**BIRCH**

**V.**

**CROPPER AND OTHERS**

*IN RE THE BRIDGEWATER NAVIGATION COMPANY LIMITED*

9TH DAY OF AUGUST, 1889

**LEX (1889) – LR 14 APP. CAS 525**

OTHER CITATION

2PLR/1889/1 (HL-E)

(1889) LR 14 APP. CAS. 525)

**HOUSE OF LORDS**

Lord Herschell

Lord Fitzgerald, and Lord Macnaghten.

**BETWEEN**

BIRCH – Appellant

AND

CROPPER AND OTHERS – Respondent

**REPRESENTATION**

HORACE DAVEY Q.C. and COZENS-HARDY, Q.C. (O. L. Clare with them) for the Appellant

RIGBY Q.C. and BUCKLEY Q.C with SWINFEN EADY for the Respondent Schofield, who represented the holders of preference shares

S. A. SAMPSON for the liquidators, Respondents

Solicitors for appellant: CUNLIFFE & DAVENPORT, for T. E. SAMPSON, Liverpool.

Solicitors for Schofield, Respondent: Burgess & Cozens, for Arthur Buckley, Manchester.

Solicitors for the liquidators, respondents: CUNLIFFE & DAVENPORT, for LINGARDS, MANCHESTER.

**ISSUES FROM THE CAUSE(S) OF ACTION**

COMPANY LAW:-Capital partly paid up - Preference Shareholders - Winding up -Surplus Assets - Distribution according to Subscribed Capital - Companies Act 1862 (25 & 26 Vict. c. 89) s. 133 sub-s. 1, 10.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

APPEAL from a decision of the Court of Appeal [ 39 Ch. D. 1].

The question was on what principle a balance of about £ 550,000 after satisfying all liabilities was to be distributed among the preference and the ordinary shareholders respectively of the Bridgewater Navigation Company in the voluntary winding-up of that company. The facts are stated at length in the report of the decisions below [39 Ch. D. 1.], and are summarised in the judgments of Lords Herschell and Macnaghten in this House.

The order of North J. declared that the balance of the proceeds of sale of the undertakings to the Manchester Ship Canal Company remaining after satisfaction of all the debts and liabilities of the Bridgewater Navigation Company, Limited, and after adjusting the rights of the shareholders inter se (other than their rights in respect of the purchase-money), and after payment of the costs of the liquidation and repayment to the shareholders (both ordinary and preference) of the capital respectively paid on their shares, ought to be divided among the holders of all the shares of the Bridgewater Navigation Company, Limited, in proportion to the amounts respectively paid up on their shares.

This order was affirmed by the Court of Appeal (Cotton, Fry and Lopes L.JJ [39 Ch. D. 1.]).

July 23, 25.

Sir Horace Davey Q.C. and Cozens-HardyQ.C. (O. L. Clare with them) for the appellant who represented the holders of ordinary shares:--

The company being wound up voluntarily under the Companies Act 1862 (25 & 26 Vict. c. 89) the balance of the assets now in question must be in the words of sect. 133 sub-sect. 1: "distributed amongst the members according to their rights and interests in the company;" and by sub-sect. 10: "the liquidators shall pay the debts of the company and adjust the rights of the contributories amongst themselves." What are their rights and interests? Substantially they are the same as under a compulsory winding-up under sect. 109. Three modes of distribution suggest themselves. First, repay the preference shareholders their capital and divide the rest among the ordinary shareholders. By the terms of their creation the preference shareholders are entitled to receive 5 per cent. on their capital as long as the company is a going concern and is earning profits, and nothing more. They are in fact in the same position as debenture-holders. They are not entitled to any share of profits when the company is wound up, and the assets now in question are profits, just as much so as when the company is going. While their capital is in the business their agreement is to receive 5 per cent.: when the business is wound up the ordinary shareholders are in the position of residuary legatees. This would be so in an ordinary partnership, and a company is only a statutory partnership. "In the absence of special agreement the rise or fall in value of fixed plant or real estate belonging to a partnership is as much profit or loss of the partnership as anything else": Robinson v. Ashton [Law Rep. 20 Eq. 25, 28.] per Jessel M.R.; Watney v. Wells [Law Rep. 2 Ch. 250.]; Binney v. Mutrie [12 App. Cas. 160.]; Lindley on Partnership 5th ed. p. 402. "When the partnership comes to an end the right to the share of profits comes to an end also; and you distribute the assets, after providing for the profits earned up to the time of the dissolution, in proportion to the partners' shares of the partnership capital. That is the general rule of law in a commercial partnership:" Griffith v. Paget [6 Ch. D. 511, 515.] per Jessel M.R.

Secondly, the preference shareholders might receive the capital value of a perpetual annuity of 5 per cent. upon the amounts of their paid-up capital.

Thirdly, the distribution may be, and (if the other modes are rejected) should be, among the shareholders according to their shares in the subscribed capital, without reference to the amount paid up: Oakbank Oil Co. v. Crum [8 App. Cas. 65.]; Ex parte Maude [Law Rep. 6 Ch. 51 .]. The decision of the Court of Appeal is entirely devoid of principle; it takes no account of the liability of the ordinary shareholders upon the unpaid part of their shares. But this cannot be disregarded, and it is conclusive against the decision of that Court.

Their Lordships thought they were bound by the decision of the Court of Appeal in Sheppard v. Scinde, Punjaub and Delhi Ry. Co. (not reported except in 36 W. R. 1), but that case is no authority for any other case which is not precisely similar in all its facts. It turned entirely on the special terms of a deed of arrangement, and all the noble and learned Lords who took part in the decision in this House (Lord Halsbury L.C. and Lords Watson, Bramwell, FitzGerald, and Macnaghten, March 4, 1889) based their judgments upon the special circumstances, and were of opinion that no assistance was to be derived from reported decisions or from the consideration of principles relating to the law of partnership or of rules applicable to the liquidation of joint stock companies.

Rigby Q.C. and Buckley Q.C (Swinfen Eady with them) for the respondent Schofield, who represented the holders of preference shares:--

The point now in question has never been expressly decided. It has been raised thrice; in Somes v. Currie [1 K. & J. 605.]; in Sheppard v. Scinde, Punjaub and Delhi Ry. Co. [36 W. R. 1.].; and in the present case. It is quite clear that the preference shareholder is not in the same position as a debenture-holder, for the former has an interest in losses: the latter has not. The possibility of liability on the unpaid part of the ordinary shares ought not to have the effect contended for. The profits and the balance of assets now divisible were earned by the paid-up capital, not by the unpaid, which had no concern in the matter. Why should the unpaid capital have any value attributed to it? It is impossible to say how much (if any) should be. The true principle is distribution according to contribution: In re Exchange Drapery Co. [38 Ch. D. 171.]; Lindley on Company Law, 5th ed. p. 455. The balance-sheets and history of the company shew conclusively that the money raised by these preference shares went to pay off or reduce loans, and therefore to pay for the land and other assets of the company, and thereby helped to earn profits and to create the assets now divisible. The decision of the Court of Appeal is right, and for the reasons there given.

S. A. Sampson for the liquidators, respondents, took no part in the argument.

Sir H. Davey Q.C. replied.

**DECISION OF THE COURT**

Held, reversing the decision of the Court of Appeal and varying the order of North J. (39 Ch. D. 1), that in distributing the assets "amongst the members according to their rights and interests in the company," and in adjusting "the rights of the contributories amongst themselves" (under 25 & 26 Vict. c. 89 s. 133 sub-ss. 1, 10), the liability of the ordinary shareholders for the unpaid balance of their shares must not be disregarded; and that after discharging all debts and liabilities and repaying to the ordinary and preference shareholders the capital paid on their shares, the assets ought to be divided among all the shareholders, not in proportion to the amounts paid on the shares, but in proportion to the shares held.

The House took time for consideration.

**MAIN JUDGMENT**

Aug. 9.

LORD HERSCHELL:--  
  
My Lords, the only question for determination in this case is upon what principle the balance of the proceeds of the realization of the assets of the Bridgewater Navigation Company remaining after satisfying all the liabilities of the company and returning to the shareholders the paid-up capital, is to be distributed as between the holders of the ordinary and preference shares of the company. The company was formed in 1872 for the purpose of acquiring the Bridgewater and other canals, with a capital of £500,000 divided into 500 shares of £1000 each. By resolution duly passed in September of that year, it was provided that the capital instead of being divided into shares of £1000 should be divided into 50,000 shares of £10 each, and should be increased to £ 1,300,000 consisting of 130,000 shares of that amount.

Prior to April 1880, 100,000 shares out of the capital of £ 1,300,000 had been issued as ordinary shares, upon which £2 10s. per share had then been paid; and on the 27th of that month it was resolved at an extraordinary meeting that the balance of the uncreated capital, viz. £300,000, should be created, and that the 30,000 new shares should be issued as preference shares entitling the holder to a preferential dividend of 5 per cent. In pursuance of this resolution the shares were issued accordingly, and the additional capital of £ 300,000 was paid up. At the same time a call of £1 was made on the ordinary shares, raising the amount paid up on them to £3 10s. per share.

In 1887 the Manchester Ship Canal Company purchased the undertaking and assets of the Bridgewater Canal Navigation Company for the sum of £1,710,000, and it was thereupon resolved that the latter company should be wound up voluntarily. In the September following the liquidators repaid to the preference and ordinary shareholders the amount of capital paid up on their shares. After making this return to the shareholders, and after discharging all the debts and liabilities of the company there remained in the hands of the liquidators a surplus of about £  
550,000. The question is how this surplus ought to be distributed amongst the   
ordinary and preference shareholders respectively?

The Court below has determined that the distribution ought to be made in proportion to the amounts respectively paid up on their shares, and your Lordships have to determine whether this is the correct principle to apply. It is contended on behalf of the appellant, who represents the ordinary shareholders, that they are entitled to the whole of the surplus; but failing this contention, it is insisted that the division ought to be made according to the capital subscribed and not to the amount paid up on the shares.

The Companies Act affords very little assistance in terms towards a decision of the question. It provides that in the case of a voluntary winding-up the property of the company shall be applied in satisfaction of its liabilities, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company. But this leaves undetermined what those rights and interests are.

The learned counsel for the appellant argue that except in so far as the provisions of the Companies Acts necessarily create a distinction between the rights of its members and those of partners, the principles of the law of partnership are applicable and ought to be applied: and they urge that in the case of a partnership, unless the terms upon which it is entered into provide otherwise, surplus assets are distributable amongst the partners in the proportions in which they are entitled to share the profits. Even assuming that the doctrine laid down with regard to the division of surplus assets, in the case of a partnership, be correct (upon which I pronounce no opinion), I am unable to see how it establishes the appellant's claim, that the ordinary shareholders should receive the whole of the assets. The appellant's argument appears to assume that the preference shareholders are not entitled to any share of the profits of the company. I do not think this is the case.   
What they are to receive is indeed limited in its amount, but it is none the less a share in the profits. To treat them as partners receiving only interest on their capital and not entitled to participate in the profits of the concern, or to regard them as mere creditors whose only claim is discharged when they have received back their loan, appears to me out of the question.

They are members of the company, and as much shareholders in it as the ordinary shareholders are; and it is in respect of their thus holding shares that they receive a part of the profits. I think therefore that the first contention of the appellant wholly fails.

The other point raised by the appeal is to my mind one of considerable difficulty. There is no decision bearing directly upon the point, and it must therefore be determined upon general principles of equity. Some stress was laid in the Court below upon the decision in the case of Sheppard v. Scinde, Punjaub and Delhi Railway Company [36 W. R. 1.]; but I do not think that case can be relied on as an authority except where the circumstances are precisely similar. All the noble and learned Lords who took part in the consideration of that case in this House rested their opinions upon the very special facts of the case, and intimated that they were not laying down any general principle.

The view taken by the Court below has presented to my mind from the outset some formidable difficulties. I cannot but feel that it would in some cases be most inequitable to take into consideration in distributing the surplus assets only the amount of capital paid up by the several classes of shareholders, and to make the distribution accordingly. In the Court of Appeal Cotton and Fry L.JJ. were guided to their conclusion by the provisions contained in the articles of association of this particular company. With all deference I do not think that they really afford the assistance that was supposed. The 85th article of association prescribes that the net profits of each year shall be divided pro rata upon the whole paid-up capital of the company and that the directors may declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon. But this article is clearly inapplicable to the preference shareholders who do not share pro rata in the profits of the year. Their rights are determined by the resolution creating the new capital which provided that the new shares were to entitle the holders thereof to a dividend of 5 per cent. per annum "upon the amount for the time being called up thereon," and taking precedence over all dividends on the ordinary shares. This clearly, by implication, excludes in the case of these shares the operation of article 85.

Cotton L.J., after pointing out, I think correctly, that under the articles, both as regards the ordinary shareholders and the preference shareholders respectively, inter se, the right to the dividend was to be on the footing of its being in proportion to the sum paid up on the shares, proceeds to say: "That is the footing on which to decide it.

All question of preference is now at an end, and the shareholders are to be dealt with as having equal rights, because the provision in the articles creating the preference shares as regards dividend to arise on the working of the capital is at an end. We must deal with them all as shareholders having equal rights without reference to profits, and, in my opinion, when that is so, and when there is the indication in the articles of association which form the contract of partnership that profit is to be divided when it is a going concern and arising from the working of the business in accordance with the sums paid upon each share, then in this particular case, and having regard to that provision, the true equitable mode of dividing this sum is to divide it among all the shareholders in accordance with and in proportion to the amount paid up by them on their shares." I have a difficulty in seeing how the provisions of the articles alluded to show that the equitable mode of distribution is that suggested. It is conceded that they cease to be applicable when the company comes to be wound up, but if they are to be regarded at all, I think that their full effect must be borne in mind. It is not the case that when the company was a going concern the profits earned were to be divided in accordance with the sums paid on each share. The share of the profits to which the preference shareholders were entitled was limited in amount. It did not depend upon the proportion which the profits bore to the total paid-up capital. And the ordinary shareholders were in fact receiving a proportion of the profits exceeding that to which they would have been entitled had such profits been divided to each shareholder in proportion to the capital paid up. I do not say that this indicates the mode in which the surplus assets should be distributed, but it does appear to me to shew that it does not follow from the method in which profits were divided that the equitable mode of dividing surplus is to let all the members share alike in proportion to the amount paid up on their shares. In the present case, too, it cannot be doubted that in estimating the price to be paid by the canal company the future prospects of the Bridgewater Company, the probable development of its property and the increase in its value were taken into account.

In these future prospects the preference shareholders had no concern save in so far as they improved the security for the payment of their interest. If that security was already ample the benefit arising from the increased value of the company's undertaking would, down to the time of its being wound up, enure entirely to the ordinary shareholders. And yet in so far as the price represented this increased future value the result of the decision is to give to the preference shareholders approximately one-half of it. Now, I do not mean to say that any principle can be laid down which will ensure perfect equality in this respect, but that which has been adopted appears to me to tend to raise the inequality to a maximum. The articles of association do not appear to me to afford the means of deciding this case upon any special grounds peculiar to this company. Their provisions are such as are commonly to be found regulating the distribution of profits in the case of joint stock companies. I think the determination of the question at issue must be arrived at upon principles wider and of more general application. In my opinion one consideration of essential importance, if an equitable distribution of the assets is to be attained, has been altogether lost sight of. The payment of £3 10s. per share was not the only contribution made by the ordinary shareholders to the assets of the company. They had each come under liability to pay the balance due on the shares held by them. Such a contribution might in many cases be just as valuable and tend just as effectually to the prosperity of the company as if they had actually paid the amount. I cannot think that this ought to be disregarded in estimating the respective rights and interests of members in the company and its property.

In the case of Sheppard v. Scinde, Punjaub and Delhi Railway Company [36 W. R. 1.] Bowen L.J. said: "Was the sum produced in any way by the liability to pay calls? That is a question of fact, and I am satisfied that the liability to pay calls was not in any way an element in the production of this purchase-money."I am not by any means prepared to say the same of this company. On the contrary I think it most probable, looking to the large sums of money raised on loan at a moderate rate of interest, that the liability of the shareholders did add very materially to the ease with which these loans were obtained, and to the consequent development and prosperity of the undertaking. In the same case Fry L.J. said:

"It seems to me that in this case distribution must be proportionate to contribution. But it is said, suppose the property to have been produced not by unequal contributions but by unequal liabilities to pay, the proceeds must be distributed according to the unequal liabilities. I agree that in that case the distribution must be guided by the amount of the liabilities. I conclude that in this case the assumption of liability by the shareholders has not in any way produced the property, and that it cannot be said that the capital has been in the least increased by the liability."

In the present case that learned judge appears to have discarded altogether these considerations, apparently because he thought the matter settled by the terms of the articles of association; but for the reasons I have given I cannot concur in this view. I am fortified by the observations of the two learned judges I have quoted in the view that a scheme of distribution which overlooks an important part of the contribution can scarcely be regarded as equitable. It would be impossible to my mind to enter upon an inquiry in each individual case how much the liability incurred and the money provided had respectively contributed to the prosperity of the company or the value of its property. Some general rule must be laid down. I quite admit that it may be urged with force that if the distribution is to follow, not the paid-up but the subscribed capital, the liability would always be treated as of as much value as actual money. But if there must be a general rule and I have to choose between so regarding it or treating it as valueless, I believe the former would on the whole be the more equitable course. I of course exclude such a case as that of the Scinde Railway, where the constitution of the company determined the amount of purchase money to be given for the undertaking, and by the mode in which it was to be ascertained indicated what was the equitable mode of distributing it. In making these observations with reference to the unpaid liability upon shares I do not desire to be understood as indicating that they are decisive of the question how surplus assets are to be divided, but only as explaining why I cannot feel satisfied that the principle which has been adopted in the Court below is the correct one. Let me put an illustration which occurred to me whilst the appeal was under argument.

Take the case of a company whose entire paid-up capital was obtained by the issue of preference shares bearing a limited rate of interest, nothing being paid upon the ordinary shares. The prosperity of such a company might be very largely due to the liability of the ordinary shareholders which might be just as valuable to the company as if they had paid a large sum on their shares, yet in such a case if the undertaking were sold, the whole of the surplus after discharging the liabilities of the company and returning their capital to the preference shareholders, would on the principle adopted by the Court below have been the property of such shareholders, and it must have been declared that the ordinary shareholders had no title to it, or to share in its distribution, that though members they had no "rights or interests" in the company. I admit that the case I have put is an extreme though it is not an impossible one, but I think it may well be put to test the equity of the principle laid down. It may be said that in the case I have put the profits could not be payable according to the amount paid up on the shares, and that in that case some other principle must be applied, and the amount subscribed or some other test must be taken. But if this be so the principle on which assets were to be distributed would be altered, it may be in a manner most detrimental to the ordinary shareholders, as soon as any call, however small, was made on the shares.

I turn now to the considerations which have led me to the conclusion that the surplus ought to be divided amongst the shareholders according to the shares which they hold in the company.

The present company has been prosperous, and the result of the winding-up is to leave a considerable surplus of assets over liabilities after returning all the capital. But I think we are naturally led to inquire how the different classes of shareholders would have been dealt with if the reverse had been the case, and a loss had resulted. This has been the subject of decision. It has been held, and I think rightly, that in such a case where there is no provision to the contrary in the articles of the company the loss is not to be borne in the proportion in which it has been declared in the present case that the surplus is to be distributed. In the case of the Anglesea Colliery Company [Law Rep. 2 Eq. 379; 1 Ch. 555.] it was held by Lord Hatherley when Vice-Chancellor, and his judgment was affirmed on appeal, that the liquidators were entitled to make a call for the purpose of adjusting the rights of the members so that the losses should fall equally on all, without regard to the amount which they had paid up on their shares. And in the case of Ex parte Maude [FN16 Law Rep. 6 Ch. 51.] where some of the shareholders had paid £20 and others £25 a share, and a surplus was left after discharging the liabilities of the company, the liquidators were held to be bound to pay out of these assets £5 to each shareholder who had paid £25 before distributing the surplus rateably. One of the articles of that company provided that the directors might declare a dividend to be paid to the shareholders in proportion to the number of their respective shares "and the amount paid up thereon respectively," and this was relied on as shewing that the loss ought to be proportioned to the amount paid up. Mellish L.J. however said:

"In my opinion we cannot draw any inference from article 114 beyond that which it states, and we cannot infer that the shareholders meant to make such an important alteration as that in case of the company being wound up the losses should be divided in proportion to the amount paid up and not to the amount subscribed."

And he held that the true view of the Companies Act was that the losses were to be borne, not in proportion to the amount paid up, but to the subscribed capital. Where the articles are silent on the subject, why should a different rule prevail as regards surplus assets? Where there is no agreement as to either it would seem only natural and equitable, that loss should be borne and benefits shared in the same proportion. And, in my opinion, this is the true principle to apply. In the course of the argument, I put the case of a company being wound up, having a large asset of doubtful value, and not capable of immediate realization. In such a case it might be necessary or prudent to call up the unpaid capital in order to discharge the liabilities of the concern, even though it turned out that this asset was more than sufficient to meet them. If the capital were thus called up the surplus would be distributed rateably amongst all the shareholders, whereas supposing the judgment under appeal to be correct, if the asset had been first realized, the distribution amongst the two classes of shareholders would have been very different. The rights and interests of the shareholders in the company would thus be made to depend on the urgency of the creditors or the timidity of the liquidators, a result neither satisfactory nor equitable.

I observe that the same consideration occurred to Mellish L.J. in the case I have just referred to. He said,

"If any other construction were adopted it would make the way in which the losses are borne depend upon the accident whether the assets could be immediately realized, or whether it was necessary to make a call to pay the debts. If the £5 per share had been called up to pay pressing debts, it could not be denied that the assets when got in would be divided pro rata; that is to say, the losses would be borne by the shareholders in proportion to their subscribed capital. Here it happened that the assets were immediately realized or that the creditors did not press for payment, so that a call was not necessary before the assets were divided, but that accident ought not to alter the way in which the assets are to be divided."

Surely all this applies with equal force to the profit resulting on the winding up of the undertaking. The truth is that each member who has subscribed for a £10 share owns the same share in the company whether it be or be not paid up, and if he is so regarded for the purpose of meeting losses, I cannot see that it is equitable that he should be otherwise dealt with when we are considering to what share of the profit he is entitled. When the whole of the capital has been returned both classes of shareholders are on the same footing, equally members and holding equal shares in the company, and it appears to me that they ought to be treated as equally entitled to its property. It may be that the principle which I recommend your Lordships to adopt will not secure absolutely equal or equitable treatment in all cases, but I think that it will in general attain that end more nearly than any other which has been proposed.

I am therefore of opinion that the judgment appealed from should be reversed; and that it should be declared that the balance of the proceeds of sale ought to be divided amongst the holders of all the shares in the Bridgewater Navigation Company Limited, in proportion to the shares held by them respectively.

I accordingly move your Lordships that the judgment appealed from be reversed, and that the declaration I have just read be made, and that (as agreed between the parties) it be further declared that the costs of the liquidators and of the appellant and the respondents, both in the court below and in your Lordships' House, as between solicitor and client upon the higher scale, may properly be retained and paid by the liquidators out of the assets of the Bridgewater Navigation Company.

LORD FITZGERALD:--  
  
My Lords, my noble and learned friend who has just spoken has in his exhaustive judgment not only carefully given all the facts and criticised and disposed of the various contentions, but he has also examined the case in all its bearings and fully and clearly indicated his reasons for not adopting the decision of the Court of Appeal. I concur in the conclusion at which he has arrived, though I do not find it necessary to say that I accept all the reasons of my noble and learned friend. I am to be followed by a second elaborate speech from my noble and learned friend (Lord Macnaghten), the notes of which I have read, and as he arrives at the same result I need not express my concurrence a second time. Coming between such weighty authorities I confidently anticipate your Lordships' sanction to my being concise.

The Bridgewater Canal Company Limited, formed in 1872, had become the proprietors of an extensive and valuable undertaking which appears, as far as we can judge, to have been worked ably and profitably with an increasing business down to 1880 when the company deemed it expedient to raise £600,000 for the purpose of paying off a mortgage of the like amount, and their financial plan appeared to be as follows--the company had already called up £ 250,000 of their subscribed capital—they made a further call of £1 a share, amounting to £100,000, and, in the exercise of the powers which they undoubtedly had, they passed a resolution calling into existence their uncreated capital by the creation of 30,000 further shares of £10 each, to be paid up in full within the two years succeeding. The terms and conditions on which the new shares were to be issued and the new shareholders to be received in respect of those shares as members of the company are fully stated in the letters of allotment. "Allotment letter, dated 27th April, 1880. The Bridgewater Navigation Company Limited, 5 per cent. preference shares. Sir, I beg to inform you that at an extraordinary general meeting of the members of the Bridgewater Navigation Company, Limited, held on the 27th April, 1880, the following resolution was passed:--That the balance of the uncreated capital of the company, namely, £ 300,000, be now created, and that there be issued 30,000 new shares of £10 each on the following terms and conditions, namely—

(1) The new shares to entitle the holders thereof to a dividend after the rate of 5 per cent. per annum upon the amount for the time being called up thereon, and taking precedence of and priority over all dividends and claims of the holders of the ordinary shares of the company.

(2) The calls upon the new shares to be payable as follows:--£1 per share on the 30th June, 1880; £1 10s. per share on the 31st December, 1880; £2 10s. per share on the 30th June, 1881; £2 10s. per share on the 31st December, 1881; £2 10s. per share on the 30th June, 1882.

(3) Interest at the rate of 5 per cent. per annum to commence from the date when each call becomes due.

(4) Any moneys paid and received with the consent of the directors in advance of calls to bear interest at the rate of 4 per cent. per annum. That in the first instance the new shares shall be allotted to the holders of ordinary shares registered in the books of the company at this date as near as may be in the proportion of three new shares for every ten ordinary shares. That any new shares not accepted by the members to whom they are allotted remain at the disposal of the directors, to be issued at such times, on such terms, and in such manner as they may think fit for the benefit of the company. An allotment of your proportion of the new shares is annexed hereto."

The subsequent practice of the company seems to have been to pay out of profits to the preference shareholders the preference dividend of £5 per cent., and the net residue of the annual profits after deducting all outgoings and providing for a reserve was distributed equally amongst the holders of the original £10 shares on which £3 10s. only had been paid up.

The next step was the statute sale of the whole undertaking to the Manchester Ship Canal Company. It seems to have been a successful stroke of business for the Bridgewater Company, and probably was not a losing one to the Manchester Company, as they got a property necessary for the purposes of their great undertaking, and got it as a going and profitable concern, with fair prospects of increasing annual profits. The Bridgewater Company as a working company having thus come to an end, a voluntary winding-up was resorted to.

The liquidators paid off every liability, and they further paid to the preference shareholders their whole capital with interest at 5 per cent., and to the ordinary shareholders their capital with their share of profits. The Bridgewater Company thus became clear of every liability, and the liquidators found that there remained the clear surplus of £550,000 to be distributed amongst those who had been the shareholders, whether ordinary or preference. The question is, on what principle is that surplus to be divided?

The case came first before North J. and the Court of Appeal adopted his decision. North J. says, at page 113:

"I find, therefore, that the parties have not entered into any contract as to the mode of division of this surplus, and that it is to be divided on equitable principles. There is little direct authority to assist me in the matter."

I quite concur so far with the learned judge. At page 114 he adds:

"But the question I have to decide is not what is a reasonable mode, but what is the equitable mode of distributing the increment in question. In my opinion the recent case before the Court of Appeal of Sheppard v. Scinde, Punjaub, and Delhi Ry. Co. [36 W. R. 1.] is so like the present as not only to assist me, but to furnish an authority I ought to follow."

That case as an authority on the present appeal has been already disposed of by my noble and learned friend. North J. then quotes a passage from the judgment of Cotton L.J., in the Scinde Case:--

"I think the general law is, that after providing for the capital at the credit of each partner, the surplus assets should be distributed in the proportions in which the capital has been contributed by the partners."

There is the principle on which North J. acted as the equitable mode of distributing the surplus.

The Court of Appeal adopted it.

My Lords, I have felt myself unable to act on this supposed rule as applicable to such an undertaking as the Bridgewater Canal Company Limited, and there is no authority for doing so. It may fit an ordinary common law partnership, but when applied to an association such as is now before us, it works out inequality and injustice and not equity. The error seems to me in supposing that there is an exact analogy between an ordinary commercial partnership and a statutable undertaking called into existence under the Joint Stock Companies Acts and regulated by the statute and its own memorandum of association and articles. There may be likeness in some particulars, but there is no real analogy.

Then what rule is to guide this distribution? There is in my opinion no contract to guide us in the circumstances which have arisen, and there is nothing to be found in the memorandum of association, or in the articles, or in the statutes, to give us any real help. The resolutions calling into existence the preference shares are equally a blank on the subject, but I have no doubt that the able men who then directed the affairs of the company, if they had foreseen the probability of a surplus on winding-up, would have been the last to agree to give up the lion's share to the preference shareholders.

Then, on what rule or principle are we to proceed? I concur in what my noble and learned friend has adopted as the equitable principle to be acted on. There is a clear stage to act on. The shareholders have been all reduced to one common level. Each shareholder of a share represents a former share in the company, and we have some authority that between the several classes of shareholders each represents £10 in the subscribed capital of the company, and that for the present purpose, and in this particular case, it matters not whether the £10 had been actually paid up in full, or subscribed for and partially paid.

We have some authority for this in Oakbank Oil Company v. Crum [8 App. Cas. 65.], which, though not an authority in point, at least imports that the proper interpretation of "share" is the shareholder's proportion in the subscribed capital of the company which appears in his name on the register of shareholders.

My Lords, I am clearly of opinion that the only equitable principle to be acted on in this case is that of equality. That is an equitable principle, and, in giving effect to that rule, each and every shareholder should receive in respect of his share an equal proportion of this surplus.

LORD MACNAGHTEN:--

My Lords, the question involved in this appeal is said to be novel. No direct authority on the point was cited. Nor am I aware of any, except a decision of Stirling J., In re London and Brighton Stock Exchange Co. Limited, on the 12th of August, 1887, which is only to be found in the Times' Reports [4 Times L. R. 2.]. The case of Sheppard v. Scinde, Punjaub and Delhi Ry. Co. [36 W. R. 1.], which was treated as an authority in the courts below, has since been reviewed in this House, and, in affirming the decision of the Court of Appeal, every one of the noble and learned Lords who addressed the House relied simply and solely on the special circumstances of the case.

The question before your Lordships is this: In the liquidation of a company limited by shares, what is the proper mode of distributing assets not required for payment of debts and liabilities, or for the costs of the winding-up, or for the adjustment of the rights of the contributories amongst themselves? As incidental to that question, your Lordships have to consider whether the mode of distribution can be affected by one or more of the following circumstances:--

(1) That the shares of the company were paid up unequally, some being fully paid up, others being paid up only in part.

(2) That the fully-paid-up shares were issued separately as preference shares, carrying a preferential dividend of 5 per cent., without any further right to participate in the profits of the business.

(3) That by the regulations of the company dividends on the company's shares were payable in proportion to the amounts paid up thereon.

The answer, as it seems to me, must depend on the principles applicable to companies limited by shares, and on the provisions contained in the Companies Act, 1862. It is, perhaps, rather beside the mark to discuss the general doctrines of partnerships and to examine particular cases of partnership contracts. The scheme of the Act and the directions to be found there are, I think, a safer guide than any analogies can be.

Every person who becomes a member of a company limited by shares of equal amount becomes entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations of the company, entitled, as a necessary consequence, to the same proportionate part in all the property of the company, including its uncalled capital. He is liable in respect of all moneys unpaid on his shares to pay up every call that is duly made upon him. But he does not by such payment acquire any further or other interest in the capital of the company. His share in the capital is just what it was before. His liability to the company is diminished by the amount paid. His contribution is merged in the common fund. And that is all.

When the company is wound up, new rights and liabilities arise. The power of the directors to make calls is at an end; but every present member, so far as his shares are unpaid, is liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities, the costs of winding-up, and such sums as may be required for the adjustment of the rights of the contributories amongst themselves.

In the case of compulsory winding up, the Act says, in sect. 109, that "the Court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that remains amongst the parties entitled thereto."

In the case of voluntary winding up, the language is not quite the same, and the directions are rather more explicit; not that there can be any difference as to the proper mode of distributing assets in the two cases; no one has suggested that. A sufficient reason for the difference of language is, I think, to be found in the circumstance that while the privilege of voluntary liquidation is confined to companies under the Act, any partnership or association consisting of more than seven members may be wound up compulsorily. To meet every case of compulsory liquidation it was necessary to use the most general language. Besides it is obvious that specific directions, useful and proper for the guidance of voluntary liquidators, are not so requisite when the liquidation is under the Court. As Lord Cairns points out in Webb v. Whiffin [Law Rep. 5 H. L. at p. 735.], "it was naturally thought important in the case of voluntary windings up to make specific provisions and to give specific directions as to matters which were supposed to be so plain and so necessarily consequential upon the general scheme of the Act, that in a winding-up under an order of the Court, it was not thought necessary to give express directions upon these matters of detail."I cannot therefore agree with Cotton L.J. that sects. 109 and 133 are to be read together, with the result that the more general language of sect. 109is to neutralise or obscure the prima facie meaning of the more specific directions given in the case of a voluntary winding-up.

The consequences that are to ensue upon the voluntary winding-up of the company are to be found in sect. 133. It is there provided that "the property of the company shall be applied in satisfaction of its liabilities, pari passu, and subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company." Then the section goes into details as to the powers of the liquidators, and ends by saying that "the liquidators shall pay the debts of the company, and adjust the rights of the contributories amongst themselves."

Now in the case of members of a company limited by shares, what are "their rights and interests in the company," in the absence of any special regulation, and what are the rights of the contributories amongst themselves which have to be adjusted in the winding-up?

Amongst the rights to be adjusted, the most important are those which arise when there is a difference between shareholders in the amount of calls paid in respect of their shares. Before winding-up no such rights exist; whatever has been paid by the shareholders of one issue in excess of the contributions of their fellow shareholders of a different issue, must have been paid in pursuance of calls duly made or in accordance with the conditions under which the shares were held. While the company is a going concern no capital can be returned to the shareholders, except under the statutory provisions in that behalf. There is therefore during that period no ground for complaint; no room for equities arising out of unequal contributions. In the case of winding-up everything is changed. The assets have to be distributed. The rights arising from unequal contributions on shares of equal amounts must be adjusted, and the property of the company, including its uncalled capital not required to satisfy prior claims, must be applied for that purpose. But when those rights are adjusted, when the capital is equalised, what equity founded on inequality of contribution can possibly remain? The rights and interests of the contributories in the company must then be simply in proportion to their shares. This was the view of Stirling J. in the case I have referred to. Your Lordships, however, were reminded more than once that "the Act does not say so." You were told that if that had been the meaning of the legislature, nothing would have been more easy than to have said in so many words that the distribution amongst the members should be "in proportion to their shares." This argument would have had much weight but for one circumstance. It overlooks the fact that the provisions for voluntary liquidation apply to some companies which have not a capital divided into shares.

It now only remains to deal with the various claims put forward in the course of the argument.

The ordinary shareholders say that the preference shareholders are entitled to a return of their capital, with 5 per cent. interest up to the day of payment, and to nothing more. That is treating them as if they were debenture-holders, liable to be paid off at a moment's notice. Then they say that at the utmost the preference shareholders are only entitled to the capital value of a perpetual annuity of 5 per cent. upon the amounts paid up by them. That is treating them as if they were holders of irredeemable debentures. But they are not debenture-holders at all. For some reason or other the company invited them to come in as shareholders, and they must be treated as having all the rights of shareholders, except so far as they renounced those rights on their admission to the company. There was an express bargain made as to their rights in respect of profits arising from the business of the company. But there was no bargain--no provision of any sort--affecting their rights as shareholders in the capital of the company.

Then the preference shareholders say to the ordinary shareholders,

"We have paid up the whole of the amount due on our shares; you have paid but a fraction on yours. The prosperity of a company results from its paid-up capital; distribution must be in proportion to contribution. The surplus assets must be divided in proportion to the amounts paid up on the shares."

That seems to me to be ignoring altogether the elementary principles applicable to joint-stock companies of this description. I think it rather leads to confusion to speak of the assets which are the subject of this application as "surplus assets" as if they were an accretion or addition to the capital of the company capable of being distinguished from it and open to different considerations. They are part and parcel of the property of the company--part and parcel of the joint stock or common fund--which at the date of the winding-up represented the capital of the company. It is through their shares in the capital, and through their shares alone, that members of a company limited by shares become entitled to participate in the property of the company. The shares in this company were all of the same amount. Every contributory who held a preference share at the date of the winding-up must have taken that share and must have held it on the terms of paying up all calls duly made upon him in respect thereof. In paying up his share in full he has done no more than he contracted to do; why should he have more than he bargained for? Every contributory who was the holder of an ordinary share at the date of the winding-up took his share and held it on similar terms. He has done all he contracted to do; why should he have less than his bargain? When the preference shareholders and the ordinary shareholders are once placed on exactly the same footing in regard to the amounts paid up upon their shares, what is there to alter rights which were the subject of express contract?

Observe how unreasonable this contention on the part of the preference shareholders is. They do not propose to unravel the accounts of the company or to inquire how long the company had the benefit of the contributions from each of the two classes of shareholders, or what was the position of the company when those contributions were made. It may be that the founders of the company made a lucky hit at the outset. Good management may have had something to do   
with the success of the company. And after all, something may perhaps be put down to the fact that the ship canal company was forced to buy a property which lay directly in the track of its undertaking. The preference shareholders discard all these considerations. They take the date of the winding-up as the date which governs the rights of the shareholders in the distribution of what they call surplus assets.

They say, "Our payments then were in excess of the payments of the ordinary shareholders." But that is a mere accident. There was a time not very long ago when the contributions of the ordinary shareholders were in advance of those of the preference shareholders. If the company had gone on they might soon have been on a level again. The prosperity of this company was certainly not due to the contributions of the preference shareholders. They did not come on the scene till just before the last act. It so happens that the very same directors' report which records their final payment, calls attention to the ship canal as a practical project. When the preference shareholders were invited to come in the prosperity of the company was assured. The business was flourishing; the shareholders were receiving dividends of 8 per cent. with occasional bonuses, and the directors were in a position to borrow at 4 per cent. Instead of borrowing, the company resolved to issue these preference shares, on the condition that they should be fully paid up within a limited time. As the company chose to admit Mr. Rigby's clients as shareholders they must have the rights of shareholders, but I cannot see why they should claim more.

Then it is said on behalf of the preference shareholders that the provision for payment of dividends in proportion to the amounts paid up on the shares leads to an inference that the distribution of surplus assets was to be made in the same proportion. I do not think that it leads to any inference of the kind. It is a very common provision nowadays, though it is not what you find in Table A. And it is a very reasonable provision, because during the continuance of the company, and while it is a going concern, it prevents any sense of dissatisfaction on the part of those who have paid more on their shares than their fellow shareholders of a different issue. But when it has come to an end I cannot see how it can be used to regulate or disturb rights with which it had nothing to do even while it was in force.

I am therefore of opinion that the judgment of the Court of Appeal must be varied, and that it should be declared that subject to the payment of the costs, charges and expenses of the winding-up, including the costs of all parties in this application here and in the courts below, the assets of the company remaining undistributed other than the reserve fund, which is not the subject of this application, ought to be distributed among all the shareholders in proportion to their shares.

Order appealed from reversed, and order of North J. varied by declaring that "the balance of the proceeds of sale of the said undertakings to the Manchester Ship Canal Company remaining after satisfaction of all the debts and liabilities Lords' Journals 9th Aug. 1889.