Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Newton and others v. *The Debenture-holders and the Liquidators of the Anglo-Australian Investment Finance and Land Company, Limited, from the Supreme Court of New South Wales; delivered 6th March* 1895.

Present:

The LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The Anglo-Australian Investment Finance and Land Company Limited was incorporated in 1880 as a Company limited by shares under the Colonial Statute 37 Vict. No. 19 known as the Companies Act 1874. The Company is now in course of voluntary liquidation.

A question has arisen in the winding up, between holders of debentures claiming to have a first charge on the capital of the Company which remained uncalled at the commencement of the liquidation and a large body of persons who had money on deposit with the Company and who are creditors without security. In the Supreme Court of New South Wales this question has been decided in favour of the

85677. 100.—3/95.

debenture-holders by the Chief Judge in Equity. The appeal is brought on behalf of the depositors from his decision.

For the purposes of this appeal it may be taken that the provisions of the Colonial Statute are identical with those of the Companies Act 1862.

In the argument before their Lordships the Appellants disputed the priority claimed by the debenture-holders on three grounds. (1) They maintained that it is not competent for any Company limited by shares to create a charge upon its uncalled capital, so as to confer priority in the winding up. (2) They contended that in the present case a charge on uncalled capital was impliedly prohibited by the terms of the Memorandum of Association; and (3) they argued that if the charge was valid to any extent it did not apply to so much of the uncalled capital as was reserved by the Articles of Association to be dealt with only in a particular event and under a special Resolution.

The power of a Company limited by shares to charge uncalled capital has been the subject of several reported cases in this country. The Court seems almost always to have regarded such a charge with disfavour. Whenever the question has arisen borrowing powers have been construed strictly and sometimes perhaps rather narrowly. But no case was cited to their Lordships in which any Judge has ever held it to be beyond the powers of a limited Company to create a charge upon its uncalled capital.

Stanley's case (4 De G. J. & S. 407) in 1864 goes further in that direction than any other. There Knight Bruce and Turner LL.J.J. laid great stress on the difficulty of enforcing a charge on uncalled capital owing to the discretionary power of making calls which the Company's deed of settlement entrusted to the directors, and

they seem to intimate that assuming the borrowing powers of the Company to have extended to future calls it would have been a breach of trust on the part of the directors to give effect to the charge though created by their own act under the authority of the Company—a proposition which it is somewhat difficult to follow. The decision however turned entirely upon the construction of the deed of settlement. There was power to charge "the property or "funds" of the Company. It was held that that expression did not include future calls. "They are property" said Turner L.J. "not of "the Society immediately but which may be "called up by the directors of the Society at "their discretion." The context too was relied on as showing that the property intended to be charged was property capable of being "assigned "transferred conveyed or surrendered." *Stanley's* case was approved and followed by this Board in *the Bank of South Australia* v. *Abrahams* (L. R. 6 P. C. 265) where the judgment was delivered by James L.J. But there the difficulty in connection with the discretionary power of the directors in regard to calls was treated merely as an argument against implying a power to charge future calls where the language of the instrument was doubtful. And it certainly seems to be assumed in the judgment that by "apt and "proper words or a sufficient context" a power to charge uncalled capital may be conferred. In *In Re Phœnix Bessemer Steel Co.* (44 L. J. N. S. Ch. 683) Jessel M.R. said "There can be "no doubt that the power can be given to a Com-"pany by the Articles of Association." He brushed aside the difficulty which weighed so much with the Lords Justices, observing that to his mind it was no difficulty at all and referring to the case of Companies governed by the Companies Clauses Consolidation Act, 1845. Where

such Companies have power to create mortgages the Statute itself confers upon them as incidental to that power a power to charge future calls. The decision in *In re Phœnix Bessemer Steel Co.* was in 1875. During the last twenty years Sir G. Jessel's opinion has been followed in many cases, and many securities have been given and taken on the faith of it. Kay J. adopted the same view in the case of *Howard* v. *Patent Ivory Manufacturing Company* (38 Ch. Div. 156) which was decided in 1888. More recently still in 1890 the question came before the Court of Appeal in *In re Pyle Works* (44 Ch. Div. 534). After examining all the previous authorities and discussing the matter very fully, Cotton and Lindley L.L.J.J. upheld a charge on uncalled capital. They found nothing in the Act expressed or implied to prevent or avoid such a security. Lopes L.J. with some hesitation concurred in the judgment. The main argument against the validity of the charge was that it seemed to contravene the directions of the Act in regard to the application of monies recovered from contributories in the winding up. But the answer was obvious. The liability of a contributory as a present member to pay calls in the winding-up is not a liability springing into existence for the first time on the Company going into liquidation. It is merely the ripening of that liability which the contributory undertook when he became a member. The Liquidator no doubt is bound to distribute what belongs to the Company in the manner prescribed by the Act. But after all the question is :—What does belong to the Company? What are its assets or its property ? That must depend on what dispositions have been made and what charges have been validly created while the Company acting within its powers was free to deal as it pleased with its own.

Their Lordships see no reason to differ from

the conclusion at which the Court of Appeal arrived in the case of *In re Pyle Works.* But they desire to add that if they had felt any doubt about the matter they would have been most reluctant to introduce into the administration of Company law in a Colony which has adopted the Act of 1862 a rule different to that established by judicial decisions in this country. There is no case in which uniformity of practice is more important or more desirable.

The second point may be dealt with shortly. The debentures expressly charge all uncalled capital. The Articles of Association as altered by special Resolution contemplate and provide for such a charge. A regulation made by special Resolution is of the same validity as if it had been originally contained in the Articles of Association. The special Resolution does not indeed purport in terms to authorize a charge upon uncalled capital, because no doubt it was assumed that that power had already been conferred by the Memorandum of Association. If the power is to be found there, nothing is wanting to make the case complete. On the other hand if the Memorandum when authorizing certain charges has omitted to authorize a charge upon uncalled capital, the omission may imply a prohibition.

Now among the objects for which the Company was established is this, "to receive money on "loan or deposit or otherwise and upon any "security of the Company or upon the security "of any property of the Company or without "giving security." Their Lordships have no hesitation in coming to the conclusion that those words authorize a charge on uncalled capital. There would be some difficulty, and perhaps not much advantage, in attempting to define precisely the meaning of each of the two expressions "any security of the Company" and "the security of any property of the Company"

in the order and position in which they occur. If they are taken separately there is room for criticism and possibly for argument. But their combined effect is hardly open to question. Evidently the intention was that all the resources of the Company, from whatever quarter they might be derived and in whatever state they might happen to be, should be available for the development of the Company's business. The power given by this clause of the Memorandum is referred to in a subsequent passage in the Memorandum itself as "the general power of the "Company to give any security of any descrip- "tion for money." That is really what it comes to, and in their Lordship's opinion that is the substance and meaning of the clause.

The only other point to be mentioned is an ingenious argument which was founded upon Article 6 of the Articles of Association. That Article is in the following terms:—

"The total amount to be called up in respect "of shares shall not exceed 5*l.* per share unless "and until the Company shall by special "Resolution . . . . determine that the "paid up capital of the Company has become "insufficient to meet its liabilities and that it is "therefore necessary to call up the whole or "portion of the balance of 5*l.* per share, but "in the event of the Company so determining "the Company may by special resolution also "determine what amount of such unpaid capital "is required to be called up and within what "time or times and may prescribe or authorize "the directors to prescribe in what sums per "share and at what intervals the amount so "required is to be called up or paid and what "notices (if any) are to be given of calls having "been made and on what days or within "what periods calls or instalments are to be "payable."

It appears that at the time when the de-

bentures were issued the prescribed limit of 5*l.* per share had not been reached. There was therefore a portion of the uncalled capital which remained under the directors' control. On behalf of the Appellants it was argued that, assuming the charge to be good to any extent, it must be confined to that part of the uncalled capital which was still at the call of the directors. The balance it was said was intended to be reserved for the benefit of the general creditors in the event of liquidation. In their Lordships' opinion it is impossible so to construe the Article in question. If the Company had power to charge its uncalled capital there is nothing in this Article excluding any part of the uncalled capital from the operation of the charge. Nor is the reservation, such as it is, calculated to give rise to any practical difficulty. Unless and until the Company makes default the debenture-holders have no right to intervene. In the meantime the provision is rather a protection to the debenture-holders. It is an additional safeguard for their interest. On default being made the debenture-holders would be in a position to present a petition for the winding up of the Company. In the event of winding up the provisions of Article 6 would no longer be in force, and there would be nothing to prevent the whole of the uncalled capital being applied in or towards the satisfaction of the claims of the debenture-holders.

Their Lordships are therefore of opinion that the appeal wholly fails, and they will humbly advise Her Majesty that it ought to be dismissed. The Appellants must pay the costs of the appeal.