which the shares in the purchasing company should be distributed among the shareholders of the liquidating company. It provided that they should be allotted by the purchasing company to the shareholders of the liquidating company in proportion to the amount paid by them in the capital of the latter. It went on to provide that the allotment should be on the basis of the amount actually paid up as capital, whether in respect of fully paid or partly paid shares.

Now such a method of distributing assets in excess of those applied in the discharge of debts and costs of winding up is not in accord with the general law, which, in the absence of specific provision, requires that the capital shall be equalized as a first step and then the fund shall be distributed according to the number of shares. The plan, therefore, needed the authority of some regulation of the company. Unfortunately the effect of what the articles of association provided upon the subject appears to have escaped attention. In point of fact an article existed (number 118) which prescribed a mode of distribution completely inconsistent with that provided by the agreement. Moreover, the same article authorized a distribution of assets in specie but only with the sanction of an extraordinary resolution and that sanction was not obtained. So far as the article deals with the proportions in which net assets are distributable, it is in the following terms:—"If the company shall be wound up, the assets of the company (exclusive of uncalled capital) after payment of the debts and liabilities of the company and of the costs and expenses of the winding up of the company, shall be distributed amongst the members of the company in proportion to the number

H. C. OF A. 1936. KING v. TAIT. Dixon J.

of shares in the company, whether paid up or partly paid up, held by them, and all such shares, whether paid up or partly paid up, shall rank equally for the purpose of the distribution of such assets, as though* all the shares in the company had been already paid up to the same amount, and no call shall be made upon the holders of partly paid shares except for the purpose of paying and discharging the debts and liabilities of the company and the costs and charges of winding up the same, or of such part of the said debts and liabilities and of such costs and charges as the other assets of the company shall be insufficient to meet and discharge."

Before the existence of this provision was discovered and its significance grasped, not only were the shares allotted in accordance with the plan of distribution adopted in the agreement, but many of the shares so allotted were dealt with by the allottees. Of the 200,000 shares, more than 35,000 were transferred to purchasers for value and the transfers were registered. Five dividends, declared by the purchasing company upon the shares, have been paid direct to the registered holders under the leave of the court or the direction of the liquidators given with the sanction of the committee of inspection. Before the last of the five dividends was paid, a proposal was made by the purchasing company for the acquisition of the balance of the assets of the liquidating company. While this proposal, which was ultimately accepted, was under consideration some shareholders objected to the mode of distribution that had been adopted in allotting the shares, and for the first time the proportion in which the contributories should participate in the surplus over debts, costs, and charges and expenses of winding up became a question. The liquidators sought the advice and direction of the Supreme Court and their application was made the means of invoking the jurisdiction of the court to determine the rights of the various classes whose interests were affected. Parties were appointed to represent respectively the holders of fully paid shares, the holders of shares paid up to 2s. 6d. who had not paid moneys in advance of the uncalled amount of the shares, the holders of shares paid up to 2s. 6d. who had paid moneys in advance of the

* Misprinted "although" in the original article.

uncalled amount of the shares, and, last, the holders of the debentures. It may be that the interests of all the holders of shares paid up to 2s. 6d. who have prepaid capital are not identical; for those who have prepaid the full or nearly the full amount of their shares might find it to their advantage to support the method of distribution which has been pursued. But this distinction was not made in the representative order. Nor were the transferees represented. The purchasing company was not a party to the proceedings.

The Supreme Court (*R. J. Douglas* and *Webb* JJ., *Hart* A.J. dissenting) upheld the distribution of the 200,000 shares, on the ground that art. 118 was contrary to law and of no effect. They gave directions for the equalization of capital by means of the remaining assets and subject thereto for the return of capital. After that they ordered that the debentures be paid. Then, they directed the distribution of the residue of the fund among the contributories according to the nominal value of the shares held by them.

From this order the present appeal is brought by the parties representing holders of shares paid up to 2s. 6d. only who have made no prepayments of capital. They claim that the basis of the distribution of the 200,000 was wrong, and should have been made in accordance with art. 118. They seek orders working out a redistribution of the shares in what they say are the correct proportions, or alternatively, an adjustment by means of the remaining assets producing so far as may be the same result. They are supported by the parties representing the holders of shares paid up to 2s. 6d. who have made prepayments. These parties also make subsidiary contentions of their own which arise out of the prepayment of capital made by them.

The first answer made to the claim of the holders of partly paid shares is that the article upon which they rely is invalid. The contention is that the article conflicts with the *Companies Acts* in attempting to exclude uncalled capital from the assets of the company distributable among contributories, and to restrict calls in the liquidation to the purpose of paying debts. Uncalled capital is, of course, as much the property of the company as any other chose in action vested in it, and it is beyond question that neither by an article of association nor by any other contract with the company

H. C. OF A. 1936. KING v. TAIT. Dixon J.

can a shareholder be relieved of his liability to pay or satisfy the amount of a share (*Ooregum Gold Mining Co. of India* v. *Roper* (1); *Welton* v. *Saffery* (2)). On the other hand, it is the province of the articles of association, subject to any provision found in the memorandum, to regulate the manner in which the funds of a company are to be applied in a winding up after the discharge of liabilities and costs, charges and expenses. In the absence of any contrary provision, the division of the company's capital into shares of equal amount, if no distinction is made among them, imports that the shareholder takes a corresponding equality of interest. The basis of the equality is the capital subscribed, not the capital paid up. As his interest is in a fund comprising the whole subscribed capital, the equality must be worked out on the footing that the capital is actually or notionally paid up. But the *Companies Acts* do not fix the proportions in which the members of a company are entitled to share in a distribution of the funds of a company, whether the distribution is on account of profits or of capital, and they do not require that the memorandum shall fix the proportions. Nor is equality an implied condition of a memorandum dividing share capital into uniform shares of equal amount. (See, per Lord *Macnaghten*, *British and American Trustee and Finance Corporation* v. *Couper* (3); per *Lindley* L.J., *Andrews* v. *Gas Meter Co.* (4); per *Wright* J., *In re Driffield Gas Light Co.* (5).)

The practice of attaching to preference shares a priority in the return of capital as well as in the distribution of profits rests upon these principles. They are the warrant also for articles of association prescribing that, in a winding up, after the discharge of liabilities and costs and charges of liquidation, and before the return of capital, the assets shall be applied in some manner other than according to the nominal amount of the shares held by shareholders, or a class of shareholders, as, for instance, according to the amount called up before the winding up on the respective shares (Cf. *In re Kinatan (Borneo) Rubber Ltd.* (6); *In re Australian Group & General Assurance*

(1) (1892) A.C. 125.
(2) (1897) A.C. 299; 76 L.T. 505.
(3) (1894) A.C., at pp. 416, 417.
(4) (1897) 1 Ch., at pp. 368-371.
(5) (1898) 1 Ch., at p. 455.
(6) (1923) 1 Ch. 124; 128 L.T. 216; 92 L.J. Ch. 613.

*Co. Ltd.* (1); *In re National Portland Cement Co. Ltd.* (2); and, per *Neville* J., *In re Ramel Syndicate Ltd.* (3)).

In the use made of the freedom to prescribe by articles of association how, after the payment of debts and costs and charges, the remaining assets are to be distributed, there is necessarily a place where the principle is encountered that no article can impair the shareholder's obligation to contribute the full amount of his share. For the uncalled capital may represent in whole or in part the fund left after debts and costs and charges have been satisfied. If the article governing the division of the fund provides against the application of uncalled capital to make up a deficiency in the amount returned in respect of shares fully paid up, or of shares paid up to a greater amount than other shares, then it is useless to call it up in the liquidation; because, when called up it must, if the distribution is to be carried out according to the article, be applied in recouping the contributories paying it up. This result is brought about by an article requiring that losses of capital shall be borne in proportion to the amount paid up, at any rate when the assets other than capital uncalled at the commencement of the winding up produce a fund exceeding debts, costs and charges, but insufficient for the return in full of paid-up capital. It would be brought about by an article directing that, in the event of liquidation, the assets, after the discharge of liabilities and costs, charges and expenses of liquidation, should be applied, first, in recouping calls made in the winding up in so far as they should prove to be in excess of such liabilities, costs, charges and expenses, and, second, in a distribution among the contributories in proportion to the number of shares.

Hitherto the *Companies Acts* have not been thought to prescribe rigidly the incidence of a loss of capital among the members of a company limited by shares. But, unless an intention to fix the proportions in which losses of capital must be borne is discovered in the Acts, or in the memorandum, there seems no reason to doubt the validity of such an article.

The article in question in the present case seeks to achieve a like result but by the direct means of excluding uncalled capital from

(1) (1932) 32 S.R. (N.S.W.) 435; 49 W.N. (N.S.W.) 111.

(2) (1933) N.Z.L.R. 1065.

(3) (1911) 1 Ch., at p. 752.

H. C. OF A. 1936. KING v. TAIT. Dixon J.

the net balance of assets available for distribution among shareholders and by a consequential direction that calls shall not be made except for the purpose of discharging debts, costs and charges. Do the Acts contain anything which invalidates such an attempt to give the shareholders an interest in the net assets according to the number of their shares without taking into account the discrepancy between the amount subscribed and the amount paid up ? In my opinion they do not. In giving my reasons for this opinion, I prefer to go in the first place to the text of the enactments before discussing how the decided cases bear upon the question. The relevant provisions of the Queensland legislation are transcribed from the English Acts of 1862, 1867 and 1879. A provision peculiar to Queensland was relied upon, namely, sec. 29 of the Queensland Act of 1889, but it does not appear to me to affect the matter. Sec. 7 of the English Act of 1862 (Queensland, 1863, sec. 6), in authorizing the formation of a company limited by shares, says simply that the liability of members may be limited to the amount, if any, unpaid on the shares respectively held by them. It assumes the liability and deals with the restriction of the amount. Sec. 8 (5) (Queensland, sec. 7 (5) ) requires that the memorandum of association of such a company shall contain the amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount. Sec. 18 (Queensland, sec. 17) imposes the liability. It says that, upon registration, the subscribers of the memorandum together with such other persons as shall from time to time become members shall be a body corporate but with such liability on the part of the members to contribute to the assets of the company, in the event of the same being wound up, as is thereinafter mentioned, that is, in the subsequent provisions of the Act. The chief provision referred to is sec. 38 (Queensland, sec. 37) which includes unlimited companies, and companies limited by guarantee, as well as those limited by shares. It provides that, in the event of a company formed under the Act being wound up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding up,

and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves with the qualifications then set out. This section states the nature and extent of the liability. It is a statutory obligation to contribute to assets, to a fund. The extent is measured by the amount required to pay the debts and liabilities of the company, to defray the cost of winding up, and to adjust the mutual rights of the contributories or members. Among the qualifications of the obligation is that which restricts the contribution to the amount unpaid on the shares of a member of a company limited by shares. The character of the liability to contribute is further described by sec. 75 (Queensland, sec. 74) which makes it a specialty debt accruing when his liability commenced, but payable at the time or respective times when calls are made as the statute afterwards mentions. It is this statutory definition of the nature, character and extent of the liability which affords the main reason relied on for impugning the validity of the article of association. For it is said that the article denies what the statute affirms, namely, the contributories' liability to contribute to the assets whatever amount may be called, whether it be for the purpose of paying debts, meeting the cost of winding up, or adjusting the rights *inter se* of the members.

It is important to notice that what the article does is to provide against calls for the last purpose only, and what the statute does is to measure the liability by what, under those of its provisions relating to the making of calls in a winding up, may be called up for the purposes it specifies, the last of which concerns the present question. Under sec. 98 (Queensland, sec. 97) the court must settle a list of contributories and cause the assets of the company to be collected and applied in discharge of its liabilities. Under sec. 102 (Queensland, sec. 101) it is authorized, either before or after ascertaining the sufficiency of assets, to make calls on the contributories. But, again, the purposes are limited to the satisfaction of debts, and liabilities and costs, charges and expenses, and the adjustment of the rights of contributories amongst themselves. Sec. 109 (Queensland, sec. 107) directs the court to adjust the rights of contributories and to distribute any surplus that may remain amongst the parties entitled thereto. As has often been pointed out, these provisions do not

H. C. OF A. 1936. KING v. TAIT. Dixon J.

define what are the rights of contributories amongst themselves, nor state who are the persons entitled to the surplus, nor whence their title arises. They are concerned, moreover, not only with companies limited by shares, but also with unlimited companies, and companies limited by guarantee. In dealing with a voluntary winding up, the statute refers in terms to the regulations of the company as governing the destination of the assets, after the discharge of debts and costs of liquidation. The rights are the same whether the winding up is compulsory or voluntary, but the legislation is more explicit in the latter case (See, per Lord *Macnaghten*, *Birch* v. *Cropper* (1) ). The first paragraph of sec. 133 (Queensland, sec. 123) provides that the property of the company shall be applied in satisfaction of its liabilities *pari passu* and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company. The ninth paragraph authorizes the liquidators to call on the contributories to pay all or any sums they deem necessary to satisfy debts and costs of winding up and for the adjustment of the rights of the contributories amongst themselves. No doubt can exist, at this date, of the indestructible nature of the duty to contribute imposed by these provisions, whether it be measured in amount, as in the case of limited companies, or be indefinite. When the Act abolished the direct liability of shareholders to creditors, who became bound to look to the corporation alone as their debtor, the capital was established as a common fund which is to be a source of payment. The shareholder's liability is to make good his proper contribution to the common fund. In a winding up every amount which should be contributed is obtained and possession is taken of the fund and it is distributed (Cp. per Lord *Cairns* in *Webb* v. *Whiffin* (2) ). But the duty to contribute is not independent of claims on the fund. On the contrary, it depends altogether on the existence of such claims. It is true that the discretionary judgment of the court or liquidator determines the time and amount of the contribution. But calls are not to be made when it is clear that the proceeds will not be required for the purpose of the liquidation (Cp. *Helbert* v. *Banner* (3) ).

(1) (1889) 14 A.C., at p. 544.
(2) (1872) L.R. 5 H.L. 711, at p. 734.
(3) (1871) L.R. 5 H.L. 28, at p. 34.

When debts and liabilities, and costs, charges and expenses are provided for, the necessity of calling up further capital depends altogether upon the rights of contributories in the fund. If no rights exist, and none can be supposed to exist, for the satisfaction of which uncalled capital is required, then neither court nor liquidator should make a call. It is in this consideration that the form of the article finds its justification. It assumes that all other claims on the fund are out of the way. In that event, and only in that event, it proceeds to deal with the title of the contributories or members to the uncalled capital. It deprives them of any title to it, or, to put it in another way, it allocates uncalled capital among the contributories precisely in accordance with their respective liabilities therefor. It does not attempt to forbid the calling up of capital although an adjustment may be necessary. But it excludes the possibility of any cause for adjustment arising, and, in the course of, and for the purpose of, doing so provides against calls for that object. It makes its intention clear that the net assets, other than uncalled capital, shall be distributed without regard to the amount of capital called up or paid, and that the shareholders shall have no title to a distribution of uncalled capital. A regulation of the company, therefore, does otherwise provide within sec. 133 (1) (Queensland, sec. 123 (1) ). It negatives all mutual rights and interests of the contributories in that asset, except those implied by the direction that further calls shall not be made. The regulation of the company also makes clear its intention that no one else shall be entitled to the uncalled capital. Accordingly neither to adjust rights, nor for any other purpose, could a call be made, except for the purpose of discharging the debts and liabilities of the company and the costs, charges and expenses of winding up. But it is said that sec. 25 of the Act of 1867 (Queensland Act of 1889, sec. 28) imposes on the shareholders an obligation to pay up the whole amount of the share in cash independently of any of the considerations I have mentioned. In my opinion, it neither extends the obligation nor alters its nature. It deals with the mode of discharge and prescribes payment in cash, unless the alternative mode of satisfaction adopted is embodied in a written contract which is filed. But it does not require the shareholder to pay up the amount

H. C. OF A. 1936. KING v. TAIT. Dixon J.

of the share although no call is made, nor authorize calls in a winding up although they are required for none of the three purposes which the Act of 1862 specifies.

Sec. 5 of the English Act of 1879 (Queensland Act of 1889, sec. 19) should be noticed. It makes it possible for a limited company by special resolution, to make any portion of its capital incapable of being called up, except in the event of, and for the purpose of, the company being wound up. Perhaps, on its wording, it does not appear to throw any further light on the question, for it does not indicate what are "the purposes of a company being wound up." But it is important for a statement contained in Lord *Watson's* opinion in *Ooregum Gold Mining Co. of India* v. *Roper* (1), in which he expresses the view that "shareholders had undoubted power to resolve that no call should be made upon the new shares except in liquidation, and then only for the purpose of paying debts and expenses of liquidation, because that power is expressly conferred upon limited companies by sec. 5 of the *Companies Act* 1879." His Lordship did not, of course, find in this provision the limitation to the purpose of paying debts and expenses of liquidation. But I take it that he considered that, as the fund remaining after fulfilment of that purpose belongs to the shareholders only, so they could deal with it by resolving that it should not be got in merely for the purpose of repayment to the contributories. This view, in my opinion, is well founded and is consistent with authority.

Direct authority for the article is found in the early case of *In re Eclipse Gold Mining Co.* (2), where Sir R. *Malins* V.C. gave effect to an article which provided that, in the event of winding up, no call should be made upon a class of contributing shares, except for the purpose of meeting debts and charges, and, in particular, none for the purpose of repaying holders of fully paid shares the amount paid up in excess of that paid on the contributory shares. It is true that the reasons of the learned judge contain no discussion of the article, but it was dealt with by counsel and affords the only justification for the decision.

In *Ooregum Gold Mining Co. of India* v. *Roper* (3) Lord *Herschell* said :—"Supposing the agreement had been in terms that the

(1) (1892) A.C., at p. 138. (2) (1874) L.R. 17 Eq. 490; 43 L.J. Ch. 637.
(3) (1892) A.C., at p. 143.

company would not enforce the payment of more than 5s. per share, except in the case of a winding up, and then only to satisfy the claims of creditors and the costs of the winding up, would there have been anything illegal in such an agreement? I fail to see anything in the *Companies Acts* which would render such an agreement invalid." With this view Lord *Watson* agreed (1).

In *Welton* v. *Saffery* (2) Lord *Watson* and Lord *Herschell* again stated, each in his own way, their opinion that there was nothing to prevent a company from attaching to a class of shares a condition exonerating the capital uncalled upon them from liability to make up a deficiency in the capital returned in a winding up in respect of other classes of shares, upon which a greater amount had been paid up. But reliance is placed on passages in the speeches of the other lords who took part in the decision of that case, which are said to be at variance with this view. In considering the effect of these dicta, it is important to understand the facts of the case. Lord *Herschell*, Lord *Macnaghten* and Lord *Davey* dealt with them in the course of their opinions in passages which are omitted from the Law Reports, but which appear in the collateral reports (3). Some further facts appear from the report of the decision of the Court of Appeal, *sub nom. Re Railway Time Tables Publishing Co. Ltd.*; *Ex parte Welton* (4). It appears that it was a winding up under supervision. The liquidator sought the sanction of the court to a further call. The purpose of the call was to adjust the rights of contributories *inter se*. Calls had already been made and the liquidator had in hand a sufficient sum to complete the payment of liabilities and costs, charges and expenses. The company had made various issues of capital. The shares were all of the denomination of £5, and all had been issued as fully paid up. But many of them actually carried a liability. Some had been issued as bonus shares, and upon them nothing had been paid, and no appropriation had been made that would satisfy the liability. Others had been issued as discount shares for the price of 10s. each. Others which bore preferential rights to dividend had been issued in circumstances making it necessary to treat them as wholly unpaid. They formed the balance

(1) (1892) A.C., at p. 138.
(2) (1897) A.C., at pp. 309, 313-315.
(3) (1897) 76 L.T. 505; 66 L.J. Ch. 362; 4 Mans. 269.
(4) (1894) 71 L.T. 682.

H. C. OF A. 1936. KING v. TAIT. Dixon J.

of an issue of shares made for a consideration which had been held sufficient to cover only part of the issue. Previous calls had been made upon all these shares without opposition. But the proposed call for the purpose of adjusting the rights of contributories was resisted. The ground for resisting the calls upon the shares issued at a discount was that, as between the shareholders, the transaction was effective. An analogous contention seems to have been advanced in opposition to the call upon the bonus shares and the preference shares, which, at the commencement of the winding up, were wholly unpaid. An article of association purported to confer power to issue shares at a discount. The article which governed the distribution of assets after the discharge of debts and charges was expressed to be without prejudice to the rights of the holders of shares issued upon special conditions, a reference which would, of course, include discount conditions, if discount were valid. The distribution which that article prescribed seems to have been treated as necessarily requiring the actual or notional getting in of uncalled capital. The article was as follows :—" If the company should be wound up, and the surplus assets shall be insufficient to repay the whole of the paid up capital, such surplus assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions." Perhaps it might have been argued that the expression " surplus assets " did not include uncalled capital and that the capital paid up at the commencement of the winding up was meant to be the basis of distributing the loss. But two decisions against this meaning of " surplus assets " existed : *Re Sheppard's Corn Malting Co, Ltd.* ; *Ex parte Lowenfeld* (1) and *In re New Transvaal Co.* (2), and, in the following year, when the contention was made on a similar article that the words " at the commencement of the winding up " governed " capital paid up " and not " shares held," it was treated as unquestionably wrong (*In re Anglo-Continental Corporation of Western Australia* (3) : cf., per *P. O. Lawrence* J., *In re Kinatan (Borneo)*

(1) (1893) 70 L.T. 3. (2) (1896) 2 Ch. 750. (3) (1898) 1 Ch. 327.

*Rubber Ltd.* (1); per *Cozens-Hardy* J., *In re Welsh Whiskey Distillery Co. Ltd.* (2)). The result was that, unless the article was inapplicable to the shares issued at a discount, it required that calls should be made for the purpose of obtaining a fund consisting of all the surplus assets and then dividing it according to the capital ultimately paid up. Lord *Davey* says in terms that the article provides for the distribution of surplus assets in course of a winding up not apparently differing from the usual way. Both he and Lord *Herschell* make a point of the question whether the discount shares were, so to speak, in or out of this article. Lord *Herschell*, whose opinion was that the issue of the shares at a discount involved a severable regulation of the mutual rights of the contributories, says that he may observe that the article is without prejudice to the rights of the holders of shares issued on special conditions. Lord *Davey* says that so much of the article relating to shares on special conditions as purported to empower the directors to issue shares at a discount is *ultra vires* and everything done under it is a nullity, and the article relating to distribution, in excepting special conditions, must be read as applying only to special conditions which the company could attach to shares. This consideration appears to me to make a fundamental distinction between this case and *Welton* v. *Saffery* (3). Once the view was adopted that, under the article, uncalled capital was distributable in common with other assets and that the article applied to discount shares, there was nothing to negative the obligation to contribute the full amount of every share except the fact that they were issued at a discount. There was no attempt to vary the distribution or division of the distributable fund among the shareholders. The regulations of the company required that to be done on principles indistinguishable from those which would have been implied. Nevertheless an attempt had been made to treat a share not in fact paid up as if for this and all other purposes it were paid up.

The ground upon which Lord *Halsbury* L.C. based his decision is that a shareholder is under a statutory liability to make good for any company purpose the amount of money which on the face of the

(1) (1923) 1 Ch. 124, at p. 129. (2) (1900) 16 T.L.R. 246, at p. 247.
(3) (1897) A.C. 299.

H. C. OF A. 1936. KING v. TAIT. Dixon J.

share he undertakes to pay and that, where it is necessary to adjust the rights between the different classes of shareholders, the right to have the capital called up is no less imperative than where creditors only are in question. This means that, so long as the interests of the contributories in the assets of a company require for their full realization the getting in of any of the uncalled capital, then it is impossible to relieve the holder of shares not fully paid of his liability to contribute for the purpose. But it does not mean that the interests in the assets may not be defined by the articles of association, or that they may not be defined in such a way as to exclude the necessity of resorting to uncalled capital to work them out.

Lord *Watson's* judgment may be resolved into three steps, namely: (i) the sole interest in the assets remaining after paying all debts and costs of liquidation is in the members and their mutual rights therein may be regulated as they choose; (ii) those rights may be defined by the conditions attached to a class of shares at their issue; (iii) but the issue of shares at a discount as fully paid up does not attach a severable condition defining those rights. In the first of these steps all the Lords appear to me to agree. In the third all except Lord *Herschell* agree, and, I think, it affords the true *ratio decidendi* of the case. In the second step Lord *Herschell*, of course, completely agrees. It is not a step which affects the present case, but I do not think its correctness is denied by any of their Lordships. Lord *Macnaghten* expressly accepts the view that directors may issue shares with a preferential right as regards capital in the event of winding up, and that the consequence would be that the ordinary shareholders would have no right of contribution. But he denies that any article could make the issue of shares at a discount an act of the company affecting any of the rights of the members. On this ground he bases his decision. The contrast again gives point to the distinction between so regulating the rights of shareholders in the fund that no adjustment by means of calls is right or proper, and attempting to negative the liability for calls, although interests exist in the fund which may call for such an adjustment.

Lord *Macnaghten* appears to see no difficulty in directors defining the interests of shareholders in the fund by attaching, pursuant to the articles, conditions to a class of shares, although the consequence

is that no calls for purposes of adjustment can be made in the winding up. Lord *Morris*, who agreed in Lord *Davey's* reasons, said that sec. 25 of the Act of 1867 (Queensland, sec. 28 of the Act of 1889) applied as much to the case of shareholders as to that of creditors, and consequently any agreement or resolution of the company to issue shares on any terms short of full payment was illegal. This statement assumes the existence of rights in respect of the fund comprising uncalled capital which may necessitate contribution. Lord *Davey's* opinion rests upon the impossibility of the company's releasing or relieving the shareholder from liability to pay up the amount of his share and the correlative right of every other shareholder to insist on the obligation, which, he says, flows from and is part of that which the Act requires to be stated in the memorandum. He then makes a statement upon which much reliance is placed in support of the attack upon the validity of the article now in question. The passage is as follows :—" In the ultimate adjustment of their rights *inter se* which takes place before the final dissolution of the company regard must be had to the primary obligation of every contributory to contribute the amount of his share to the assets of the company, and according to the ordinary principle of equity the contributories have the right to have the adjustment made on the basis that all have satisfied or will satisfy their primary obligation to the company. I do not think that any article or regulation of the company which ignores that primary liability, or purports to provide for the adjustment of their rights on any other basis, could validly be made, because it would be inconsistent with the memorandum as interpreted by this House. This opinion, I should observe, is perfectly consistent with a regulation being made for priority to certain shareholders on the distribution of surplus assets when ascertained and got in. But no contributory can take or retain anything out of the surplus assets until he has satisfied his primary obligation either by payment of, or being debited in account with, the amount remaining unpaid on his shares " (1).

This passage is taken to mean that the liability of every shareholder to pay up the full amount of his share necessarily gives rise to mutual rights and interests in the assets which are unalterable,

(1) (1897) A.C., at pp. 329, 330.

H. C. OF A. 1936. KING v. TAIT. Dixon J.

and, therefore, must be preserved in any plan of distribution laid down by the articles. But, notwithstanding the language used, I do not think that his Lordship was of that opinion. What he afterwards says about the possibility of achieving the desired result by conferring a preference in the distribution of capital appears to me to show that he did not take the view attributed to him. In speaking of " surplus assets," I think he means the fund remaining after the discharge of debts and costs of winding up, and before return of capital. Otherwise, what he says about preferential rights would not be accurate. His intention is, I think, to insist that nothing can detract from the liability to pay up the share for all the purposes of liquidation, including the full adjustment of rights. He is not considering the definition or measure of the rights and interests to be adjusted. But, assuming there are rights and interests to be adjusted, he declares emphatically that the adjustment must proceed on the basis that the shareholder is liable to pay up his shares. It may be that Lord *Davey* having already said that the mode of distribution described by the articles of the company did not appear to differ from the usual way, spoke on the assumption that rights and interests existed which could not be realized and enforced without calling up capital, and was addressing himself altogether to the question whether, by means of articles or otherwise, the liability for a call for that purpose could be impaired or destroyed. But I do not think his Lordship was considering such a case as the present, where the article seeks to provide for a division of assets which renders it unnecessary and improper to get in uncalled capital.

For these reasons I think the article is valid.

It follows that the 200,000 shares were distributed on an altogether erroneous basis. The holders of fully paid-up shares received more, and the holders of partly paid-up shares less than their due proportion.

This conclusion makes it necessary to consider how, if at all, the error may be rectified.

The shares have been allotted by the purchasing company and that allotment cannot be cancelled. Apart altogether from the fact of that company's being a stranger to these proceedings, the allotment is an integral part of the process of issuing portion of its capital

and constituted the allottees members of the company. As against the purchasing company, neither the liquidators nor the claimant shareholders have any title to obtain rectification of the register. No doubt, as between the parties to the agreement of purchase, the effect of the clause prescribing the proportions in which the shares were to be allotted was merely to direct with exactness how the consideration for the sale was to be made over. It could not affect the validity of the agreement (*Wall* v. *London and Northern Assets Corporation* (1) ). But when the purchasing company complied with the notification under the agreement and made an allotment of the specified number of shares to each shareholder named, it not only regularly performed that part of the agreement but brought into existence new rights which may be transferred, but cannot be nullified.

Is it possible to require the holders of shares allotted in excess of the allottees' due proportion to transfer them to the liquidators, or at their direction, so as to enable them to effect a proper distribution? To do this would mean the making of an order or series of orders working out specific relief by which the completely executed distribution of shares would be undone, and a new distribution accomplished in its stead. The fully paid shareholders are contributories within sec. 100 of the Act of 1862 (Queensland, sec. 99 of the 1863 Act) (*In re Aidall Ltd.* (2) ). But it is open to question whether this could be done without a suit. The answers made on behalf of the holders of paid-up shares to the claim for this relief include not only the contention that the order of the Supreme Court confirming the agreement stands in the way, but also assertions that some or all of the shareholders are, on grounds of estoppel or acquiescence, precluded from such a remedy by their participating in the distribution, and, in some cases, voting for the agreement directing it. There is, in my opinion, one objection to granting such relief that is insuperable. Its very foundation is the power to make a complete redistribution by divesting shareholders of specific property given them in excess of their rights and investing those to whom it should have been distributed. Specific relief of such a kind is of an equitable nature. Can it be granted partially,

(1) (1898) 2 Ch., at pp. 479, 480, 482, 483.

(2) (1933) Ch. 323.

H. C. OF A. 1936. KING v. TAIT. Dixon J.

so that some only of those who have received more than their due proportion will be divested of it ? In my opinion relief on such a footing supposes an entire revision of the original distribution so as to secure a proper division of property in specie. In the present case this cannot, I think, be done. Large numbers of the shares have been transferred for value to strangers. It is true that the identity of the shares has always been preserved as that of the issue in respect of the liquidating company. But it is impossible to treat the transferees as in possession of property subject to an equity of which they have constructive notice. Indeed, I should doubt whether in the hands of the original allottees the shares could be considered subject to an equity in favour of other shareholders or the liquidators. The distribution was made with the sanction of the court and in satisfaction of rights to which all parties were endeavouring to give effect (See *Stuart* v. *Kingston* (1) ). *Neville* J., in *In re Birkbeck Permanent Benefit Building Society* (2), appears to have treated the overpayments as if they were moneys recovered under a judgment or decree afterwards set aside. Such a view cannot be taken of the allotments of shares in the present case.

The consequence is, in my opinion, that the distribution of shares cannot now be disturbed.

But I can see no reason why the assets as yet undistributed should not be divided so as to adjust the rights of shareholders so far as the amount available permits. It is said that the amount will not permit this to be done completely, unless further dividends from the shares are retained by the liquidators and added to the fund available for the purpose. In the many more important aspects of this case which were discussed on the hearing of the appeal, the question whether the dividends ought thus to be diverted received little attention. On consideration, I have come to the conclusion that they ought not to be so dealt with. The provision requiring that, except with the sanction of the court or of the committee of inspection, the dividends should be paid to the liquidators and withheld from the holders of the shares on which they were payable seems to me to be ancillary to the charge over the shares in favour of creditors. That charge confers no rights on the liquidators which could enure

(1) (1924) 34 C.L.R. 394. (2) (1915) 1 Ch. 91.

for the benefit of any class of the contributories. It is simply a collateral security for the creditors. The provision controlling the payment over of dividends cannot be given an operation beyond its evident purpose, which was to effectuate the charge and no more.

I think that the assets now in, or afterwards coming to, the hands of the liquidators, not including the dividends payable to them under clause 9 of the agreement, should be applied so as to bring about, as nearly as may be, a distribution of the assets of the company remaining after providing for debts and costs of winding up, in proportion to the number of shares without regard to the amount paid up in respect of them.

To work this out, it becomes necessary to consider whether the prepayment of capital should be first returned, or should also be disregarded, and whether any percentage in the nature of interest should be allowed in respect of the prepayments after the commencement of the winding up.

When, in July 1927, the capital of the company was brought up to £500,000 by the issue of 250,000 £1 shares paid up to 2s. 6d., the directors by resolution attached the condition " that shareholders should be allowed to pay the capital in advance of calls, but in such cases where the capital was paid in advance, the dividend be limited to 6 per cent per annum thereon." Art. 22 of the company's articles provides that the directors may, if they shall think fit, receive from any member willing to advance the same, all or any part of the moneys for the time being remaining uncalled on his share beyond the calls actually made. Sec. 24 (2) of the Act of 1867 (Queensland, sec. 27 (2) of the Act of 1889) provides that nothing in the Acts shall be deemed to prevent a company, if authorized by its regulations, from accepting from any member of the company, who assents thereto, the whole or a part of the amount remaining unpaid on any share or shares held by him, without any call having been made in respect thereof.

The payment of uncalled capital in advance of calls operates, I think, under such an article and resolution, as a payment-up of the capital. It is not a mere loan to the company with a direction superadded that, on calls being made, the cross-demand created by the loan shall be set off against the call so that one shall satisfy the

H. C. OF A. 1936. KING v. TAIT. Dixon J.

other in whole or in part. It is not repayable as a loan (*London and Northern Steamship Co. Ltd.* v. *Farmer* (1) ). The shares are considered in a winding up as paid up to the extent of the payment in advance so as to relieve the shareholder of calls (*Poole, Jackson and Whyte's Case* (2) ; *Re Exchange Banking Co. Ltd.* ; *Ranwell's Case* (3) ; cf. *In re A. M. Wood's Ships' Woodite Protection Co. Ltd.* (4) and *In re Washington Diamond Mining Co.* (5), where the prepayment was treated as absolving the shareholder from a call and the application of the money in paying fees was attacked). The benefit of the prepayment passes by transfer and devolution with the share (*Tanner* v. *Tanner* (6) ). In a winding up, where the assets more than suffice to pay the debts and costs of winding up, the balance is to be applied in recouping the prepayment on account of shares before returning the called-up capital (*In re Exchange Drapery Co.* (7) ; *In re Wakefield Rolling Stock Co.* (8) ). This would be the proper order of application whether the advance was a payment of capital in excess of that paid on other shares (*In re Hodges Distillery Co.* ; *Ex parte Maude* (9) ) or a loan constituting a debt (sec. 38 (7) of the Act of 1862 ; Queensland, sec. 37 (7) of the Act of 1863), unless the debt should not be regarded as incurred to the shareholder in his character of member. But, in that event, he would be liable to calls in the winding up for the full amount uncalled on his shares, if there were a deficiency of assets, and could do no more than prove in the winding up in respect of the prepayment.

Clause 7 of table A of the 1862 Act (Queensland, 1863 Act) authorizes the payment of interest upon moneys paid in advance of what is due on shares at such rate as the advancing shareholder and the directors agree. It is established that interest payable under such an agreement is an ordinary debt payable out of the general assets of the company regardless of profits (*Dale* v. *Martin* (10) ; *Lock* v. *Queensland Investment and Land Mortgage Co.* (11) ). Lord *Herschell* and Lord *Macnaghten* said that it was a debt which

(1) (1914) 111 L.T. 204.
(2) (1878) 9 Ch. D. 322, at p. 329.
(3) (1881) 45 L.T. 431 ; 50 L.J. Ch. 827.
(4) (1890) 62 L.T. 760.
(5) (1893) 3 Ch. 95, at p. 113.
(6) (1848) 11 Beav. 69, at p. 72 ; 50 E.R. 742, at p. 744.
(7) (1888) 38 Ch. D. 171.
(8) (1892) 3 Ch., at p. 174.
(9) (1870) 6 Ch. App. 51.
(10) (1883) 11 L.R. Ir. 371.
(11) (1896) A.C. 461 ; (1896) 1 Ch. 397.

could not be properly described as owing to the shareholder in his character of member. From this Mr. *Sweet* has said that it must follow that the advance is a debt payable to him otherwise than in that character (*Law Quarterly Review*, vol. 13, p. 117). But *Lindley* L.J. (1) expressly said that the shareholder could not rank with creditors in respect of any capital whether prepaid or not; and *Kay* L.J. (2) said that the effect of the transaction was that the company borrows money from the shareholders which it need not repay.

In the present case, the advances were received on terms providing for the payment, not of interest, but of a limited dividend. In my opinion, no right to the payment described as dividend was given by the conditions on which the shares were issued and no debt would be incurred by the company on account of it until a dividend was declared. On winding up all claim to such a payment ceased. When there is an agreement to pay interest, it has been held that, in a winding up, an addition should be made, in recouping the advances of capital, of interest calculated to the time of repayment (*In re Exchange Drapery Co.* (3) and *In re Wakefield Rolling Stock Co.* (4) ). But, in my opinion, these cases have no application to the terms on which prepayments were received in the present case. The prepaid shares should, I think, simply be treated as paid up to the full amount of the moneys paid in advance of capital.

It remains to consider the peculiar position of the debentures. None of the representative parties objects to the payment of the debenture debt in priority to the distribution to shareholders. But, as these parties are not armed with authority to vary the rights of the different classes they represent, the court is not relieved of deciding whether this course is correct. The question depends upon the interpretation of the condition of the debenture and its application to the rights of shareholders in respect of capital created by art. 118. The condition makes payment of the debenture subject to " a prior right on the part of all shareholders to the repayment of paid-up capital." Does this mean a right to have the assets applied so that,

(1) (1896) 1 Ch., at p. 405.
(2) (1896) 1 Ch., at p. 407.
(3) (1888) 38 Ch. D. 171.
(4) (1892) 3 Ch. 165.

H. C. OF A. 1936. KING v. TAIT. Dixon J.

until under the plan of distribution prescribed by art. 118 all the shareholders have received back their paid-up capital, the debentures shall not be paid ? If so, the fund must be large enough to provide the face value of all the shares, although half of them be only partly paid. Or does it mean that the debentures shall not be payable until the assets provide a fund sufficient to recoup all the paid-up capital, if applied solely to that purpose ? If so, the actual manner of distribution is of no importance : the debentures are to be paid when an amount has been set aside from the fund equivalent to the paid-up share capital. In favour of the first interpretation, it may be said that art. 118 in its present form was adopted at the incorporation of the company when the debentures were issued. On the other hand, the mode of distribution is a matter entirely within the control of shareholders, who, by a properly framed article, may cause the assets not required for payment of debts to be applied in any manner they choose. Why should the debenture holders be concerned with the application of the fund ? If a fund is left large enough to cover the paid-up capital, why should the rights of the debenture holders depend upon what regulation has been adopted and is for the time being in force ? If the condition means that each shareholder shall receive his capital back before the debenture becomes payable, notwithstanding that, under the regulations of the company, some cannot do so unless others are recouped their paid-up capital many times over, then the rights of the debenture holders depend not simply on the amount of further capital the company actually raised, but also on the manner in which it chose to raise it. For if in the present case the company had issued 31,250 shares of £1 to raise the sum of £31,250, which was actually produced by the issue of 250,000 shares of £1 called to 2s. 6d., the right of the debenture holders to payment would not be in question. The expression " prior right on the part of all shareholders " is capable of meaning all collectively as opposed to each distributively. It is an interpretation which gives a surer and more reasonable standard of obligation, and, on the whole, I see no reason why it should not be adopted. If the prior right is enjoyed by the shareholders collectively, its satisfaction demands no more than a sum which,

if applied to that purpose only, would return the capital paid up. That sum is, of course, available. I think the debenture holders are entitled to rank for payment after a sum of £329,372 10s. 9d. representing the share capital paid up, has been appropriated to the shareholders out of the assets remaining after debts and costs of winding up have been paid or provided for. The distribution of 200,000 shares in the purchasing company operates in relief of this sum.

One further matter must be mentioned. In working out the amounts payable to shareholders to equalize their total distributable share and produce as far as may be a distribution rateable with the subscribed capital held by them without regard to the amount paid up, it will or may be necessary to adopt a definite value for the shares in the purchasing company which were allotted on 21st July 1932. The value of such shares in the purchasing company is said to have fluctuated, since 10th March 1932 and up to the date of these proceedings, between 18s. 9d. and 22s. each. It does not appear what was the market value at the date of allotment. The value which the shareholders should be taken to have received in respect of the shares is, I think, the fair market value ascertained as at that date.

In my opinion the appeal should be allowed. So much of the order of the Supreme Court, dated 29th February 1936, should be set aside as adjudges and declares that the distribution of the 200,000 shares is valid and stands, that the balance unpaid on shares be treated as called up and the holders of such shares be debited accordingly, that subject thereto paid-up capital be repaid, that the debentures be then paid off and that the surplus be divided according to the nominal value of the respective shareholdings; and as declares and determines the rights of the parties accordingly.

In lieu thereof declarations should be made to the following effect:—

(1) That number 118 of the articles of association is valid and binds the company, the liquidators and the contributories in the distribution of assets in the winding up.

H. C. OF A. 1936. KING v. TAIT. DIXON J.

(2) That the assets of the company which now remain in the hands of the liquidators, or which afterwards they may get in, or their proceeds, ought to be applied and divided among the contributories in such a way as to produce as nearly as may be an adjustment among them so that, notwithstanding the distribution of the shares of Brisbane Permanent Building and Banking Company Ltd. in proportion to the amount of capital paid up, each shareholder in the result will receive a share of the assets available for distribution proportionate to the number of shares held by him whether paid up or partly paid up.

(3) That for the purpose of determining the amount, if any, payable to the respective shareholders, they shall be considered to have received in the winding up by the distribution and allotment of such shares amounts calculated according to the fair market value of such shares estimated as at the date of allotment, or as near thereto as may be.

(4) That the debentures should be paid off after an amount has been paid or provided for the shareholders equal to the total amount of the capital of the company which has been paid up or prepaid, namely the amount of £329,372 10s. 9d.

(5) That the holders of shares upon which 2s. 6d. was paid on application or allotment and no further capital has been called up, but in respect of which moneys have been received as advances of the capital uncalled or part thereof, are not entitled to any priority in respect of such advances, but such shares rank equally with other shares for the purposes of art. 118.

All parties should receive their costs of this appeal out of the assets.

EVATT J. Upon the main question argued—the validity of art. 118 of association—I was much impressed with the able and elaborate argument of Mr. *Hutcheon*, but for the reasons stated in the judgment of my brother *Dixon*, with which I agree, I have come to the conclusion that the appeal should be allowed.

MCTIERNAN J. I have read the judgment of *Dixon* J. and agree with it.

*Appeal allowed. Set aside so much of the order of the Supreme Court, dated 29th February* 1936, *as adjudges and declares that the distribution of the* 200,000 *shares is valid and stands, that the balance unpaid on shares be treated as called up and the holders of such shares be debited accordingly, that subject thereto paid-up capital be repaid, that the debentures be then paid off and that the surplus be divided according to the nominal value of the respective shareholdings; and as declares and determines the rights of the parties accordingly. In lieu thereof make declarations to the following effect:—*(1) *That number* 118 *of the articles of association is valid and binds the company, the liquidators and the contributories in the distribution of assets in the winding up.* (2) *That the assets of the company which now remain in the hands of the liquidators, or which afterwards they may get in, or their proceeds, ought to be applied and divided among the contributories in such a way as to produce as nearly as may be an adjustment among them so that, notwithstanding the distribution of the shares of Brisbane Permanent Building and Banking Co. Ltd. in proportion to the amount of capital paid up, each shareholder in the result will receive a share of the assets available for distribution proportionate to the number of shares held by him whether paid up, or partly paid up.* (3) *That for the purpose of determining the amount, if any, payable to the respective shareholders, they shall be considered to have received in the winding up by the distribution and allotment of such shares amounts calculated according to the fair market value of such shares estimated as at the date of allotment, or as near thereto as may be.* (4) *That the debentures should be paid off after an amount has been paid or provided for the shareholders equal to the total amount of the capital of the company which has been paid up or prepaid, namely, the amount of* £329,372 10*s.* 9*d.* (5) *That the holders of shares upon which* 2*s.* 6*d. was paid on application or allotment and no further capital has been called*

H. C. OF A. 1936. KING v. TAIT.

*up, but in respect of which moneys have been received as advances of the capital uncalled or part thereof, are not entitled to any priority in respect of such advances, but such shares rank equally with other shares for the purposes of article* 118. *Remit the cause to the Supreme Court. Let all parties be at liberty to apply to the Supreme Court as they may be advised. Costs of this appeal of all parties to be paid out of the assets, those of the liquidator as between solicitor and client.*

Solicitors for appellant S. G. King, *Henderson & Lahey.*
Solicitors for F. C. Macnish, *Macnish, Macrossan & Dowling.*
Solicitors for A. H. Tait, *Cannan & Peterson.*
Solicitors for the debenture holders, *Morris, Fletcher & Cross.*
Solicitors for the liquidators, *Morris, Fletcher & Cross.*

B. J. J.