23.1946

No. 63 of 1946.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT, SITTING AS A COURT OF APPEAL, JERUSALEM.

BETWEEN

MARGARETE LINZ née SPRINGER — *Appellant*

AND

THE ELECTRIC WIRE COMPANY OF PALESTINE LIMITED — *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal from a judgment of the Supreme Court of Palestine sitting as a Court of Appeal in its civil jurisdiction dated the 7th February 1945 dismissing an appeal by the Appellant from a judgment and decree of the District Court of Haifa dated the 28th July 1944 which dismissed with costs an action by the Appellant (plaintiff in the original Court) against the Respondent (defendant in the original Court and hereinafter called "the Respondent Company") claiming payment by the Respondent Company of the counter value with interest of a sum of Reichsmarks paid by her to the Respondent Company in payment up in full of 775 shares of LP.1 each in the capital of the Respondent Company agreed to be subscribed by and purported to be allotted and issued to her as preference shares, on the ground that the shares so allotted and issued to her were shares in the Respondent Company's original capital and that none of these shares could, having regard to the provisions of its Memorandum of Association, be converted into and issued as preference shares, or alternatively on the ground that none of those shares were ever in fact effectively converted into preference shares, and accordingly that she did not receive the preference shares which she agreed to subscribe or any other consideration for the said payment. p. 54. p. 35.

2. The facts giving rise to the present appeal so far as material to be herein stated are as follows.

3. The Respondent Company was incorporated on the 25th September 1934 under the Palestine Companies Ordinance 1929 under the name of The Palestine Electric Wire Company Limited (subsequently duly changed to its present name) as a Company limited by shares. p. 58. p. 67.

p. 58. 4. Clause IV of the Respondent Company's Memorandum was in the following terms, namely :—

"IV. The capital of the Company is LP.25,000 divided into 25,000 Ordinary Shares of LP.1 each."

p. 59. 5. The Respondent Company's Articles of Association provided (Article 44) that the Company might from time to time by special resolution increase its capital by the creation of new shares of such amount to be divided into shares of such respective amounts and to be issued upon such terms and conditions and with such rights and privileges annexed thereto as by the special resolution creating the same should be directed but did not confer upon the Company any power to issue any of the shares in its original capital with preferential or other special rights or subject to any restrictions or provisions or otherwise than as ordinary shares.

p. 61. 6. The Respondent Company's Articles further provide (Article 58) that a meeting for the passing of a special resolution should be called by not less than 21 days' notice specifying the place day and hour of the meeting and in case of special business the general nature of the business, such notice either to be published in a newspaper circulating in the area in which the Company carried on its business or to be sent by ordinary mail
p. 62. to all its members entitled to receive notice and (Article 72) that subject to any special rights or restrictions for the time being attached to any special class of shares on a show of hands every member present should have one vote and upon a poll every member present should have one vote in respect of every share held by him.

p. 64. 7. On or shortly after the 12th April 1935 there was filed with the Registrar of Companies in Palestine a copy of a special resolution stated to have been passed at a separate meeting of the holders of the Ordinary Shares held on that date. The said purported resolution provided as follows :—

"That the original terms of the Company's Memorandum of Association be altered to the effect that the capital shall consist not solely of ordinary shares, but that LP.11,000 unissued shares shall be issued as preference shares. Such preference shares shall be entitled to a dividend in advance at the rate of 6% out of the net profits. After them the Ordinary Shares will be given a dividend of 6%, and the surplus net profits will be distributed amongst the preference and ordinary shares in such manner that for each more 2% dividends on the ordinary shares, one more per cent. dividend will be given on the preference shares provided that the total dividend on the preference shares shall not exceed the rate of eight per cent.

Accordingly the preference shares will, in case of the Company being wound up, first be satisfied with 100% out of the assets available ; then 100% will be paid up to the holders of the ordinary shares ; and the surplus of the assets will be distributed in such manner that the ordinary shares will receive double of the amount received by the preference shares. The preference dividends at the

rate of 6% are cumulatively payable; but they become payable only as for the time after the business of the Company has been commenced; i.e. they are first payable for the first business year. The commencement for the first business year is fixed for not later than one year after the subscription.

The voting right of the preference shares shall be one third of the voting right of the ordinary share."

8. In fact the said purported resolution was not passed at any meeting either of the Respondent Company or of the ordinary shareholders of the Respondent Company convened for or held on the said date or on any other date. What in fact occurred was as follows :—

9. Until and on the 12th April 1935 the only members of the Company were the following eight persons being the subscribers to its Memorandum and Articles of Association, namely :— pp. 58, 23.

1. A. Broido
2. Alfred Rosenberg
3. Alfred Schreuer.
4. Ludwig Mayer.
5. Aleinikoff.
6. S. E. Soskin.
7. Alexander Kremener.
8. Adalbert Buxbaum.

10. For some time previously to the 12th April 1935 the said eight subscribers or certain of them had been discussing the question of issuing part of the shares in the original capital of the Respondent Company as preference shares and shortly before that date the said A. Buxbaum (who was a lawyer and acting as the Respondent Company's legal adviser) prepared a resolution which is set out on page 69 of the Record and delivered the same to the said A. Broido who was a Director of the Respondent Company for consideration by him. p. 16, l. 36. p. 26, l. 1.

11. On the 12th April 1935 the resolution so prepared was considered by the said A. Broido at the flat of the said A. Broido which was also the Respondent Company's registered office 47 Arlosoroff Street and by the said A. Rosenberg and A. Schreuer who also had flats in the same building and signed by the said three persons, none of the other five members of the Company with the possible exception of the said L. Mayer being present. Subsequently, but upon what date or dates was not proved at the trial, the signatures of the five other members, including the said A. Buxbaum, to the said resolution were obtained. A copy translation of the document so signed is set out at p. 69 of the Record. p. 69.

12. On the 19th April 1935 the Appellant through her Uncle and agent Dr. Siegfried Levinger applied in writing to the Respondent Company for the allotment to her of 775 6 per cent. cumulative preference shares of LP.1 each in the Respondent Company and on or about the 10th September 1935 the Respondent Company purported to allot to her 775 preference shares conferring the preferential rights expressed to be attached by the said purported special resolution to the 11,000 shares in the original capital of the Respondent Company therein mentioned and subsequently issued to her a certificate for the said shares as fully paid preference shares. p. 1, l. 28. p. 4, l. 10. p. 35, l. 30. p. 5, l. 1. p. 2. l. 9. p. 5. l. 33. p. 81, l. 1.

p. 35, l. 30. 13. By her said application the Appellant agreed to effect payment for the said 775 shares in German Reichsmarks out of moneys paid by her to a special account with a Bank in Berlin to the credit of a Palestinian company styled Trust & Transfer Office " Haavara " Ltd. (hereinafter called " Haavara ") such payment to the Respondent Company to be made through Haavara whose charges were to be paid by the Appellant.

p. 41, l. 36. 14. In accordance with the terms of her said application the Appellant
p. 42, l. 11. on or about the 25th June 1935 paid for the said shares by procuring Haavara to pay to the credit of the Respondent Company with a Bank in Germany the sum of RM.9,493·75 (equivalent to LP.775 at the current rate of exchange of RM.12·25 to the LP.), Haavara debiting the Appellant with the sum of RM.11,039·25, the difference of RM.1,545·49 representing the commission of 14 per cent. on the said sum of RM.11,039·24 charged by Haavara for effecting the transfer in Germany.

p. 42, ll. 32–41. 15. The said commission charged by Haavara was as to 5 per cent. of RM.11,039·24 in excess of the commission of 9 per cent. contemplated by the Appellant and the Respondent Company during the discussions between them preceding the application by the Appellant for the said preference shares as that which would be charged by Haavara for effecting the said transfer. Haavara, in view of this fact, agreed with the Respondent
p. 74, l. 16. Company to increase by 5 per cent. of RM. 11,039·24 the rebate or bonus payable by it to the Respondent Company and paid to or credited the Respondent Company with the amount of the difference (approximately RM.551) in order to enable the Respondent Company to refund to the Appellant the equivalent of this amount in Palestine pounds. The agreement between the Respondent Company and Haavara is set out in paragraph 5 of D/9 (Record, p. 74, lines 16–24). The Appellant was not a party thereto. The Respondent Company retained part of the rebate so received from Haavara and applied the balance thereof, namely, RM.474 without any authority from the Appellant in payment up in full of 38 ordinary shares of LP.1 each in its capital which shares were subsequently allotted by the Respondent Company to the Appellant.

p. 76, l. 12. 16. When allotting and issuing the said 38 ordinary shares to the Appellant the Respondent Company suggested to her that she might like to subscribe additional ordinary shares so as to make her holding of ordinary
p. 75, l. 13. shares a round number and in response to that suggestion the Appellant applied for and paid up in full a further 12 ordinary shares which were allotted and issued to her making her total holding of ordinary shares 50 shares.

p. 85, l. 1. 17. In the month of July 1939 the Appellant being in need of money and in ignorance of the fact that the 775 preference shares subscribed for by and purported to be issued to her had never been validly created and had no existence in fact, sold or purported to sell through the Holland Bank Union the said 775 preference shares for the sum of LP.116·250 (being 15 per cent. of their nominal amount) and also her 50 ordinary shares
p. 89, l. 8. for the sum of LP.3·750 (being 7½ per cent. of their nominal amount) and
p. 91, l. 1. executed transfers in blank of the said shares which were ultimately completed as to the purported preference shares in favour of " PIA "

Palestine Independent Trust Association Limited and as to the ordinary shares in favour of one Bromberger as purchasers and transferees and registered in their names, and delivered the said transfers with the certificates for the said purported preference and ordinary shares to the said Bank. The said transfers were subsequently registered by the Respondent Company and the said Certificates thereof cancelled, and new certificates thereof in the name of the "PIA" Palestine Independent Trust Association Ltd. issued. p. 81.

18. In the year 1941 one Regina Schlesinger another original subscriber for and allottee of the purported preference shares of the Respondent Company instituted an action in the District Court of Haifa against the Respondent Company and three of its directors—claiming repayment of the moneys paid by her for the said shares with interest on the ground that no resolution of the Respondent Company converting 11,000 of the shares in its original capital into preference shares had ever been passed, and alternatively that the purported conversion of 11,000 of those shares into preference shares was ultra vires the Respondent Company. p. 94, l. 1.

19. On the 18th February 1943 an Order was made in the said action by consent confirming terms of compromise agreed upon between the parties by which the Respondent Company admitted that the said purported resolution of the 12th April 1935 was not properly passed and that in the circumstances the allotment to the said Regina Schlesinger of 1,500 shares as preference shares was void and it was agreed that the said allotment should be considered void ab initio and the Respondent Company should refund to the said Regina Schlesinger the sum paid by her for the said shares with an additional sum for interest and costs and ordering that the Respondent Company should pay to the said Regina Schlesinger the said sums in settlement as aforesaid. p. 92, l. 11.

20. On the 4th March 1943 the Respondent Company issued to all persons then registered in its register of members as holders of any of the said purported preference shares a circular stating that in the light of the admissions by the Respondent Company and judgment in the said action by the said Regina Schlesinger against it it had been decided that the Respondent Company could not maintain that the conversion of the 11,000 shares in its original capital into preference shares purported to be effected by the alleged resolution of the 12th April 1935 was validly made, and that the Company would return to the registered preference shareholders the amounts paid up by them in respect of their shares. No such offer was however made to the Appellant in respect of the 775 preference shares subscribed by and issued to her. p. 94, l. 1. p. 99, l. 41; p. 100, l. 34.

21. On the 28th March 1943 the Appellant by her attorneys Dr. Alfred Werner & Co. wrote to the Respondent Company contending that owing to no preference shares of the Respondent Company ever having been effectively created she had never received the preference shares for which she applied on the 19th April 1935, withdrawing her application for those preference shares in view of the delay in making any valid allotment, and claiming repayment of the counter value in Palestine pounds p. 96, l. 1.

of the sum in Reichsmarks paid by her to the Respondent Company for the same : and shortly afterwards the Appellant commenced in the District Court of Haifa

THE PRESENT ACTION

p. 1, l. 18. 22. By her amended Statement of Claim the Appellant, after alleging the subscription by her for and the purported allotment to her of 775 preference shares of the Respondent Company, and that no preference shares had ever been created or existed on the ground that the purported conversion of 11,000 of the shares in the Respondent Company's original capital into preference shares was ultra vires the Respondent Company under the terms of its Memorandum of Association, and alternatively on the ground that the alleged special resolution of the Respondent Company or of the ordinary shareholders effecting the conversion of 11,000 of those shares into Preference Shares was never passed, no meeting of the Respondent Company for passing that resolution having been duly convened or held on the 12th April 1935 or on any other date, claimed the repayment to her by the Respondent Company of the counter value in Palestine pounds of the sum in Reichsmarks paid by her for the said shares with interest thereon from the 7th July 1935 on the ground that she did not receive the consideration for that payment for which she bargained or any consideration.

p. 4, l. 5. 23. By its amended Statement of Defence dated the 24th May 1944 the Respondent Company alleged (inter alia) :—

Paragraph 4. That the Appellant's application was submitted pursuant to an arrangement between the Respondent Company and Haavara, to which the Appellant was a party, by virtue of which the Respondent Company were to issue out of its original authorised capital 11,000 shares to be designated as preference shares and to allot to the Appellant in consideration of the payment by her to Haavara in Germany of a certain amount 775 of those shares, subject to certain adjustments whereby any balance would be allotted in the form of ordinary shares.

Paragraph 5A. That the original provisions of the Respondent Company's Memorandum of Association in regard to its share capital were modified by the conversion of 11,000 of the shares in that capital into preference shares in pursuance of the said arrangement and with the knowledge of the Appellant, and that that resolution was passed unanimously by the holders of all the shares of the Respondent Company then issued at an extraordinary general meeting held on the 12th April 1935.

Paragraph 5B. That in any event the said resolution of the 12th April 1935 was approved and validated by resolutions passed by the Respondent Company and by the holders of the preference shares on the 14th May 1944.

Paragraph 6. That the Defendant Company in pursuance of the agreement alleged in paragraph 4 allotted to the Appellant 775 preference shares and 50 ordinary shares in its capital in satisfaction of the payment made by her in Germany.

Paragraphs 8 to 10 and 18. That the Appellant had on the 28th September 1941 transferred the said preference shares to "PIA" Palestine Independent Trust Association Limited and the said ordinary shares to the said Bromberger who were entered on the share register of the Respondent Company as members and that thereupon the Appellant ceased to have any interest in the said preference or ordinary shares and by reason thereof the Plaintiff was not entitled to bring the action in respect of shares in which third parties had acquired rights.

24. On the 8th July 1943 issues in the action were agreed between the parties of which the following are now material: p. 9, l. 1.

1. Whether plaintiff's application of the 19th April 1935 for allotment of preference shares was made in pursuance of an arrangement as alleged in para. 4 of the Defence?

2. Did the Company hold an extraordinary general meeting on 12.4.35 for the purpose of altering the share capital of the Company and if so is the resolution creating the 6% cumulative preference shares valid in law?

5. Did plaintiff pay anything for the 50 ordinary shares? If so is the allotment of 50 ordinary shares severable from the allotment of the cumulative preference shares? In the alternative were they issued as dividend or bonus shares in specie as plaintiff's profits on the 775 6% cumulative preference shares and were they issued validly according to law?

6. Was plaintiff entitled to withdraw her application for allotment of preference shares on 28.4.1943?

7. Has plaintiff validly transferred the shares allotted to her as stated in para. 8 of the Defence and if so can she still maintain her claim?

8. Did plaintiff receive the 775 6% cumulative preference shares and 50 ordinary shares in full satisfaction of all amounts she paid to defendant?

25. The action was heard on the 18th February 1944 and on subsequent dates in the District Court of Haifa before their Honours Judge Shems and Judge Nasr. p. 10, l. 1.

26. The Appellant gave evidence herself in support of her claim and several witnesses were called on her behalf including her uncle the said S. Levinger who applied for the 775 preference shares on her behalf and the said A. Schreuer, L. Mayer and S. E. Soskin three of the subscribers to the Memorandum and original members of the Company. Counsel also put in certain interrogatories administered on behalf of the Appellant for the examination of the Respondent Company and the answers and further answers thereto made in the form of two affidavits dated the 13th December 1943 and 2nd February 1944 by A. Broido, a director of the Respondent Company on its behalf. p. 12, l. 25. p. 15, l. 10. p. 16, l. 8. p. 17, l. 26. p. 11, l. 34. p. 98, l. 1. p. 101, l. 1.

27. The Respondent Company called no evidence but its Counsel was allowed by the Trial Judges (notwithstanding objection by the Appellant's Counsel and quite irregularly as the Appellant submits) to cross-examine the said A. Broido (as though he had been called as a witness on behalf of the Appellant) because his said affidavits in answer and further answer to interrogatories were put in by the Appellant's Counsel.

28. The oral evidence given and documents put in by and on behalf of the Appellant at the trial, including the said affidavits of the said A. Broido in answer and further answer to interrogatories established (as the Appellant submits) the facts as stated in paragraphs 3 to 21 above and in particular—

(A) That no notice convening any meeting of the Respondent Company or of its Ordinary Shareholders to be held on the 12th April 1935 for passing the special resolution returned to the Registrar of Companies as having been passed on that date was ever given to the members of the Company or any of them.

(B) That no meeting of the members of the Respondent Company or any of them took place on that date other than the informal meeting of the said Broido, Rosenberg and Schreuer and possibly Mayer in the flat of the first-named referred to in paragraph 11 above.

p. 70, l. 1. (C) That the minute entered in the Respondent Company's minute book of the meeting purported to have been held on that date (copy of which but not the minute book containing the same was put in at the trial) was false and untrue both as regards the statement therein that 21 days' notice of the meeting had been given and also the statement that all the eight members of the Company were present at that meeting and that, though the said Minute is or would (had the minute book been produced) have been prima facie evidence of the facts therein stated, the said evidence was completely rebutted.

(D) That the sum in Reichsmarks paid by the Appellant through the medium of Haavara to the Respondent Company in Germany was intended to be and was paid by her exclusively for and in payment up of the 775 preference shares applied for by her, and not for those shares and an indeterminate number of ordinary shares, and that the Appellant was not a party to and did not know of the arrangement between the Respondent Company and Haavara with regard to the increase by 5 per cent. of RM. 11,039·24 of the rebate payable by Haavara to the Respondent Company out of the commission with which the Appellant was charged by Haavara for the transfer of the said sum in Reichsmarks in Germany with a view to enabling the Respondent Company to account for it to the Appellant, but which were never so accounted for by it, being in part appropriated and retained by the Respondent Company and in part applied in paying up 38 ordinary shares in the Respondent Company's capital which were issued and allotted to

the Appellant by the Respondent Company as a bonus or dividend in specie on her purported preference shares and which the Appellant understood throughout as being received (to use her own words) " gratis—it was a kind of bakshish." p. 12, l. 47.

29. The Respondent Company tried to prove the allegations in paragraph 5 (B) of its Amended Defence that the purported resolution of the 12th April 1935 was approved and validated by resolutions passed by the Respondent Company and by the holders of the preference shares on the 14th May 1944, by statements by the said A. Broido in his cross-examination by the Respondent Company's Counsel (wrongfully allowed by the trial Judges as hereinbefore submitted) that such meetings were held and ratifying resolutions passed thereat as special resolutions, and production by him of what he alleged to be a true copy of the Minutes of the meeting of the Company (being exhibit D/18 printed on page 110 p. 110, l. 1. of the Record) and of an agreement between him purporting to act on behalf of the Preference shareholders and the Respondent Company being presumably the agreement produced without any Exhibit number on page 104 of the Record. The Minute Book of the Respondent Company p. 104, l. 1. containing the Minutes of the said alleged meetings, if held, was not proved or produced, nor did the said A. Broido even state that he was present at the meetings the due convening and holding of which and the passing of resolutions whereat he purported to prove.

30. On the 28th July 1944 the Judges of the Court of first instance p. 35, l. 10. delivered judgments dismissing the action. The principal judgment was p. 50, l. 40. that of Shem, J. He decided the issues Nos. 1, 4 and 5 as follows, namely :—

Issue No. 1. He held that the Appellant's application for the p. 43, l. 29. allotment of preference shares was made in pursuance of an arrangement between the Respondent Company, Haavara and the Appellant, but that there was no evidence that the Appellant was made to understand that the Respondent Company was to issue 11,000 of the shares in its original capital as preference shares, nor that it was to allot to the Appellant 775 of those shares in consideration of the payment by her to Haavara in Germany of a certain amount subject to certain adjustment whereby any balance would be allotted in the form of ordinary shares.

Issue No. 4. He held that notice of the meeting to take place p. 49, l. 49. on the 12th April 1935 was sent to the shareholders, that three or four out of eight attended the meeting and signed the Minutes passing the resolution, and that all the other shareholders subsequently signed the resolution as passed. That this was sufficient consensus of all the shareholders as the act of the Company so that the resolution passed was intra vires the Company and the preference shares issued by virtue of this resolution were validly issued. He further held that the resolution, if intra vires the Respondent Company, was ratified at a meeting held on the 14th May 1944. The Appellant contends and will submit that his decision on this issue, so far as it was a decision on questions of fact, was not in accordance with the evidence adduced at the trial, and so far as it was a decision on questions of law was incorrect.

p. 44, l. 8. Issue No. 5. He held that the application by the Respondent Company of the RM. 550·17 commission overcharged by Haavara to the Appellant for transfer fees and paid by Haavara to the Respondent Company to be accounted for by it to the Appellant or of RM.474·68 part of that sum in paying up the 38 Ordinary Shares allotted to the Appellant, constituted a payment by the Appellant of RM.550·17 for the said 38 ordinary shares and, that the allotment of those 38 ordinary shares was part of the same transaction as and not severable from the allotment of the 775 preference shares. He further held that the Appellant paid LP.12 in cash for the remaining 12 ordinary shares and that their allotment was severable from the allotment of the 775 preference shares and the first 38 ordinary shares, but that the 38 ordinary shares were not issued as dividend or bonus shares although he further held that they were paid up out of the rebate received from transfer fees.

31. Following upon his decisions upon the issues Nos. 1, 4 and 5 he decided the issues 6, 7 and 8 as follows, namely :—

p. 50, l. 6. Issue No. 6. That the Plaintiff was not entitled to withdraw her application for allotment of the preference shares on the 25th March 1943.

p. 50, l. 9. Issue No. 7. That the Plaintiff had transferred the shares allotted to her, both preference and ordinary shares. That the transfer was a valid transfer and the change of ownership duly entered in the registers of the Defendant Company and that on this ground also the Plaintiff's claim could not be maintained.

p. 50, l. 15. Issue No. 8. That the Appellant received 775 preference shares and 38 ordinary shares in full satisfaction of the amount paid by her in Germany to Haavara to be put to the credit of the Defendant Company.

p. 50, l. 40. 32. The judgment of Nasr, J. dealt solely with the two questions whether the conversion of part of the shares in the original capital of the Respondent Company into preference shares was intra vires having regard to the provisions of clause IV of its Memorandum, and if it was, whether the conversion of 11,000 of those shares into preference shares was validly effected. He decided both these questions in the affirmative holding (wrongly as the Appellant submits) that as regards the first question Article 44 negatived any implication from the use of the word " ordinary " before the word " shares " in clause IV of the Memorandum that all the shares in the original capital were to be retained throughout the life of the Company on an equality basis, and as regards the second question that in view of the unanimous agreement of all the shareholders, as evident from the resolution signed by all of them, it was immaterial whether that agreement was reached at one and the same time or in one or different places, and also whether prior notice to convene a meeting for the purpose of passing the resolution was sent to the shareholders or not.

33. The Appellant appealed to the Supreme Court of Palestine p. 50, l. 1.
in its Appellate Jurisdiction. The Appeal Court (Mr. Justice Shaw and Mr. Justice Frumkin) on the 7th February 1945 delivered judgment dismissing the appeal.

34. The judges of the Court of Appeal in their joint judgment did not decide or express any opinion upon the question whether the shares purported to be issued by the Respondent Company as preference shares were or were not validly created as such. They accepted (wrongly as the Appellant submits) the finding of Shems, J. (not supported by Nasr, J.) upon the 8th issue that the 38 ordinary shares formed part of the consideration for the money paid by the Appellant in Germany and dismissed the Appeal on the grounds :—

(A) That as the 38 ordinary shares were in any event validly issued and formed part of the consideration received by her for her payment she could not successfully maintain that she had received no consideration for that payment ;

(B) That the fact of her having negotiated the 775 purported preference shares for value also precluded her from saying that she had received no consideration, although the consideration may have been different to that which she expected to get ; and

(C) That the Appellant must be held to have had constructive notice of the Memorandum and Articles of Association of the Company and that if she wished to take exception to the share certificates (meaning presumably the validity of the resolution purporting to create the preference shares) the time to do so was before she accepted them or at least whilst they were still in her hands.

35. The Appellant being dissatisfied with the said judgment of the p. 57, l. 1.
Appeal Court applied to that Court for leave to appeal to His Majesty in Council which leave was duly granted by Order dated the 14th May 1945.

36. The Appellant submits that the judgments of the Court of first instance and of the Court of Appeal were wrong and ought to be reversed and the present appeal allowed for the following amongst other

REASONS.

(1) HAVING regard to the terms of clause IV of the Respondent Company's Memorandum the issue of any of the 25,000 shares in its original capital as preference shares was ultra vires.

(2) IN any event the Respondent Company had no power to issue any of the shares in its original capital as preference shares without first altering its articles by special resolution so as to authorise such issue.

(3) NO such special resolution was passed previously to the purported issue to the Appellant of 775 of those shares as the preference shares for which she applied, or at any

subsequent time previously to the withdrawal by her of her said application on the 25th March 1943. The purported Resolution of the 12th April 1935 was void and a nullity also inasmuch as

(A) the alleged general meeting was not validly convened or held and was not a general meeting of the Respondent Company but a casual meeting of three or at most four of the subscribers to its Memorandum and Articles of Association, and

(B) in any event the said Resolution alleged to have been passed thereat had neither been proposed nor passed as a Special Resolution.

(4) THE invalidity of the said alleged special resolution could not be and was not cured by all the subscribers to the Respondent Company's Memorandum and Articles signing as such on dates not proved the document dated the 12th April 1935 purporting to change the Memorandum so as to authorise the issue of 11,000 of its original shares as preference shares.

(5) BY reason of the foregoing the purported allotment and issue to the Appellant of 775 preference shares of the Respondent Company was not an allotment and issue to her of the shares for which she applied, there not being any such shares in existence, and the Appellant is and has at all times been a creditor of the Respondent Company for the amount paid by her for those non-existent shares.

(6) THE transaction under which the Appellant applied and paid for and the Respondent Company purported to allot and issue to her the said 775 purported preference shares was distinct and severable from the arrangement made on the 4th June 1935 between the Respondent Company and Haavara with regard to the increase of the rebate by the latter to the former to which the Appellant was not a party and of which she had no knowledge, which arrangement resulted in the Respondent Company issuing to the Appellant 38 ordinary shares.

(7) THE Appellant received no consideration at all for the sum paid by her for the said 775 alleged preference shares.

(8) THE Appeal Court erred in holding that the Appellant had constructive notice of the invalidity of the said alleged preference shares and was debarred thereby from challenging their validity in the present action.

(9) THE right of the Appellant to recover as a creditor of the Respondent Company the sum paid by her for the said alleged preference shares was not and could not be

affected by the purported sale and transfer by her of those non-existent shares to " PIA " Palestine Independent Trust Association Limited nor could any payment made to the Appellant by or on behalf of the purported transferees be treated as a consideration moving from the Respondent Company.

(10) THE purported ratification of the alleged invalid resolution of the 12th April 1935 by the resolutions of the Respondent Company passed the 14th May 1944 and by the agreement of the 11th April 1944 between the said A. Broido purporting to contract on behalf of the holders of the preference shares and the Respondent Company was only proved (if at all) by the evidence of the said A. Broido given on his cross-examination by the Respondent Company's Counsel, which was wrongfully allowed by the trial Judges and should be rejected for this reason, and in any event was not and could not be effective to render valid ab initio the said purported resolution of the 12th April 1935.

(11) IN any event the said purported ratification on a date subsequent to the commencement by the Appellant of the present action did not and could not affect her rights as existing when the action was commenced.

(12) THE judgments of the Court of first instance and of the Appeal Court were wrong and ought to be reversed.

VALENTINE HOLMES.

W. GORDON BROWN.

No. 63 of 1946.

In the Privy Council.

ON APPEAL

From the Supreme Court, Sitting as a Court of Appeal, Jerusalem.

BETWEEN

MARGARETE LINZ née **SPRINGER**
Appellant

AND

THE ELECTRIC WIRE COMPANY OF PALESTINE LIMITED *Respondent.*

Case for the Appellant.

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