Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Wise v. *The Perpetual Trustee Company, Limited (Executors of W. H. Paling, deceased), from the Supreme Court of New South Wales; delivered the* 13*th December* 1902.

Present at the Hearing:

LORD MACNAGHTEN.
LORD LINDLEY.
SIR FORD NORTH.
SIR ARTHUR WILSON.
SIR JOHN BONSER.

[*Delivered by Lord Lindley.*]

This Appeal raises the extremely important question whether the members of an ordinary club are personally liable to indemnify the trustees of the club against liabilities incurred by them as such trustees and where there is no rule imposing such liability.

The undisputed facts are shortly as follows:—

In the year 1886 certain persons including a Mr. Paling, now deceased, formed a club in Sydney, New South Wales, which was known as the Cercle Français. The Appellant became a member of the club in July 1886 and remained a member of the club until its dissolution. In January 1887 the club adopted certain rules the 12th and 17th of which were as follows:—

12. "The administration of the affairs of the club is entrusted "to a committee elected at the first general meeting in each "year. The duties of the members of the committee are "purely honorary.

17. "The committee disposes of the funds of the society and "has full power to take all measures for the internal manage- "ment which it may deem necessary."

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Between July and December 1887 it was considered by some members of the club that the premises then occupied by the club at No. 50 Wynyard Square were too small and steps were taken to provide increased accommodation. A general meeting was called to consider the subject; and a meeting was held on the 9th day of December 1887. Too few members attended to bind the club; but the subject of obtaining a lease of new premises of the club was discussed and the members present resolved that the matter be left in the hands of M. Lachaume, the president of the club, to make the best arrangements in the interests of the club; and the said Lachaume and the said W. H. Paling and Messrs. Doublet and Van de Velde were appointed trustees of the club.

A general meeting of the club was held on the 13th day of January 1888 at which the minutes of the meeting of the 9th day of December 1887 were read and confirmed.

On the 12th day of July 1888 the above-mentioned Messrs. Paling, Lachaume, Doublet, and Van de Velde became lessees of certain premises known as 50 Wynyard Square and 9 Wynyard Lane for a term of ten years from the 9th day of July 1888 at a rental of 555*l.* per annum and subject also to certain onerous covenants set out in the said lease. After the execution of this lease the above-mentioned premises were used for the purposes of the club and the club remained in possession thereof until it was dissolved.

In July 1888 after the execution of the lease the old rules of the club were repealed and new rules were adopted. The 3rd, 4th, 14th, and 15th were as follows:—

"3. The property of the club subject to the liabilities "thereof, shall belong to the members for the time being.

"4. No member shall by reason of his membership, have

" any transmissible or assignable interest, by operation of law
" or otherwise in any of the property of the club. On any
" member ceasing by death, resignation, or otherwise to be such,
" all his interest shall survive, accrue, and belong to the other
" members for the time being.

" 14. The affairs of the club shall be under the management
" of the following office bearers viz.: a president vice-president
" four trustees a committee and a treasurer.

" 15. All purchases investments leases conveyances securities
" or contracts by to or on behalf of the club shall be made
" taken or entered into in the names of the trustees. All the
" real and personal property of the club shall be vested in and
" shall be held by them upon trust for the members for the
" time being and shall (except as to the real property) be
" subject to the disposition of the committee whose order
" certified in writing under the hand of the chairman of the
" day and attested by the secretary shall be obligatory upon
" and a justification to the trustees as to making taking or
" entering into any such purchase investment lease convey-
" ance security or contract or any disposal of any personal
" property vested in them as such trustees. And the orders
" of the committee certified in like manner as to any purchases
" necessary for carrying on the internal management of the
" club shall also be obligatory upon and a justification to
" the trustees for making the same. The real property of
" the club shall not be dealt with except by the resolution
" of a general or special general meeting of the members of
" the club."

The rules prescribed the entrance fees and subscriptions, but there was no rule imposing any liability on any of the members to pay more.

The club continued to exist until February 1891 when it was dissolved. It had 80 members when the lease was obtained and 90 more joined afterwards.

In April 1891 the above-mentioned lessees sub-let the premises comprised in the lease of the 12th day of July 1888 to the Cosmopolitan Club Company for the unexpired portion of the ten years term less one day the under-lessees covenanting to pay the same rent and perform the lessees' covenants. The Cosmopolitan Club Company remained in possession until January 1894 and paid the rent up to that date when they went into liquidation. The lessees then re-entered into possession of the premises and from time to time re-let them giving the club

the benefit of all rentals received. Finally all the trustees except the said William Henry Paling being unable to pay the rent the said Paling in his lifetime and his executors (the Respondents to this Appeal) after his death paid under the lessees' covenants various sums amounting in the aggregate to 2,350*l.* or thereabouts in excess of monies received by them by sub-letting the premises.

On the 22nd day of April 1897 the executors of the said William Henry Paling deceased filed a Statement of Claim in an action in the Supreme Court of New South Wales in Equity against certain members of the Club selected to represent them all and the Plaintiffs prayed as follows :—

"(1) That it may be declared that all persons who were "members of the said Cercle Français on the 12th day of July "1888 and all persons who became members of the same "Cercle Français subsequent thereto and the personal repre-"sentatives of any of such persons respectively who are now "deceased became and are jointly and severally liable to con-"tribute to and indemnify the Plaintiffs and the estate of the "said William Henry Paling against the rent paid and "expenses incurred by the said William Henry Paling during "his lifetime and by the Plaintiffs since his death in respect of "the said lease and the covenants thereof and the future rent "and expenses to which the Plaintiffs as executors of the said "William Henry Paling are or may become liable under the "said lease and the covenants thereof and that the Defendants "and all such other persons and representatives as respectively "aforesaid may be jointly and severally decreed to repay to the "Plaintiffs and indemnify them against such rent and "expenses with interest on the same at such rate as this "Honourable Court shall direct and also to pay the Plaintiffs' "costs of suit.

"(2) That an account be taken under the direction of this "Honourable Court of the rent and expenses respectively "aforesaid.

"(3) That an inquiry may be directed as to the persons "constituting the said several classes of members and whether "any and which of such persons are dead and if so who are "their respective legal personal representatives."

The Appellant was not a party to the said suit nor was he served with notice of the said Statement of Claim nor of the proceedings therein. In the Statement of Claim the Plaintiff set out the various classes of members which

each Defendant was to represent. They were as follows:—

(i) a'Beckett as representing members of the Committee at the time of the making of the lease.

(ii) Fesq as representing members of the Club present at the general meeting of the 13th day of January 1888.

(iii) Burne as representing members at the time when the lease was made but who were not present at the meeting of the 13th day of January 1888.

(iv) Woolcott-Waley as representing members of the Committee at a date subsequent to the lease being made.

(v) Henderson as representing the members of the Club elected at a date subsequent to the date of the lease.

On the 25th day of May 1897 Manning, Chief Judge in Equity, made an Order authorising the above-mentioned Defendants to defend the proceedings respectively on behalf of the above specified classes. The Appellant was not served with and was no party to the said Order.

On the 27th day of October 1898 Simpson, Chief Judge in Equity, made a Decree dismissing the suit against the Defendants Woolcott-Waley and Henderson with costs and declaring (*inter alia*) that the Defendants a'Beckett Fesq and Burne and all other persons who were members on the 12th day of July 1888 and who assented to or subsequently ratified the action of the trustees of the club in taking the lease of that date are and each of them is bound to indemnify the late William Henry Paling and his estate against the rent and other moneys paid by the said William Henry Paling or his executors under the said lease. By the said Order it was further decided that the Master in Equity should enquire as to

which persons were liable to contribute on the basis of the above decree.

On the 5th day of August 1899 the Defendants gave notice to the Appellant that the Master in Equity was proceeding to settle the said list and that the Appellant's name had been submitted to the Master for inclusion therein.

On the 25th day of August 1899 the Appellant filed an affidavit objecting to his inclusion in the said list and on the 21st day of November 1899 the Appellant filed a notice of further objections.

In November 1899 evidence was taken upon the said matter, and the Master found that the Appellant had assented to or ratified the action of the trustees in taking the lease and that he ought to indemnify the Plaintiffs with costs to be taxed; and on the 15th day of December 1899 the Master made a separate certificate to that effect. On the 15th day of February 1900 the Appellant took out a summons to vary the Master's certificate. The said summons was heard by the Chief Judge in Equity; and on the 5th day of March 1900 the said summons was dismissed with costs.

On the 19th day of March 1900 the Appellant filed a notice of appeal against the said Order to the Full Court; and on the 23rd day of July 1900 the said Appeal was dismissed with costs.

The present Appeal is from these last Orders. There is no appeal from the decree of the 27th October 1898. In the case lodged by the Appellant he stated and his Counsel repeated before their Lordships that the Appellant was always willing to share with all the other members of the Club the liabilities under the said lease but as the form of the suit and the declarations in the decree rendered only four or five persons liable to make good a sum which

(by the addition of costs) amounted to over 5,000*l*. he objected and objects to take upon himself an individual liability not shared by other members of the club.

The Decree of 27th October 1898 was not made upon the broad ground that the members of the club as *cestuis que trustent* were bound to indemnify their trustees, it was made upon the theory that only those members of the club were liable to indemnify the Plaintiffs who had assented to or ratified the taking of the lease; and the Master's certificate found that the Appellant had assented to and ratified it. The Chief Judge refused to vary the certificate thinking it right. The Full Court on Appeal affirmed the decision but not unanimously nor on the same grounds. The Chief Justice considered it proved that the Appellant had become one of the *cestuis que trustent* of the lease and was therefore liable to indemnify the Plaintiffs. Mr. Justice Cohen considered that the Appellant had assented to and ratified the taking of the lease and had therefore become liable. Mr. Justice Owen differed. He thought the Master's certificate wrong and that the Appellant ought to succeed.

With respect to the Appellant's assent or ratification to the taking of the lease much discussion took place as to what was meant in this case by ratification, and it was contended that no ratification as distinguished from approval could be established. It is not however necessary to do more than to say that it became plain to their Lordships when the evidence had been examined that although there was ample evidence to prove that the Appellant knew that a lease had been taken for the club and that the club had the use of the property and that the lease might become a burden to the club, yet that the Appellant had done nothing whatever to incur any liability to indemnify the trustees, unless such liability attached to him as

a member of the club and as one of the *cestuis que trustent* of the lessees. It further appeared to their Lordships to be proved that notwithstanding the irregularities of the meeting of December 1887, and the doubts thrown on the legal validity of its subsequent confirmation, yet that the members of the club generally and the Appellant with the others through the committee of management and otherwise so far assented to what had been done as to have become *cestuis que trustent* of the lessees. Their Lordships were satisfied that the relation of trustee and *cestui que trust* had been created. It follows from this that the lessees as trustees were entitled to be indemnified out of any property of the club to which their lien as trustees extended. But the evidence against the Appellant did not prove anything more than the existence of the above relation; and their Lordships intimated that in their opinion the real question for decision was whether the Appellant was liable to indemnify the trustees under the circumstances thus proved. This view was ultimately accepted by Counsel and their Lordships do not therefore think it necessary to allude further to the evidence on the present occasion.

In *Hardoon* v. *Belilios* 1901 A. C. 118 this Board had to consider the right of trustees to be indemnified by their *cestuis que trustent* against liabilities incurred by the trustees by holding trust property. The right of trustees to such indemnity was recognised as well established in the simple case of a trustee and an adult *cestui que trust*. But as was then pointed out this principle by no means applies to all trusts and it cannot be applied to cases in which the nature of the transaction excludes it.

Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and

the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to anyone else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition not usually expressed but understood by every one that clubs are formed; and this distinguishing feature has been often judicially recognised. It has been so recognised in actions by creditors and in winding-up proceedings. See *Flemyng* v. *Hector* 2 M. & W. 172; *St. James' Club* 2 De G. Mc & G. 383.

Apart from an observation of Lord St. Leonards in the last case and which observation is in favour of the Appellant, the only reported case in which a Court has had to consider the application to a club of this right to indemnity is *Minnitt* v. *Lord Talbot* L. R. Ir. 7 Ch. 407. In that case some members of a club who had guaranteed the repayment of money borrowed for the club sought indemnity not only out of the property of the club but from the members personally. The Court which had already given effect to their lien (*see* L. R. Ir. 1 Ch. 143) afterwards made an additional order and inquiry similar to those made in this case. The grounds upon which this addition to the original decree was made do not appear; nor does it appear what were the grounds on which any member was held to have incurred liability nor indeed whether any member had incurred such liability. This case does not therefore assist their Lordships on the present occasion.

The question now to be decided may be regarded as not yet covered by authority; and a choice must be made between either ignoring the essential features of a club or holding that the general rule established in *Hardoon* v. *Belilios* is inapplicable to such a body of persons. Their Lordships feel no difficulty in making this choice

The trustees of a club are the last persons to demand that the fundamental conditions on which their *cestuis que trustent* have become such shall be completely ignored.

The Appellant in this case is not in their Lordships' opinion under any legal or equitable obligation to pay or contribute anything towards the indemnity of the Plaintiffs; but he has offered to do so and the Plaintiffs are not satisfied with his offer. Their endeavour to obtain more is to be regretted and cannot succeed. This may seem hard on the trustees; but they have only themselves to blame for their own imprudence in not seeing to their own safety. A decision in their favour would not only be hard on the members of the club, but would be inconsistent with the terms on which they became members.

Their Lordships will therefore humbly advise His Majesty to set aside the certificate of the Master and to reverse the Orders of the 5th March 1900 and the 23rd July 1900 with costs.

The Respondents will pay the costs of the Appeal.