THE SHAREHOLDERS' CORPORATE CONTRACT IN WESTERN AUSTRALIA

It is the object of this article to attempt a re-evaluation of the shareholders' corporate contract as it finds expression in the articles of association of a company and to assess the accuracy or otherwise of the many conflicting judicial expressions. Perhaps the two most famous quotations should be profered at this point.

> It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less, in my opinion, regulate their rights *inter se*. Such rights can only be enforced by or against a member through the company, or through the liquidator representing the company; but I think that no member has, as between himself and another member, any right beyond that which the contract with the company gives.—per Lord Herschell in *Welton v* Saffrey.[1]
>
> It is laid down in text-books of the highest authority that the articles are not a contract between the members and the company, but a contract with the other members. The articles are a contract only as between the members *inter se* in respect of their rights as shareholders.—per Astbury J in *Hickman v Kent* or *Romney Marsh Sheep Breeders' Association*.[2]

General considerations of the question will be made first, treating it in its common law context, and then, second, as a statutory product. Subsequently other precendent cases and learned opinion will be covered and finally a synthesis will be attempted.

The Position of a Common Law Contract

Since there is no single document nor even any direct correspondence common to the individual shareholders it follows that any common contract must be the product of legal inference. It is theoretically possible to find a contract in this manner which might be either a specialty or simple contract. The traditional approach to tracing a contractual programme in the share situation treats the application for shares as being an offer and allotment by way of resolution of the

1 [1897] AC 299 at p 315.
2 [1915] 1 Ch 881 at p 890.

board of directors as being an acceptance of that offer.[3] This, of course, is the language of simple contracts and the documents themselves show no signs of being deeds. However, at the point at which the allotment is made, the applicant is not a shareholder but has the simple contract right to become a shareholder by way of inclusion of his name upon the share register. When that has been done, a share certificate under seal is issued in his favour but it would seem that this action is of secondary evidentiary value only and of itself could not be regarded as changing the nature of the contractual relationship.[4] Further, neither articles nor memorandum of association are executed in the traditional manner of a deed, both being signed before witnesses but not sealed.[5] Thus it would seem that at common law there is a simple contract only. In Western Australia the common law position as to execution of deeds has been modified by the Property Law Act, 1969, section 9 of which removes the necessity for sealing and indenting; but simply signing before a witness would seem not to make the document a deed since it seems implicit in the section that there must be an intention to create a deed. The section only specifies an alternative way in which a deed may be executed, it does not positively say that all such executed documents are deeds.

It would appear, therefore, that in the absence of statutory intervention a simple contract exists between each shareholder and the company; but with no direct contractual link between shareholders themselves the traditional view of contractual privity as that was expressed in such cases as *Tweedle v Atkinson*[6] would deny immediate contractual legal relations between them. Should the more recent views expressed, particularly by Barwick CJ, in *Coulls v Bagot's Executor and Trustee Co Ltd*[7] and *Olsson v Dyson*[8] eventually prevail it is possible that a court could find that the articles of association in defining the rights and duties of the company with each and every shareholder grant within the several individual contracts specified, rights to other shareholders outside of the signatories to that contract. The

3 See, eg Re Universal Banking Co; Rogers' Case (1868) 3 Ch App 633.

4 This general view seems to be held by most text writers, eg Gower MODERN COMPANY LAW 3rd ed p 380 and is supported by the wording of s 92 (1) of the Australian Uniform Companies Act (hereafter referred to as AUCA) which makes it 'prima facie evidence of the title of the member to the shares'.

5 AUCA S 18 (2) for the memorandum and s 29 (2) (c) for the articles.

6 (1861) 1 B & S 393, 121 ER 762.

7 (1967) 119 CLR 460.

8 (1969) 120 CLR 365.

reasoning here would be somewhat tenuous and to the present writer, unsatisfactory, and with the retirement from the High Court bench of Windeyer J whose support for the changing of the privity rule in the above two cases seems far better reasoned than perhaps, with respect, was that of the learned Chief Justice, the future of this line of development is rather obscure. Of course, it should be noted that the jurisdictions in the United States of America seem to have had little trouble in finding *jus* for the *tertii*[9] in the general law of contracts and if such changes should be made in Australian law there seems no reason to fear major complications.

Before turning to the statutory situation, however, as that is found in the Companies Act, mention should be made of section 11 of the Propery Law Act, 1969 which, in so far as Western Australia is concerned does impinge upon the privity question. As has been pointed out by others[10] subsection (1) of this provision is on terms with the equivalent section 56 of the English Law of Property Act, 1925 which in *Beswick v Beswick*[11] was limited, by a majority of the House of Lords, to real property transactions. A major part of the reasoning in that decision was the ex real property historical development of the section in question coupled with a long title to the Act which purported to consolidate but not to change the law; this attitude being no better expressed than by Lord Guest in his judgment.[12] There are, however, two grounds upon which the Western Ausralian section 11 could be distinguished from the English precedent section 56. Firstly, the WA legislation is specified to 'amend and consolidate the law relating to property . . . '. Secondly, subsections (2) and (3) are additional to the English provision and subsection (2) in particular is clear on its face that its language ambit is wider than real property (but, of course, so was the original English s 56). As yet untested before the courts, the WA section 11 could have one of three possible interpretations—a court could follow Beswick's case and limit the whole of the section to real property, or it could distinguish the reasoning and motivation in Beswick and apply the whole of the section to both real and personal property, or again, subsection (1) alone could be limited to real property as a respectful following of the House of Lords

9 See RESTATEMENT OF THE LAW, 2nd ed, Contracts, s 90.

10 By G A Kennedy and R D Keall in separate papers, each entitled *The Property Law Act in Operation,* given at the 1973 Summer School organised by the Law Society of Western Australia.

11 [1968] AC 58.

12 Ibid at p 85.

but beyond that the other subsections could be applied to both real and personal property. The result of a test case seems very uncertain[13] and the present writer is disposed against a divided interpretation, both by rational inclination and anticipation of the judicial mind. At this point of time, however, safety, as well as what limited authority there is, would seem to dictate a cautious and limited application of this section despite the obvious verbal difficulties thus embraced.

The Position in the Companies Legislation

English legislative history directly upon the present issue commences, naturally enough, with the Joint Stock Companies Act, 1844.[14] Prior to this legislative authority for the incorporation of companies by way of registration under a general statute, business corporations had used the model of the partnership in having a deed of settlement as their foundation document and section 7 of the 1844 Act continued this practice even for the registered company. Immediately, however, inconsistencies are apparent: the sections requires that, prior to registration, the deed be executed by not less than one quarter in number of the subscribers, holding between them not less than one quarter in value of the maximum authorised share capital; section 26 then provides that a person shall not enjoy the benefits of shareholding unless and until he has executed the deed, so that each shareholder will be bound directly to the deed. But if there is an interim period between execution by some for the purposes of registration and by all for the purposes of personal benefit, section 7 further provides that the 'Deed must contain a Covenant on the Part of every Shareholder, with a Trustee on the part of the Company, to pay up the Amount of the Instalments on the Shares taken by such Shareholder and to perform the several Engagements in the Deed contained on the part of the Shareholders . . . ' It is clear from other wording in the section that a person was described as a shareholder both before and after registration but there was no requirement for the company to have a trustee nor was it necessary, for the purposes of registration, for the deed of settlement to be executed by such a trustee on behalf of the company. The effect of non-compliance with the 1844 Act is interesting since section 7 states ' . . . it shall not be lawful for any Joint Stock Com-

13 Professor Sutton in CONSIDERATION RECONSIDERED, Uni of Qld Press 1974 at pp 236-7 assumes a wide compass for s 11 but his view is not expressed as exhaustive and for the purposes of that particular book seems to be rather an illustration than an authoritative announcement.

14 7 & 8 Vict c 110.

pany hereafter to be formed . . . , to act otherwise than provisionally in accordance with this Act until such Company shall have obtained a Certificate of complete Registration as herein-after provided. . . . ' This makes it clear that the actual creation of the company is a private contractual act by deed but that all the subsequent requirements as to that deed merely enable the company to operate in business—something akin to the present certificate to commence business of the public company. Thus the legislation did not create companies; it merely regulated them and the deed of settlement became contractually effective as between the shareholders themselves individually but, except in so far as their covenant to comply with their 'several engagements' was concerned, not as between the company per se and the shareholders—and then only so far as a 'trustee' had been appointed for such matters, although presumably if there was a re-execution in appropriate terms subsequent to the original deed, the company could take the benefits in its own right.

In 1856 this was all changed by the new Joint Stock Companies Act[15] in which creation of the body corporate was provided for. In that statute section 7 stated that, when registered, the memorandum of associaion shall 'bind the Company and the shareholders therein to the same extent as if each Shareholder had subscribed his Name and affixed his Seal thereto or otherwise duly executed the same, and there were in such Memorandum contained, on the part of himself, his Heirs, Executors and Administrators, a Covenant to conform to all the Regulations of such Memorandum, subject to the Provisions of this Act.' Section 10 followed the same formula for the articles of association and section 11 provided for both documents to bear stamp duty as if they were deeds. These provisions were necessary since the prescribed forms were not specialty documents and it is at this time that the frequently recognized[16] omission occurs in not specifying that the effect of these documents applies as if the company itself had executed the notional deed. Whilst such a statement would have had certain practical and jurisprudential difficulties since the company was non-existent at the time of the first execution of the documents such difficulties would have been by no means insurmountable since the whole structure is a legal fiction and man's notional conjecture knows few limits.

---

15 19 & 20 Vict c 47.

16 See, eg Gower MODERN COMPANY LAW, 3rd ed p 261; Pennington COMPANY LAW, 3rd ed p 55; Patterson & Ednie AUSTRALIAN COMPANY LAW, 2nd ed, Vol 1, para 33/4.

With the Companies Act of 1862[17] the stamping provision was incorporated into each of the other two sections, section 11 dealing with the memorandum and section 16 basically dealing with the articles but continuing on to provide that all monies payable by a member to the company under the terms of the company regulations shall be deemed to be a specialty debt. We are told that this extension was needed to correct, or at least clarify the decision in *Robinson's Executor's Case*[18] where it was decided that a call made in a winding up was not a debt arising out of the deed of settlement but one arising out of the general law and therefore not a specialty debt.[19] Whether or not the reasoning in the Robinson case is entirely satisfactory[20] it does seem that the statutory provision as to specialty debt was intended to cover a small area of corporate functioning and was not thought of as going to the very root of the relationships involved.

Next, the 1908 Companies (Consolidation) Act[21] takes on the modern form with s 14(1) providing for the 'as if sealed by each member' formula and s 14(2) declaring that all debts due by a member to the company under the memorandum or articles shall be in the nature of specialty debts. The stamping requirement was no longer thought necessary in this context. Subsequently, slight wording changes are to be found in the Companies Act, 1929, s 20[22] and on to the present section 20 of the Companies Act, 1948[23] but there are no fundamental changes of substance.

The Western Australian history of this legislation is both shorter and simpler. The Joint Stock Companies Ordinance of 1858[24] repeated the provisions of the 1856 English legislation, section 7 dealing with the memorandum and section 10 with the articles but there is no provision for stamping as if they were deeds, the matter of charges being dealt with independently.

In 1893 the Companies Act[25] replaced this Ordinance and the new form of words used follows the key phrases of the 1862 English Act, stamping again being omitted. Section 15 dealt with the memorandum

17 25 & 26 Vict c 89.
18 (1856) 6 De G M & G 572, 43 ER 1356.
19 Buck v Robson (1870) LR 10 Eq 629 per Bacon, V C at p 631.
20 Since statutory debts were always regarded as a member of the specialty class. See post.
21 8 Edw 7 c 69.
22 19 & 20 Geo 5, c 23.
23 11 & 12 Geo 6, c 38.
24 22 Vict No 6.
25 56 Vict No 8.

and section 19 with the articles. This legislation continued in force until 1943 when section 31 of the Companies Act of that year anticipated the more modern wording of the 1948 English Act. Lastly, the 1961 Uniform Companies Acts, in section 33, make the same provisions with minor wording changes.

In summary, then the legislative history in this respect appears thus:

1844: Company created by formally executed deed of settlement, registration simply regulating the corporate affairs. Execution of this deed by the company as a separate legal entity was neither possible nor required, there being a faltering suggestion that a trustee for the company should be able to enforce corporate rights.

1856: Company now created by registration. No prior deed but effects deemed to be the same as if a deed had been executed by the members. No mention of execution by the company but company declared bound.

1862: Debts due to the Company under the company regulations are deemed to be specialty debts.

1908: The debts now deemed to be specialty debts are those due to the company under the memorandum and articles. We now have substantially the modern form of these provisions.

Possible Attitudes

It seems appropriate at this point to summarize the possible attitudes to section 33 and indicate some of the major results which would flow from such attitudes. These will then be assessed in the light of the precedent cases.

(1) It can be argued that the section is totally misplaced, being a peculiar and thoughtless carry-over from the law of partnership. The section, then would be discounted and given no effect.

(2) Taken at face value, the section may be considered to create a deed contract as between the members only. This would mean that the simple contract at common law, between the company and each member would subsist independently. It would mean, too, that each member could sue each other member to ensure total compliance by that individual with all the terms of the memorandum and articles, including any relationships which exist between the two *apropos* non-member status. In such a deed there could be no ground for distinguishing between covenants *qua* member and those *qua* non-member status. But a different result could be achieved upon the simple contract

between company and member in which undertakings could be read as limited to the status of the parties.

A further point must be made: any debts that might accrue between members as a result of memorandum or articles obligations would be deed specialty debts.

(3) One step advanced from the previous situation is to argue that the section, impliedly at least, also creates a deed relationship between the company and the individual member, as well as one between the members *inter se*. This would mean that all covenants should be enforced in whatever capacity they are granted and received; and subsection (2) creating the status of specialty debt for amounts due under the memorandum and articles from a member to the company is superfluous. Also, it would mean that all similar debts owed by the company to the member would be deed specialty debts.

(4) A fourth approach is equivalent to that in (2) above but this time it is alleged that the section creates, not a deed contractual relation but a special statutory contract as between individual members only. What conclusions would follow from this are hard to predict since the nature of such a statutory contract is peculiar to a particular statute. However, to maintain consistency it should be argued that the results of such statutory contract would be the same 'as if the documents had been signed and sealed' and had been a deed.

(5) Similarly (3) above has its equivalent double statutory contract but the effects would seem to be identical with those in (3).

(6) Another argument which could be advanced is that the statutory effect is to create a peculiar non-contractual relationship as between the members only. Here it might be possible for the interpreter who is particularly adept at verbal gymnastics to claim that the results need not be the same as those which would apply to a deed since the section merely says that the company and the members shall be bound 'as if . . . ' That such an argument would be tenuous in the extreme is obvious and the present writer, at least, would feel, not only a lack of confidence in it but also some embarrassment in urging it. If successful, however, it could be that such 'peculiar' relationships, *a priori,* will lead to unpredictable detailed conclusions, and, further, there would be no need nor reasonable capacity to distinguish, as has been done above, between situations where different types of relationship exist between the company and its member while the relationship between members inter se remained static—as per items (2) and (3) above, and (4) and (5) above.

(7) Lastly, it might be argued that the section does not, in effect, create totally new legal relationships between the members *inter se* but, acting upon the existing simple contract relationships between the company and its members individually, it operates, via the concept but not actuality of a deed, as a privity extending provision allowing each individual member to become a mutual privy to each other member's contract with the company. The result of such a privity operation would be that the simple contract base could still distinguish between rights enjoyed *qua* member and *qua* non-mmber and also it would allow meaning to subsection (2) in raising the status of some only of the mutual debts to be specialties.

The Precedents

What do the cases establish as precedents? How do such precedents align with the seven attitudes just enumerated? These questions must now be answered.

If one first takes the case of the relationship between the company and the shareholder it seems that the following propositions can be established:

(i) The member can sue the company to secure his shareholder or member's rights such as voting upon his shares,[26] dividends due [27] and return of capital.[28]

(ii) There is some doubt as to the basic nature of these obligations. An Irish case[29] was followed by Byrne J in *Re Artisans Land and Mortgage Corporation*[30] in deciding that since the share certificate itself was issued under seal the [otherwise simple] contractual obligation created a deed specialty debt. This was followed without reasoned comment by Harvey CJ in Eq in the New South Wales Supreme Court.[31] Against this is the decision of the Senior Master of the Ontario Supreme Court (A S Marriott, QC) in *Re Northern Ontario Power Co*[32] who followed an earlier Canadian dictum[33] and accepted academic criticism of the Artisans Land case that sealing the certifi-

26 Pender v Lushington (1877) 6 Ch D 70.
27 Wood v Odessa Waterworks Co (1889) 42 Ch D 636.
28 Griffith v Paget (1877) 5 Ch D 894.
29 Re Drogheda S S Co [1903] 1 I R 512.
30 [1904] 1 Ch 796.
31 Re Sydney Permanent Freehold Land and Building Co Ltd (1934) 31 WN (NSW) 146.
32 [1954] 1 DLR 627.
33 Treasurer of Ontario v Blonde [1941] 3 DLR 225 per Robertson, CJO at p 237.

cates merely authenticated the corporate document and did not make it a specialty. The amounts due as declared dividends and return of capital in that case were held to be simple contract debts.

The academic criticism referred to was contained in Palmer COMPANY LAW[34] an opinion which, perhaps, should not be lightly discarded, and is also reflected by Gower.[35]

Further support for the contrary argument is provided by the decision of Vaughan Williams J in *Re Cornwall Minerals Railway Company*[36] which involved a statutory company with power to issue debentures and to pay interest thereon. This power was exercised, the debentures being issued under the corporate seal but the interest payments which would fall due were evidenced by warrants simply signed by the company secretary. The learned judge decided that the interest accrued did so as a statutory not a simple contract debt, the warrants merely evidencing, not creating, the debt.

Having, however, argued that this type of debt should not be regarded as a deed specialty debt it must be said that, without any precedent authority in support, most text-books regard the English statutory section 20 as making these specialty debts in some way.[37] One answer available is that these are statutory specialty debts not deed specialty debts[38] and the language of the sections in saying that the company is bound by the articles could be used to claim that such debts due under the memorandum or articles are converted into statutory debts.

The choice then between simple contract, deed specialty or statutory specialty debt is a difficult one to resolve: the present writer favours the more acceptable reasoning of a simple contract debt but most authors disagree; that such opposed authors themselves do not agree as to what sort of specialty this debt is, only adds to the confusion.

(iii) The shareholder rights which the individual may enforce against the company are only those rights which that individual holds as shareholder and do not extend to rights purportedly secured in the

---

34 18th ed p 218 but by 1958 the 20th ed (at p 626) has dispensed with this critical point and adopts the Artisans Land Case reasoning. A similar attitude is taken by Halsbury, 4th ed, Vol 7, para 610.

35 MODERN COMPANY LAW 3rd ed, 354.

36 [1897] 2 Ch 74.

37 Even Gower op cit and see also Pennington, COMPANY LAW 3rd ed p 270.

38 See R v Williams [1942] AC 541, per Lord Maugham at pp 554 et seq; Leivers v Barber, Walker & Co Ltd [1943] 1 KB 385, per Goddard LJ at p 398; Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (1940) 63 CLR 278, per Dixon J at p 300.

memorandum or articles in any other capacity. Thus, in the absence of a separate contract,[39] the non-member has no contract upon which he can sue,[40] even where, subsequent to the purported creation of the rights, he has become a member, as occurred in *Eley v Positive Government Security Life Assurance Co Ltd.*[41] It is established, too, that even with a member, it is only his membership rights *per se* which can be enforced and additional claims to such offices as that of managing director[42] or company solicitor[43] or to property purchase provisions[44] are ineffectual if based only upon the memorandum/articles/statute relationship.

(iv) The company may sue the individual shareholder to enforce obligations contained in the memorandum and articles including such matters as payment of calls[45] and repayment of loans.[46]

(v) Again, the nature of this liability is in doubt. The enforcement of calls made by the directors, apart from section 33 of the AUCA is based upon the articles of association and one would expect that debts arising in this way would be simple contract debts. The very early case of *Cork v Brandon Railway v Goode*[47] held that the calls made were statutory specialty debts since the company had no authority other than the statute upon which to make calls. Why there was this lack of other power was not explained, the more probable answer is that the deed of settlement contained no authorizing covenant but it is also possible that even if such a covenant did exist, if the deed had not been executed by either a trustee for the company or else by the company subsequent to its creation in the deed, there would be no avenue by which the company could enforce such covenant. It is suggested that the pecularities of the factual circumstances in this case make it a doubtful value as a precedent. A Victorian Full Court decision indicates that in the absence of section 33 of the AUCA there is a normal simple contract claim for calls[48] but in a normal company

39 See, eg Re New British Iron Co; Ex parte Beckwith [1898] 1 Ch 324.

40 Melhado v Porto Alegre Railway Co (1874) LR 9 CP 503; Re English and Colonial Produce Co Ltd [1906] 2 Ch 435.

41 (1876) 1 Ex D 88.

42 Re Standard Salt and Alkali Ltd; Ex parte Lahiff [1934] SASR 168.

43 Eley v Positive Government Security Life Assurance Co Ltd (1876) 1 Ex D 88.

44 Re Tavarone Mining Co; Prichard's Case (1873) 8 Ch App 956.

45 Buck v Robson (1870) LR Eq 629; see also AUCA 4th Sch Table A Art 9 and AUCA S 219.

46 Peninsular Co Ltd v Fleming (1872) 27 LT 93.

47 (1853) 13 CB 826, 138 ER 1427.

48 In re Peter Lalor Home Building Co-operative Society Ltd (in liquidation); Tuckman v Dunlop [1958] VR 165.

situation AUCA s 33(2) has been given its face value and the call was treated as creating a specialty debt of some kind.[49]

In many sets of articles of association there is to be found a provision for forfeiture of shares where calls are not paid and, further, that the former shareholder remains liable for such calls notwithstanding forfeiture.[50] In such circumstances *Land Mortgage Bank of Victoria Ltd v Reid*[51] indicates that a new simple contract debt is created for the outstanding balance as at the time of the forfeiture. This decision will be the subject of later comment.

But not all calls are made by the directors: in a winding up calls may be made by the liquidator and AUCA s 219 makes the debt thus created a specialty in language similar to that in AUCA s 33(2). In this respect it should be remarked that section 219 creates a new statutory specialty obligation distinct from any earlier obligation upon directors' calls.[52]

With regard to loan money owed by the members to the company it appears that the Court of Common Pleas had decided[53] that such amounts are a statutory specialty although the report of the case is not entirely satisfactory. Since such debts arising *ex* the articles rather than a separate loan agreement are most unusual it is not surprising that there is a dearth of precedents on this point but the English Court of Appeal has indicated that in some cases, at least, the loan agreement arises ex contractu. In *The Lion Mutual Marine Insurance Association, Limited v Tucker*[54] it was held that the memorandum and articles of association created two types of obligations upon members: the first was to pay in accordance with calls made upon the member's guarantee (it was a company limited by guarantee) and the second was to pay amounts due for losses suffered by other members on the basis of mutual insurance of ships. This latter obligation was held to arise *ex contractu* but no question of simple or specialty liability was raised.

Whilst, then one could say that such loans become specialty debts there is doubt as to whether they should be regarded as either deed or statutory specialties.

---

49 James Gillespie & Co Ltd v Reid [1905] VLR 101.

50 AUCA 4th Sch, Table A, art 32.

51 [1909] VLR 284.

52 In re Peter Lalor Home Building Co-operative Society Ltd (in Liquidation); Tuckman v Dunlop [1958] VR 165; Hansraj Gupta v Asthana (1932) LR 60 Ind App 1 (Privy Council).

53 Peninsular Co Ltd v Fleming (1872) 27 LT 93.

54 (1883) 12 QBD 176.

(vi) Again, it is necessary to specify limits to the nature of the various types of action which AUCA s 33(2) classes as specialty. One can say that section 33(2) only applies to debts contracted by a member in his capacity as a member since this is a point which was vital to the decisions in the *Lion Mutual Marine Insurance Case*[55] and in the *Peter Lalor* and *Hansraj Gupta* cases.[56] Similarly by describing the post forfeiture obligation to pay calls as being a simple contract debt the *Land Mortgage Bank Case*[57] stated that the obligation, albeit arising out of the articles of association, did not arise in a membership capaciy.[58]

(vii) Moving on now to the relationship between members *per se*, precedent cases as against *obiter dicta* are few. In this area the general question which requires an answer is, 'can a shareholder bring a direct action to ensure compliance with the memorandum and articles by another shareholder?' In the English jurisdiction there appears to be only three cases in which one shareholder has sued another in this context, and no Australian cases are known which are directly on point. In all three English cases the immediate question dealt with the transfer of shares in a restrictive proprietary company and in all cases the remedy sought was either injunction or declaration; no cases seeking damages are known.

In *Delavenne v Broadhurst*[59] some shareholders sought injunctions against other shareholders and the company to prevent allegedly improper share transfers. Bennett J rejected the motion on the merits, finding that the articles did not cover transfers from member to existing member and the questions of standing and proper defendant were not raised. Of course the company was a co-defendant in the action.

1949 brought *Re Greene; Greene v Greene*[60] in which a rather more complex situation arose. Four director/shareholders of a company altered the articles to provide that upon the death of any director his shareholding should devolve to his widow notwithstanding any contrary will provision. The validity of this article was challenged following the death of a director intestate. Harman J held that the article was invalid in automatically entitling the widow upon the death

---

55 Ibid.
56 Supra.
57 Supra.
58 The contrary view is indicated in BUCKLEY ON THE COMPANIES ACTS 13th ed p 53.
59 [1931] 1 Ch 234.
60 [1949] Ch 333.

as it was contrary to the Companies Act which required all transfers of shares to be preceded by a proper instrument of transfer. Further it was held that the articles did not constitute a trust in favour of the widow since during the shareholder's lifetime there was no limitation upon his legal or equitable estate and if such a trust was intended to take effect upon death a legal testamentary document was required. Lastly the articles were held not to constitute a mutual contract between the shareholders but could only form the basis of concurrent contracts between shareholder and the company so that the proper plaintiff for enforcement would be the company; in any case, the article being *ultra vires,* it could not form the basis of a valid contract with the company.[61] Thus it was decided that the shares in question were part of the intestate estate and an order was made rectifying the share register.

Lastly came the celebrated decision of Vaisey J in *Rayfield v Hands.*[62] Here two articles provided difficulty. Article 6 stated that no shares could be transferred to a non-member so long as a member was willing to purchase them. Article 11 provided that a member intending to sell shares 'shall inform the directors who will take the said shares equally between them at a fair value . . . ' All directors were required to be shareholders. Upon the refusal of the directors to purchase proferred shares an assessment of value and a purchase order was sought by the intending vendor. In a judgment which is far from satisfactory—even to those commentators who sympathise with the result achieved[63]—the learned judge held that Article 11 bound the directors in their capacity as shareholders since a share purchasing liability could not be imposed upon directors per se. This reasoning neither convincingly nor explicitly enunciated is, of course, quite false since it is common practice as in the instant case for the articles to impose a share-purchasing obligation upon directors *qua* directors—these we refer to as the director's share qualification. Further, the word 'will' was interpreted as a mandatory 'shall' and lastly these obligations were enforced as a result of what was held to be the corporate contract between shareholders *per se.* One major criticism of this judgment which seems to have been overlooked by at least most

---

61 As an aside to this point, it should be noted that AUCA s 20 appears not to affect this question, it being limited to actions based upon a transfer, etc to or by the company. Thus in Australia this *'ultra vires'* (or perhaps more properly 'illegal') question would remain.

62 [1960] 1 Ch 1.

63 See, eg Gower 21 Mod L Rev 401, [1958] CLJ 148, 657.

commentators is that the interpretation thus given to Article 11 renders Article 6 meaningless. Article 6 imports the normal proposition of first refusal by existing shareholders and clearly requires that if there be no willing purchaser from within the existing shareholders, the vendor may look elsewhere. This criticism is the more significant since one of the props of the judgment as given was that all articles must be given a commercial meaning where possible.

Again, a most significant criticism which has not escaped notice[64] is that Vaisey J relied upon drawing the analogy between the company in question and a partnership. Whatever value such an analogy might have (it is, of course, commonly used in the 'just and equitable' ground for winding up) it is suggested that for the present purposes it entirely avoids the question by an *a priori* defining of the conditions in which a solution is required to be found.

The effect of *Rayfield v Hands* upon commentators is varied, ranging from an acknowledgement of its existence but not its authority[65] through cautious citation[66] and diplomatically silent use as support authority[67] to welcome acceptance of its decisiveness.[68] The present writer views the case with considerable reserve and when laid alongside *Green's Case*[69] which is of equal authoritative weight it would appear to, at the very most, simply keep the scales indecisively balanced.

At this point it should be noted that in nearly every case cited in this article, and in many more, *obita dicta* abound. An attempt to accommodate all such *dicta* in one formula is foredoomed and the resultant mass of material is beyond digestion. Suffice it to say that it is anticipated that a *dictum* could be produced to support almost any view of the matter presently under consideration.

A Conclusion?

If a conclusion is sought, it is suggested that the only basis beyond that of a selective approach to expressions of generalities is that of logic applied to the actual decisions in the precedent cases. The seven differeing basic attitudes to section 33 as offered earlier in short form, were:

64 Gower, ibid, also Paterson and Ednie, AUSTRALIAN COMPANY LAW 2nd ed para 33/7.
65 HALSBURY'S LAWS OF ENGLAND 4th ed Vol 7 para 119.
66 Paterson and Ednie AUSTRALIAN COMPANY LAW 2nd ed para 33/7.
67 Gower MODERN COMPANY LAW 3rd ed p 262.
68 Pennington COMPANY LAW 3rd ed pp 58-9.
69 Supra.

(1) It is totally misplaced and of no effect.
(2) It creates a deed contract between members to supplement a simple contract between the company and its members.
(3) It creates two deed contracts between the members *inter se* and between the company and its members.
(4) It creates a statutory contract between the members to supplement a simple contract between the company and its members.
(5) It creates two statutory contracts as between members and as between the company and its members.
(6) It creates a peculiar non-contractual statutory relationship as between the members as well as between the company and its members.
(7) It modifies existing contractual relations as between the company and its members and by extending the concept of privity allows the possibility of actions directly between members.

It is suggested that all the sources available reject the first and most extreme of these attitudes. Secondly, the benefits enforceable out of the company/member relationship being restricted to 'membership' rights *per se* (and a possible application of this in the member v member situations) indicates that the section cannot be said with any useful or usual meaning to create deed or statutory contracts in the nature of deeds. Thus, such reasoning would eliminate attitudes (2) to (5) inclusive. Giving support to this rejection is the existence of AUCA section 33(2) and 219 declaring certain debts to be specialties —otherwise redundant provisions.

It is possible, but for all practical purposes useless, to suggest that the section creates peculiar, undefined statutory relationships. Additionally, the constant judicial and other use of the language of contract in this area makes this interpretation difficult to support even theoretically.

On the other hand it seems consistent with the cases at large to offer explanation (7). The reading of section 33(1) as a privity of contract section makes sense of the original context in which it was framed, of the general contractual language, and of the natural reticence of common lawyers to accept the section at its full face value. Further, such an explanation gives some significant value to AUCA section 33(2) and 219 in declaring certain debts due to be specialties.

It is interesting to note the accommodation which this attitude provides for just two more of the many points causing difficulty for the observer. The opening quotation from Lord Herschell indicated that personal membership rights could be enforced via the company only;

by incorporating the privity aspect it could be said that even direct action is notionally via the company in terms of the consensus element of the relationship. Further to this point Farwell LJ has stated ' . . . it may well be that the Court would not enforce the covenant as between individual shareholders in most cases . . . '[70] Thus the statutory extension of privity is subject to the need for it and where it is more appropriate that the company itself should be a party to the action, such formality will be necessary. Again, a feature of the decision in *Rayfield v Hands*[71] which excited criticism[72] was the use by the learned judge of section 56 of the English Law of Property Act in extending privity. This may well have been a subconscious grapping with the privity base of section 20 of the English Companies Act and whilst such a justification on 'sub-conscious reasoning' is an entirely invalid use of academic licence, it does provide an interesting point of contact, especially in Western Australia where the implications and effects of section 11 of the Property Law Act are yet to be enunciated with authority.

On the whole it is urged that the only explanation of the effects of section 33(1) of the Uniform Companies Act which provides any reasonable gathering together of the precedents is that the section has a limited privity operation which attaches to the otherwise simple contract between the company and each shareholder individually.

D. W. CHANTLER*

70 Salmon v Quinn & Axtens Ltd [1909] 1 Ch 311 at p 318, Cozens-Hardy, MR concurred. This, interestingly, is a case in which the obiter dicta support the theory of a direct contract between shareholders inter se.

71 Supra.

72 Supra, footnote 63.

* Lecturer in Law, University of Western Australia.