

paid the larger sum. But in point of fact, in a question of the extent by which his income has been diminished during the year by the payment, there can be no doubt that it was only by £33 and not by £66.

LORD LINDLEY—I am of the same opinion. I think the judgment of Mathew, L.J., absolutely unanswerable. I say this bearing in mind that under the old common law plea of payment you could prove the plea by a settlement of account on a balance payment, but that is not such a payment as is contemplated by the Income-Tax Acts at all.

Judgment appealed from affirmed and appeal dismissed.

Counsel for the Petitioner and Appellant—Dankwerts, K.C.—Acland, K.C. Agents—Hunter & Haynes.

Counsel for the Respondent—Attorney-General (Sir Richard Finlay, K.C.)—Solicitor-General (Sir E. Carson, K.C.)—Rowlatt, Agent—Sir F. C. Gore, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Friday, March 25.

(Before Lords Macnaghten, Davey, James of Hereford, Robertson, and Lindley.)

NEW BALKIS EERSTELING, LIMITED
v. RANDT GOLD MINING COMPANY, LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL
IN ENGLAND.)

Company—Shares—Sale of Shares Forfeited for Non-Payment of Calls—Liability of Purchaser for Fresh Calls—Terms of Certificate—Construction of Contract—Companies Act 1862 (25 and 26 Vict. cap. 89), Sched. I., Table A, art. 22.

In 1895 an incorporated company issued shares of the nominal value of 5s. On these shares 3s. 4d. was paid by the holders. In 1898 a call for the remaining 1s. 8d. per share was made on the holders, but it was not paid, and the shares were forfeited to the company. In 1900 the shares thus forfeited were sold by the company, the certificate of proprietorship granted to the purchaser under article 22 of Table A of the Companies Act 1862 stating that the remaining 1s. 8d. per share had been called up and was payable by the former holders, and that the purchaser was to be deemed to be holder of the shares "discharged from all calls due prior to the date" of the certificate. Thereafter a call of 1s. 3d. per share was duly made by the company on the purchaser.

Held that the purchaser was in the same position as if the former call of

1s. 8d. had never been made, and that he was liable to pay the call of 1s. 3d.

Among the regulations in Table A of the First Schedule of the Companies Act 1862 applying to incorporated companies limited by shares is the following—"22. A statutory declaration in writing that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated as against all persons entitled to such share, and such declaration and the receipt of the company for the price of such share shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed the holder of such share, discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale."

In 1901 the Randt Gold Mining Company, Limited, raised an action in the King's Bench Division against the New Balkis Eersteling, Limited, for £2605, 5s. 10d.

The following were the facts leading to the action—In 1895 the plaintiffs were incorporated under the Companies Acts 1862 to 1890 as a company limited by shares, with a nominal capital of £80,000 in 320,000 shares of 5s. each, on which 3s. 4d. per share was paid. Of these shares 40,000 were held by the African Gold Properties, Limited.

In 1898 a call of 1s. 8d. per share was made upon the holders. The African Gold Properties, Limited, failed to pay this call, and their shares were duly declared forfeited to the plaintiffs.

In 1900 the plaintiffs sold these 40,000 shares to the defendants, and granted them a certificate under article 22 of Table A of the Companies Act 1862, in the following terms—"The Randt Gold Mining Company, Limited, Registered Office, 19 and 21 Queen Victoria Street, E.C., Capital £80,000, divided into 320,000 shares of 5s. each. Certificate.—This is to certify that the New Balkis Eersteling Limited, of Winchester House, Old Broad Street, London, E.C., is the registered holder of 40,000 shares of 5s. each, numbered 103,341–103,340, 220,808–247,507, 92,966–103,265 inclusive, in the above-named company, upon which the sum of 3s. 4d. per share has been paid. The remaining 1s. 8d. per share has been called up, and is payable by the African Gold Properties, Limited, who were the holders of the said shares prior to the same being forfeited, and the said New Balkis Eersteling, Limited, is to be deemed to be the holder of the said shares discharged from all calls due prior to the date hereof. Given under the common seal of the company this 17th day of May 1900.—F. CATESBY HOLLAND, Director; C. F. WAINWRIGHT, Secretary." (Seal.)

Thereafter the plaintiffs resolved that a call of 1s. 3d. per share be made on the

shares held by the defendants, and notice of this call was duly given.

The defendants refused to pay the call, and the present action was raised by the plaintiffs.

BUCKNILL, J., gave judgment in favour of the plaintiffs for the sum sued for. On appeal the Court of Appeal (the LORD CHANCELLOR (HALSBURY), the LORD CHIEF JUSTICE (ALVERSTONE), and SIR F. JEUNE) affirmed the decision.

The defendants appealed.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows—

LORD MACNAGHTEN—This case has been presented to your Lordships on the part of the appellants with great ability, but, speaking for myself, I rather doubt whether there is any room for argument. The facts are quite clear. There was a company called the African Gold Properties Company, Limited, who were holders of shares in the Randt Company. They had 40,000 shares, upon which calls to the amount of 3s. 4d. per share were made and paid. Then there was a call of 1s. 8d., which was not paid, and the shares were forfeited. They were disposed of to the present appellants, and a certificate of proprietorship was granted to them. It seems to me that the whole question depends upon the true construction of that certificate, bearing in mind, of course, that the certificate derived its efficiency from the general principles applicable to such a case as this, and the provisions of the enactment especially in Table A of the Companies Act of 1862. The general principle in such a case is, I think, that every member of a company limited by shares is liable, in respect of all moneys payable upon his shares, to pay every call that is duly made upon him. It is contended by the appellants that the company had no power to make this call. Now, the certificate is in these terms—“This is to certify that the New Balkis Eersteling, Limited . . . is the holder of 40,000 shares of 5s. each” (then it sets out their numbers) upon which the sum of 3s. 4d. has been paid.” That, of course, means that 1s. 8d. per share has not been paid. Now, the provisions of Table A require that in the case of forfeiture “a certificate of proprietorship shall be delivered to a purchaser,” and, according to the provisions of the Act, the certificate is to specify the shares held by him, and the amount of liability upon those shares. Therefore, so far, the certificate in this case is entirely in accordance with the requirements of Table A. It leaves the appellants liable on the face of the certificate for the 1s. 8d. which is unpaid. The contest is really raised upon the latter part of the certificate, which is in these terms—“The remaining 1s. 8d. per share has been called up, and is payable by the African Gold Properties Limited, who were the holders of the said shares prior to the same being forfeited.” That is a statement of fact which is literally and accurately true. Then it goes on to say “and

the said New Balkis Eersteling Limited is to be deemed to be the holder of the said shares discharged from all calls due prior to the date hereof.” That follows the language of article 22 in Table A, which says that “a certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed to be the holder of such share, discharged from all calls due prior to such purchase. It seems to me to be a very reasonable provision to make, because if he had not been discharged from these calls questions might have been raised as to whether he was or was not liable to pay interest upon these shares in respect of the calls which had been made. The intention seems to me to be that he is to get a certificate of proprietorship like everybody else, specifying what had been paid on his shares, and leaving him liable in respect of the balance to any call which the company may properly make. As regards this call, there is no objection taken to it for want of formality or regularity, or anything of that kind. It seems to me that it is a call that has been duly made, and the appellants are liable to pay it, and therefore I move your Lordships that this appeal be dismissed with costs.

LORD DAVEY—I confess that in the course of the argument I had some doubt whether the order which is appealed from could be supported or not, but reflection has satisfied me that the decision of Bucknill, J., affirmed by the Court of Appeal, is correct. It appears to me that the certificate in question follows the terms of section 22 of Table A in the Companies Act 1862. I will remark that, if it is in accordance with section 22, no question of *ultra vires* can be raised, because it would be ridiculous to say that what is prescribed by an Act of Parliament, agreeing with other articles of a company formed under that Act, could be *ultra vires*. The question really, as it appears to me, turns upon the construction of a few words in section 22—namely, what is meant by saying that the purchaser from the company of a forfeited share is “to be deemed to be the holder of such share, discharged from all calls due prior to such purchase.” Does that mean that he is to be discharged from the liability to pay the amount of calls already due, or does it really mean that the demand which has been made is no longer to affect the title to his shares? The words rather favour the former construction, because they are “discharged from all calls due.” Now, what is due is the amount of the previous call—not the demand itself; the demand is not due, but the amount of the previous call is due. But if I look at the whole section, and the context in which it is found, and also at the nature of the transaction, I think that the meaning must be that the holder of the share as such is to be discharged from any liability under the previous demand. The reason why I say so is this. In the first place, the purport of section 22, and the effect of it, and, as you see if you read the whole of it, the intention is to give the holder of the purchased share

a good title—that is to say, a clean title—to the share which he purchases unaffected by the proceedings which had previously taken place arising out of the nonpayment of the previous demand. He is to have a clean title unaffected by the fact of the previous call having been made, or, in other words, I think that the effect is that so far as the purchaser and any holder from him of that share are concerned they are to be in the same position as if that prior call had never been made. But that is a mere question of completing and perfecting the purchaser's title, and it does not appear to me to affect the question of what it is that he purchases. Now, what is it that he purchases? Upon this certificate there can be no doubt what it is that he purchases—namely, a 5s. share on which 3s. 4d. only has been paid—and therefore the holder of that share, under the Act of Parliament and the previous clauses (I think that the sections are sections 4 and 6) in Table A, will be liable to pay the extra 1s. 8d. Whether the company could make a contract to relieve him from the payment of that 1s. 8d. is, I think, hardly doubtful. They could not do so unless they were expressly authorised. Now, there is nothing in section 22, as I read it, which authorises the company to relieve him from the payment of that 1s. 8d. Therefore the result is this, that the purchaser purchases the shares *talis qualis*—that is to say, shares upon which 3s. 4d. only has been paid up. He is relieved from any liability under the previous demand or call which has been made by the company, and from any consequences of not complying with that call, but the holder of them is subject to any call which the company may properly make. He holds his shares in all respects as if those previous calls had never been made by the company, and with this consequence, that the company, *quoad* these particular shares (I am speaking only of the forfeited shares which are the subject of the purchase), is at liberty to make another call calling up the money over again. Therefore I think that the order appealed from should be affirmed.

LORD JAMES OF HEREFORD—At first I confess that I shared the doubts to which Lord Davey has referred as having been entertained by him, but as the case proceeded it seemed to me that the conclusion which has been now stated by him was perfectly accurate. The question is really contained in the last words which he has uttered. It was contended at the Bar, as I understand, that the company had no power to make a second call on the shares which had been forfeited. It seems to me that it is in that statement that the fallacy lies. I can see no reason why, when the shares have been forfeited, and no call has been received on them, the power of the company should be taken away, and it should be prevented from obtaining the amount that may be necessary to put it in funds for carrying on its business by making a second call. The non-payment of a call cannot be equivalent to the receipt of it in any shape or form. That being so, there

is nothing injurious to the public interest, and nothing contrary to the equities existing between the parties, in this call being made and enforced against the present appellants.

LORD ROBERTSON—I entirely agree.

LORD LINDLEY—I am of the same opinion. I am not surprised at this certificate being construed in different ways by different people, but in order to understand it one must understand the subject-matter to which it relates. It is said that a forfeited share is like a table or a chair or any other property which the company has at its disposal. It is nothing of the sort. A forfeited share, which is either sold or reissued, or parted with with a view to future use, is a share in the company, which involves a great deal. But the short answer to the appellants' case appears to be this. Nobody who knows anything at all about companies and shares, and the forms of documents which are in use in business, would dream of taking this certificate as a certificate for a fully paid-up share. It is nothing of the sort; it tells you that it is nothing of the sort; it tells you how much is paid; it tells you what is not paid; and then it goes on to say that the person who takes this share is to be "discharged from liability for all calls," which means that there is to be no liability on this share. The holder is not to be liable for the 1s. 8d.; that call, so far as he is concerned, does not affect it. But it tells him in language which I do not say is so plain that it cannot be misunderstood, because evidently it has been misunderstood, that he has become the holder of a share not paid up in full. Now, what is the liability of the man who takes that? It is to pay calls as and when they are made. Then it is said, "You cannot make two calls." If you look at article 4 you will see that they are asking the House to put a construction upon it which has never been put upon it yet, so far as I know, and one which would not work in practice at all. What would be the result if under a certificate of this kind, or proceedings of this sort, the company were endeavouring to raise more than 5s. per share, I do not know, but that point is not raised. I can conceive that there might be difficulties then. But, as I understand it, they have given credit to these gentlemen for the money which they have actually got from the previous call; therefore this point is not raised. They are not attempting by this machinery to raise more money per share than they were authorised to raise by the Act. I have no doubt myself that the decision is quite right, and that this appeal ought to be dismissed.

Judgment appealed against affirmed and appeal dismissed.

Counsel for the Plaintiffs and Respondents—Sir R. Reid, K.C.—A. T. Clouston. Agents—Sanderson, Adkin, Lee, & Eddis.

Counsel for the Defendants and Appellants—Haldane, K.C.—A. T. Lawrence, K.C.—C. C. Scott. Agents—Dale, Newman, & Hood.