Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Bank of South Australia v. *Abraham, and others, from South Australia; delivered 16th March,* 1875.

Present:

SIR JAMES W. COLVILE.
LORD JUSTICE JAMES.
SIR BARNES PEACOCK.
LORD JUSTICE MELLISH.
SIR MONTAGUE SMITH.

THE question in this Appeal is, whether a power in a deed of settlement of a Joint-Stock Company, authorizing the Directors to mortgage or charge the property of the Company, gives them authority to include in such mortgage or charge future calls, or in other words, the unpaid capital of the Company.

There was a difference of opinion amongst the Judges of the Supreme Court, before which the question was brought on appeal from the order of the Primary Judge. The majority were of opinion that the word "property" included future calls, and that the law had been so settled in this country by Leishman's case, a Vice-Chancellor's decision, cited from the "Law Times."

The dissentient Judge who had made the order then under appeal admitted that this was so, but thought that the context of the deed excluded that construction in this particular case.

It is much to be regretted that the attention of the Judges was not called to Stanley's case (4 N.R. 255 and 33; "Law Journal," ch. 7, 535), a decision of the Court of Appeal which has been followed in other cases, and has been cited and

referred to in every text-book as the leading case authoritatively settling the rule of law.

In that case the words of the power were "property and funds," and it was held that a charge on future calls was *ultra vires* and void. It is impossible to distinguish that case from the one under Appeal, and the contention on the part of the Respondents was, that their Lordships, or the ultimate Tribunal of Appeal, should review that decision, and overrule it, as not being a correct exposition of the law.

Even if their Lordships had any doubt as to that decision, they would not have felt themselves warranted in disturbing a rule which has been uniformly (with the exception of Leishman's case) assented to and acted upon in this country. And it is to be noted with respect to Leeshman's case that, although it was after Stanley's case had been decided by the Court of Appeal, the Vice-Chancellor does not appear to have referred to that case, and Leishman's case has not found its way into the authorized reports or text-books.

The decision in Stanley's case appears to be based on very intelligible and reasonable grounds. The capital not paid up is, according to the usual form of deeds of settlement (the form in this case), only *sub modo* the property of the Company. The Company has no absolute right, and the shareholder is under no absolute liability to pay. The right only arises if and when calls are made by the Directors in the exercise of a discretion within limits both of time and amount prescribed by the deed.

The due making of the call by the resolution of a Board of Directors is an essential conditional precedent.

It was held, therefore, in Stanley's case, that the general words "power to charge property and funds" could not be intended to create a charge. It would either leave it optional with the Directors to give it effect by making calls which would be nugatory, or it would entirely alter the provisions of the deed as to calls, which is not to be implied.

Their Lordships see no ground for dissenting from that view. They may add that the right of the Company is, strictly speaking, more in the nature of power than of property, and although

that which a man has power to make his own may be charged, as well as that which is actually his, it requires apt and proper words, or a sufficient context, to have this effect.

In the particular case before them, the power was contained in a deed of settlement of a Company which, at the time, was a partnership with unlimited liability, and although they afterwards availed themselves of the power to register as a Company with limited liability, the construction of the deed must, of course, be the same as it originally was.

In such a partnership the provisions as to calls and capital are merely the internal arrangements and bargains of the partners as to raising money for the concern, and it would be a strange thing to pledge these as an additional security to creditors, who had the whole fortune of every shareholder by law pledged to them.

Their Lordships will humbly recommend to Her Majesty that the Appeal be allowed, and that the order of the Supreme Court complained of be discharged, and that in lieu thereof there be an order dismissing the Appeal to that Court, and affirming the order of the Primary Judge with costs.

The Appellants are to have their costs of the Appeal, to be paid by the Respondents, Breakell and Gordon. The Official Liquidator will take his costs of the Appeal out of the estate.

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