**WHITE**

**v.**

**BRISTOL AEROPLANE COMPANY LD.**

IN THE COURT OF APPEAL

ON THE 11TH DAY OF DECEMBER, 1952

**LEX (1952) – 2 W.L.R. 144**

OTHER CITATIONS

2PLR/1953/1 (CA)

[1952 W. 4263.]

[1953] 2 W.L.R. 144

**BEFORE THEIR LORDSHIPS:**

EVERSHED M.R.

DENNING AND ROMER L.JJ.

**REPRESENTATION**

J. G. STRANGMAN Q.C. and K. L. COGHLAN for the Company

NEVILLE GRAY Q.C. and DENIS S. CHETWOOD for the Plaintiff

Solicitors:

STANLEY & CO.;

E. F. TURNER & SONS.

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

COMPANY LAW:- Articles of Association of company dealing with increase of capital – Classes of shares - Preference shareholders and ordinary shareholders – Rights attaching to classes of shares – How determined - Proposed increase of capital- Notice summoning general meeting of ordinary shareholders to authorize increase of shares -Action by preference stockholder for injunction against same on ground that sanction of preference stockholders by extraordinary resolution required – Need to determine questions with reference to Articles and constitution of company

**ORIGINATING COURT**

SUMMARY OF FACTS AND JUDGEMENT

The defendant company was proposing to increase its capital by the issue of 660,000 £1 preference stock, ranking pari passu with the existing 600,000 £1 preference stock, and 2,640,000 ordinary shares of 10s. each intended to rank pari passu with the existing ordinary stock, all the new shares to be issued to the existing ordinary stockholders and paid for out of the reserve fund of the company.

The plaintiff was a preference stockholder and brought proceedings on behalf of himself and all the other preference stockholders and moved for an interim injunction to restrain the company from (a) convening a general meeting for this purpose without summoning the preference stockholders to attend the meeting; and (b) passing or acting upon the proposed resolution without the sanction of an extraordinary resolution passed at a separate meeting of the holders of the preference stock in accordance with article 68 of the company's articles of association.

Article 62 of the company's articles of association conferred on the company in general meeting power to issue the proposed new shares. Article 68 provided so far as material: "All or any of the rights or privileges attached to any class of shares forming part of the capital for the time being of the company may be affected, modified, varied, dealt with, or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class..." Under article 83 the holders of preference stock were not to receive notice of a general meeting or to attend and vote there unless the meeting was convened (inter alia) "to consider a resolution directly affecting their rights or privileges as a separate class":-

APPEAL from Danckwerts J.

The defendant company had an issued share capital of £3,900,000 consisting of £600,000 five per cent. cumulative preference stock of £1 each, and £ 3,300,000 ordinary stock, and it was proposing to increase its share capital by £660,000 preference shares of £1 each, ranking pari passu with the existing preference stock, and 2,640,000 shares of 10s. each, ranking pari passu with the existing ordinary stock. The new preference and ordinary shares were to be issued to the existing ordinary shareholders and paid for out of the reserve fund of the company.  
The company therefore proposed to summon a general meeting of the ordinary shareholders for the purpose of obtaining their authority for what was purposed. Draft notices had been sent out. In these circumstances the plaintiff for and on behalf of himself and all the other preference stockholders brought proceedings for an injunction to restrain the company from

"(a) convening a general meeting to consider the resolutions set out in the draft notice ... without giving notice of such general meeting to the holders of the preference stock of the company, and

(b) passing or acting upon such resolutions without the sanction of an extraordinary resolution passed at a separate meeting of the holders of such preference stock in accordance with article 68 of the defendant company's articles of association."

And the plaintiff moved for an interim injunction.

The material articles of association of the company are all stated in the judgment of Evershed M.R.

DECISION APPEALED AGAINST

Danckwerts J. granted the injunction asked for, applying his previous decision in In re John Smith's Tadcaster Brewery Co.Ld., [[1952] 2 All E.R. 751.] and holding that the proposed increase in the capital of the company would affect the voting rights of the holders of the existing preference stock.

The company appealed.

ISSUES FOR DETERMINATION OF APPEAL WITH ARGUMENTS OF COUNSEL

J. G. Strangman Q.C. and K. L. Coghlan for the company.

There is no ground for saying that the rights of the existing preference stockholders are affected by the proposed issue of new preference shares and ordinary shares, and if their rights would be left undisturbed Danckwerts J. ought not to have granted the injunctions asked for by the plaintiff. In acting as he did Danckwerts J. relied on his earlier decision in In re John Smith's Tadcaster Brewery Co. Ld., [[1952] 2 All E.R. 751.] a case which is under appeal. The question turns on the memorandum and articles of association of the company, and clause 6 of the memorandum confers power on the company to issue new capital. The relevant articles of association are article 62, which empowers the company in general meeting to issue new capital and as to preference stock or shares to rank pari passu with the existing preference stock but so that the preference stock shall not exceed the ordinary shares; article 63 enables the company in general meeting to offer new shares to the existing shareholders. Then article 68 provides that

"all or any of the rights or privileges attached to any class of shares ... may be affected, modified, varied, dealt with, or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class." It is on that that the plaintiff relies, on the ground that the preference stockholders' rights are "affected" by what is proposed, and the claim to be summoned to vote at the general meeting of the company is based on article 83, on the ground that the meeting is to be convened "to consider a resolution directly affecting their rights or privileges as a separate class."

When the matter is considered without reference to authorities, not one of the rights conferred on the preference shareholders are being disturbed by what is proposed. What is being done is within the powers of the company in general meeting under article 62. It was only if it was proposed to issue shares in priority to the preference shares that this could not be done without an extraordinary resolution passed by the members of the class at a separate meeting. Further, the proportion that the preference stock bears to the ordinary stock will be improved by what is proposed. Having regard to the facts and the articles of association it cannot be said that what is proposed will affect in any way the bundle of rights of the existing preference stockholders.

The material authorities are, first, In re Mackenzie & Co. Ld., [[1916] 2 Ch. 450.] where the material words of the particular article were that the rights of the preference shareholders were not without the sanction in writing of two-thirds of the class to be "altered, modified, dealt with or affected in any manner whatsoever." The proposal was to reduce the company's capital, preferred and ordinary, and Astbury J. rejected the argument that the consent of the preference shareholders was required. The next case is Greenhalgh v. Arderne Cinemas Ld. [[1946] 1 All E.R. 512.] There as part of a transaction for advancing money the plaintiff had issued to him 1941 2s. shares with the like voting power as the other ordinary shares, which were 10s. shares. To meet this the proposal of these other shareholders was to divide each 10s. share into five 2s. shares so as to make their voting power five times greater. The court held that this would not vary the rights of the holder of the 1941 2s. shares. There Lord Greene M.R. said that the rights of the holders of the 1941 2s. shares "are affected, as a matter of business. As a matter of law, I am quite unable to hold that, as a result of the transaction, the rights are varied; they remain what they always were." So here the rights of the preference shareholders are not affected in law by what is proposed even if it could be said that they were affected in value.

Neville Gray Q.C. and Denis S. Chetwood for the plaintiff.

The order of the judge was the logical one and ought to be upheld. Where the word "affected" is added to all the other words in article 68, it must be treated as having a very wide meaning. It is the widest word of all those used. This view is supported by the latter part of article 62. The rights of preference stockholders are (1) the right to 5 per cent. interest, (2) the preferential rights conferred on them in a winding up, and (3) the voting rights expressly contemplated in article 62. Any member of the Stock Exchange would say that the voting rights of a majority of the preference stockholders would be affected by the proposed issue to the ordinary shareholders. We rely on the word "affected" and would say that the rights of the existing preference stockholders would clearly be affected: see per Lord Greene M.R. in Greenhalgh v. Arderne Cinemas Ld., [[1946] 1 All E.R. 512, 519.] where he said the rights of the plaintiff were affected as a matter of business though not varied in law. The test here is not the value of the preference shares but it may be the value of the preference shareholders' rights. In In re Mackenzie & Co. Ld. [[1916] 2 Ch. 450.] The whole argument was whether rights were "altered" or "modified" and the judge there said that the rights were not altered without saying whether they were affected. "Affected" is the widest term and it is contended that here the preference stockholders' rights would be affected by what is proposed.

The question whether they have a right to attend the general meeting under section 83 is of little importance and, if the plaintiff is not right as to the need for a class meeting under section 68, the question under article 83 is of little concern

J. G. Strangman Q.C. in reply.

DECISION OF THE COURT OF APPEAL

Held, that the proposed issue of new capital did not "affect" the rights or privileges of the existing preference stockholders. They might be affected as a matter of business by reason of the new preference stock which would be in the possession of the ordinary shareholders and have a majority over the existing preference stock. This, however, would affect only the enjoyment of the rights, and not the rights themselves.

In re Mackenzie & Co. Ld. [1916] 2 Ch. 450 and Greenhalgh v. Arderne Cinemas Ld. [1946] 1 All E.R. 512 considered.

Decision of Danckwerts J. reversed.

**MAIN JUDGEMENT**

EVERSHED M.R.

The question raised in this appeal is whether, according to the proper construction of the memorandum and articles of association of the Bristol Aeroplane Co. Ld., to which I will refer hereafter as "the company," the proposed distribution (by way of capitalization of undistributed profits) of fully paid-up preference and ordinary shares requires: (1) that a separate meeting of the existing preference stockholders should be summoned, and an extraordinary resolution in favour of the proposals passed thereat; and (2) that the existing preference stockholders should be summoned to attend, and vote at, the general meeting of the company.  
Before I refer to the relevant articles, it may be convenient to state the existing capital position of the company. There have been issued, and are fully paid up, 600,000 preference shares of £1 each, since made into preference stock; in addition, there have been issued and paid up 6,600,000 ordinary shares of 10s. 0d. each, which have also been converted into £3,300,000 ordinary stock. The proposal is to increase the capital from its existing figure of £3,900,000 to £5,880,000, by the creation first of 660,000 new cumulative preference shares of £1 each, ranking pari passu in all respects with the present preference stock, so as to form a uniform class therewith, and second by the creation of 2,640,000 new ordinary shares of 10s. each, to rank on conversion into £1 stock pari passu in all respects with the existing ordinary stock. It should be pointed out that these new shares will all be distributed among the existing ordinary stockholders; it is therefore manifest that the ordinary stockholders, by obtaining between them the 660,000 preference shares of £1 each, or its equivalent amount of stock, will, on a matter which has solely to be debated by preference stockholders, have a majority over the existing preference stockholders; and it is also manifest that upon a matter on which all the stockholders, preference and ordinary, debate together, the new ordinary stock to be issued will swell the total number of votes that can be cast by ordinary stockholders - although it is fair to add that the proportion of votes which ordinary stockholders will have as against preference stockholders will be reduced from the present ratio of about 11 to one to the smaller ratio of about seven-and-a-half to one.

It has been the contention of the plaintiff, who is the representative of the preference stockholders - a contention which was successful in the court below - that the proposal now made falls within the ambit of certain clauses in the articles which I will read, so as to give the preference stockholders the right to a separate meeting, and to attendance at the general meeting of the company. I turn, therefore, at once to the articles, and I am bound to say that the draftsman has displayed a prolixity of expression which has, I think, given rise to the difficulty with which the company, and the court, are faced. It will be sufficient if I go at once to article 61, observing only that by a previous article, article 50, the words "share" and "shareholders" are later used as comprehending "stock" and "stockholders."  
Article 61 sets out the present capital, and indicates the rights, or some of the rights - for it is not in this respect exhaustive - which belong to the preference stockholders. After stating the figures which I have already mentioned, the article proceeds:

"The said preference stock shall confer upon the holders thereof the right to a fixed cumulative preferential dividend at the rate of five per cent. per annum on the capital paid up or credited as paid up thereon, and the right in a winding up to repayment of the capital paid up or credited as paid up thereon, together with all arrears and accruals of the said preferential dividend down to the date of such repayment, whether earned or declared or not, before any return of capital is made on the ordinary stock or shares, but shall not confer any further right to participate in profits or assets."

There then follows a number of articles dealing with increase of capital, of which the most important is article 62, which I will read in full:

"The company may from time to time, in general meeting, whether all the shares for the time being authorized shall have been issued, or all the shares for the time being issued shall have been fully called up or not, increase its capital by the creation of new shares, such aggregate increase to be of such amount and to be divided into shares of such respective amounts as the general meeting resolving upon the creation thereof shall direct. Subject and without prejudice to any rights for the time being attached to the shares of any special class, any shares in such increased capital may have attached thereto such special rights or privileges as the general meeting resolving upon the creation thereof shall direct, or, failing such direction, as the directors shall by resolution determine, and in particular any such shares may be issued with a preferential, deferred or qualified right to dividends or in the distribution of assets and with a special or without any right of voting. No shares shall be issued so as to rank in priority to the preference stock referred to in article 61 either as to dividend or capital, without the sanction of an extraordinary resolution passed at a separate meeting of the holders thereof in manner provided in article 68; but preference shares may without any such sanction be created and issued so as to rank pari passu therewith, provided that the total nominal amount of the preference capital for the time being issued shall not exceed the total nominal amount of the ordinary capital for the time being issued and outstanding."

Article 63 provides for shares being offered to the existing members in a particular manner. Article 64 says:

"Subject to any directions that may be given in accordance with the powers contained in the memorandum of association or these articles, any capital raised by the creation of new shares shall be considered as part of the original capital, and as consisting of ordinary shares, and shall be subject to the same provisions with reference to the payment of calls, transfer, transmission, forfeiture, lien and otherwise as if it had been part of the original capital."

Article 68 bears the familiar heading "Modification of Rights," and it reads as follows:

"Subject to the provisions of section 72 of the Act"

- that is, of the Companies Act, 1948, relating to the right of holders of special classes of shares to apply to the court in certain circumstances where variation of their rights is proposed; it is a section which does not apply in the present case –

"all or any of the rights or privileges attached to any class of shares forming part of the capital for the time being of the company may be affected, modified, varied, dealt with, or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class. To any such separate meeting all the provisions of these articles as to general meetings shall ... apply."

I must next refer to article 83; and we now pass from the first point, whether there must be a separate meeting, to the second point, whether the preference stockholders are entitled to be present, and to vote, at the general meeting. Article 83 provides:

"Subject to any special rights or restrictions for the time being attached to any special class of shares in the capital of the company, on a show of hands every member personally present shall have one vote only, and in case of a poll every member present in person or by proxy shall (subject as hereinafter provided) have one vote for every share held by him or in the case of the said preference stock one vote for every £1 of preference stock held by him or in the case of the said ordinary stock one vote for every ten shillings of ordinary stock held by him: Provided that preference shares or preference stock shall not confer on the holders thereof the right in respect thereof to receive notice of or to attend or vote at a general meeting unless the dividend thereon is in arrear or unless the meeting is convened to consider a resolution for winding-up or to reduce capital or to consider a resolution directly affecting their rights or privileges as a separate class"

- and the last sentence is not material.

The only other articles to which I need allude are articles 131 and 132. Article 131, under the heading of

"Dividends and Reserve Fund," provides as follows: "Subject to any rights or privileges for the time being attached to any shares in the capital of the company having preferential, deferred or other special rights in regard to dividends, the profits of the company which it shall from time to time be determined to distribute by way of dividend shall be applied in payment of dividends upon the shares of the company in proportion to the amounts paid up thereon respectively" as therein stated. Article 132 provides: "The directors may, with the sanction of a general meeting, from time to time declare dividends,"

etc. Finally, it is under article 139 that the proposed scheme of capitalization is intended to be carried through; but I need not read that article.

From what I have read it will be observed first, that the rights of the preference stockholders consist first of the right to priority in respect of the dividend of five per cent. on the paid-up capital - that is, in priority to any dividend paid to ordinary stockholders; secondly, that the preference stockholders have the right to repayment in a winding-up of capital and unpaid dividends on their shares before anything is distributed to the ordinary stockholders; and thirdly, that they have a qualified right to attend meetings and to vote. Their voting rights by reference to the amount of capital paid up are half those of the ordinary stockholders, and they are entitled to influence the transactions of the company only at meetings at which it is proposed to deal with subject-matters of the kind which I have read from article 83. They have also, to complete the matter, certain special rights to be separately summoned in case there is anything to be done affecting, modifying, varying, dealing with or abrogating in any way their other rights or privileges.  
Those being the relevant articles, the question shortly is: will the effect of this proposed distribution, if carried out, be to "affect" the rights of the preference stockholders? I can state it thus briefly, because Mr. Neville Gray, for the plaintiff, has not sought to make any distinction between "rights" and "privileges," and he has, in view of certain authorities which I shall later mention, not contended that the proposals operate, or would operate, to "modify " or "vary," still less to "abrogate," the existing preference stockholders' rights; and, finally, Mr. Gray does not attach any separate significance to the words "dealt with."

The argument for the plaintiff, in its briefest form, is that this word "affect," particularly when followed at the end of the collection of words I have mentioned by the phrase "in any manner," is a word of the widest import, and that it therefore must be taken to cover, and as having been intended to cover, a transaction which, though not in any way modifying or varying the rights, would in some way otherwise affect them; and, as Mr. Chetwood added in his few observations following those of his leader, if it has a meaning of that kind, the precise method whereby the result is arrived at cannot matter. On the other side it has been argued that this formula is in substance one of some antiquity; that there is authority for the view that no such broad and significant meaning should be given to the word "affected"; and further, that to give so broad a meaning to that word is not consistent with the inevitable implications of other parts of these regulations, particularly articles 62 and 64. The judge came to the conclusion that the plaintiff's contentions were well-founded, and he therefore granted injunctions to restrain the company from carrying out their proposed scheme of increase of capital and distribution of new shares, without first having a separate extraordinary meeting of the preference stockholders, and also summoning the preference stockholders to the general meeting of the company.

In so holding he followed an earlier decision of his own in In re John Smith's Tadcaster Brewery Co. Ld., [[1952] 2 All E.R. 751.] an appeal from which is now pending in this court. The judge, in the latter case - and, indeed, I think, in the present case - expressed the view that the matter was not free from difficulty; nor, indeed, is it, and that is as the result, I venture to repeat, of the use of a multiplicity of words without perhaps ever considering what their significance, singly or in conjunction, might be. But with all respect to the judge, I have come to a conclusion different from that which he entertained. I think, approaching this matter for the moment as a matter of construction of these articles, and without reference to these earlier authorities, that you cannot sensibly give to this word "affected" the wide meaning for which the plaintiff has contended.

It is necessary, first, to note - although on this matter Mr. Gray has not argued to the contrary - that what must be "affected" are the rights of the preference stockholders. The question then is - and, indeed, I have already posed it - are the rights which I have already summarized "affected" by what is proposed? It is said in answer - and I think rightly said - No, they are not; they remain exactly as they were before; each one of the manifestations of the preference stockholders' privileges may be repeated without any change whatever after, as before, the proposed distribution. It is no doubt true that the enjoyment of, and the capacity to make effective, those rights is in a measure affected; for as I have already indicated, the existing preference stockholders will be in a less advantageous position on such occasions as entitle them to register their votes, whether at general meetings of the company or at separate meetings of their own class. But there is to my mind a distinction, and a sensible distinction, between an affecting of the rights and an affecting of the enjoyment of the rights, or of the stockholders' capacity to turn them to account; and that view seems to me to flow necessarily from certain other articles which I have already read.

Let me take first of all article 62; it is divided, so to speak, into three sections. The first indicates that the company may from time to time in general meetings increase the share capital by creating new shares. Up to that stage, no particular characteristics or rights are attached to the new shares created, and should nothing else be done to give them special character, article 64 automatically makes them ordinary shares. As a matter of construction of so much of the article, I find it impossible to hold at that stage that increasing the capital by creating new shares involves an "affecting" of the preference stock - though, of course, if the matter be analysed sufficiently, it is obvious that the result of so doing in some measure, for better or for worse, touches the way in which in the future preference stockholders may turn to account that which they have. You then get the second part of article 62, which introduces for the first time the warning that what follows is without prejudice to the rights of "special classes," by which it is conceded that at least for present purposes the preference stockholders are meant. Without prejudice to them, shares in such increased capital may have attached to them special rights or privileges as to dividends, and in particular as to voting. There again, that second section seems to me to indicate that it is only when these new shares are given special privileges of one kind or another, you may come into conflict with the rights attached to the existing special classes; so that this second step may be capable of being taken only after you have done what has to be done in the way of calling a separate meeting and so forth.

Then the matter is carried still further by the third, and perhaps most significant, part of this article:

"No shares shall be issued so as to rank in priority to the preference stock ... without the sanction of an extraordinary resolution passed at a separate meeting of the holders thereof in manner provided in article 68."

But the article goes on to provide:

"but preference shares may without any such sanction be created and issued so as to rank pari passu therewith,"

subject only to the one limitation that this must not be done to such an extent that the total amount of paid-up preference capital exceed that of the ordinary capital, and so, I assume, leaves to the preference stockholders an insufficient basis of security over the ordinary issued capital.

Without going into too much detail, I cannot make those articles consistent with the view that any variation which in any manner touches or affects the value of the preference stock, or the character or enjoyment of any of their privileges, is within the contemplation of article 68. I think that Mr. Gray had to admit, going still further, that even a deliberate increase of new ordinary shares to rank pari passu with the existing ordinary shares, would on this view of it make necessary separate meetings of the existing preference stockholders and also of the existing ordinary stockholders. I cannot think that such a result ought to be attributed to articles which are, after all, fairly well known as common form. Such a result seems to me to strike at the usual conception of the relations, in a company of this sort, of preference and ordinary stockholders, where the former take their rights subject always to the normal incidence of the company's right to increase its capital.  
I also obtain some assistance from article 83, in two ways. First, with regard to the actual wording - though in documents of this sort I do not attach too much importance to the precise language - instead of a repetition of the phrase "may be affected, modified, varied, dealt with, or abrogated," in article 68 you get the single phrase "directly affecting"; which leads me to the conclusion that "directly affecting" in this article and in this context cannot have so broad and general a meaning as the plaintiff contends. Second, I notice that a resolution to reduce capital is regarded as in itself such as to require the summoning of the preference stockholders to the meeting and as something therefore distinct from a resolution "directly affecting" their rights. Also I do not forget Mr. Strangman's point that even the payment of dividends might, on the broadest view, affect the rights of a preference stockholder. I quite agree that the court ought not, unless it is unavoidable, to reduce to mere futility a particular word which has apparently been deliberately introduced; but I do not think that it is necessary to go so far.  
Examples were put, in the course of the argument, which I think might well answer the question: to what does the word "affected," as distinct from "varied," apply? For example, it might be - though I express no view on it - that a resolution aimed at increasing the voting power of the ordinary stockholders by doubling it, so giving them twofold their present power, without altering any other of the privileges or rights attached to any class, might be said to be something so directly touching the position, and therefore the rights, of the preference stockholders, having regard to the statement of the voting rights in article 83, as to be within the ambit of article 68, albeit that there was no variation of their own individual rights. That case is not before us, and I mention it only to indicate that I am not persuaded that the conclusion which I have indicated involves the result that no meaning, as distinct from variation, can be given to the word "affected."

I must say a word now about the earlier cases. Of Danckwerts J.'s earlier decision I propose to say nothing - all the more, because the case will shortly be coming before this court - save that the articles in that case were not the same as the present articles. There was nothing in the Tadcastercase [[1952] 2 All E.R. 751.] to correspond with the second and third parts, for example, of article 62 in the present case, and Mr. Strangman pointed out other differences, to which I need not allude.

I go back at once to the case which may be said to have been the founding authority in cases of this sort, In re Mackenzie & Co. Ld., [[1916] 2 Ch. 450.] before Astbury J. In that case there were, as here, preference shareholders or stockholders and ordinary shareholders or stockholders. The former had the right to a preferential dividend, but they had no right to priority as to capital in a winding-up. The company proposed to reduce its capital and to make the reduction a rateable reduction upon all the shares, preference and ordinary alike. Objection was taken that the written consent of the preference shareholders as a special class was required. The relevant clause in the memorandum there was in substantially the same form as article 64 and provided:

"Subject to any express provision to the contrary made upon the creation of any class of shares, all or any of the special rights, privileges and advantages attached to any class may, with the sanction in writing of the holders of two-thirds of the issued shares of the class (but shall not without such sanction), be altered, modified, dealt with or affected in any manner whatsoever."

The argument, it is true, appears to have proceeded solely upon the two words "altered" or "modified." I observe, however, having regard to the argument of the leading counsel who appeared for the opposing preference shareholders, that the judge was most careful in his judgment, so far as I can see, to avoid using any one of the four words used in the article. But if the argument of the appellant company here is correct, I should have thought it inevitable that the rights of the preference shareholders there were in a broad sense "affected." True, the rights as stated in the article remained, namely, the right to receive four per cent. on the nominal amount of the capital from time to time paid up or credited as paid up; but in the business sense, in truth and in substance, the effect of what was done was to reduce by an amount corresponding to the amount of the reduction the total dividends of the preference shareholders. The judge rejected the argument (without, as I have said, referring to any one of the four words used in the article) that the preference shareholders were entitled to be separately summoned to an extraordinary meeting, or rather required to sign the necessary consent.

The other case which has been referred to is the case in this court of Greenhalgh v. Arderne Cinemas Ld. [[1946] 1 All E.R. 512.] In that case the plaintiff had, as part of a transaction for advancing money to the defendants, obtained the issue to him of a number of what were called "1941 2s. 0d. shares," and it was one of the terms of the original arrangement that each of those shares should, as regards voting, rank pari passu with the other issued ordinary shares of the company, which happened to be 10s. 0d. shares; so that, in effect, so long as that arrangement stood in relation to the actual paid-up capital, the plaintiff had five times as many votes as the other shareholders. The proposal, on behalf of the other shareholders, was to reverse the situation by subdividing the existing shares, so that at a stroke their voting power was made five times as great. Not unnaturally the plaintiff strongly objected, and among other points taken by him was the point that they could not do so without first calling a separate meeting of the 1941 2s. 0d. shares, treating them as a separate class; and the court proceeded to consider that matter on the footing that the 1941 2s. 0d. shares were a separate class. It is important to observe that the relevant modification of rights article was the much less verbose article taken from Table A. That said: "If at any time the share capital is divided into different classes of shares, the rights" - and they did not bother to add "privileges" or "advantages," or anything like that - "may be varied" - and they did not add "altered," "modified," "affected," "disturbed," "dealt with, " or "abrogated" - "with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class." So that all this court had to consider was whether this proposal of the other ordinary shareholders in the company involved a variation of Mr. Greenhalgh's rights as a substantial holder of the 1941 2s. 0d. ordinary shares. This court said not; but Mr. Gray has pointed out, and has laid emphasis upon the circumstance, that Lord Greene M.R., who delivered the leading judgment, apparently did not observe that the word "affected" did appear in the Mackenziecase. [[1916] 2 Ch. 450.]

I make two references to Lord Greene's judgment in the Greenhalgh case, [[1946] 1 All E.R. 512, 517.] where he said:

"Several authorities have been cited, but the only one, I think, which throws any light on the matter is In re Mackenzie & Co. [[1916] 2 Ch. 450.] a decision of Astbury J., which I do find, up to a point, helpful. It was a case of a petition for reduction of capital, and under the memorandum and articles the only right of the preference shareholders was to have a fixed cumulative preferential dividend of a certain amount. A rateable reduction of all the shares, preference and ordinary, was purposed to be carried out, subject to the sanction of the court. All the shares, preference and ordinary, suffered the rateable reduction, and the result of that was that the dividend rights of the preference shareholders were substantially affected because, by reducing their capital, as they were only entitled to a fixed cumulative preferential dividend on the nominal amount of their capital for the time being paid up, it reduced the dividend accordingly, although the dividend still remained at four per cent. That reduction operated in a certain way to the benefit of the ordinary shareholders, who were entitled to what is commonly called the equity."

Then a little later he said [[1946] 1 All E.R. 512, 517.]:

"Astbury J. pointed out that the only dividend right was a right to four per cent., per annum on the nominal amount of the capital from time to time paid up or credited as paid up, and that, under the articles, the company had power to reduce its capital."

Then Lord Greene quoted from Astbury J. [Ibid. 517.]:

"The result of the memorandum and articles shortly is this. Subject to the right of the company to reduce its capital by the votes of the ordinary shareholders in any manner sanctioned by statute these preference shares are to be of the denomination of £20 each, and the only \*80 special right, privilege, or advantage attached to those shares is a cumulative four per cent. preferential dividend on the nominal amount of capital from time to time paid up or credited as paid up thereon."

Later Lord Greene used these words [[1946] 1 All E.R. 512, 517.]:

"As Vaisey J. pointed out, and I agree, the effect of this resolution"

- that is, the resolution in the Greenhalgh case [Ibid.] –

"is, of course, to alter the position of the 1941 2s. shareholders. Instead of Greenhalgh finding himself in a position of control, he finds himself in a position where the control has gone, and to that extent the rights of the 1941 2s. shareholders are affected, as a matter of business. As a matter of law, I am quite unable to hold that, as a result of the transaction, the rights are varied; they remain what they always were,"

and so on.

I cannot attach such importance to the use by Lord Greene of the word "affected" as to lead me to conclude that the authority of the Greenhalgh case [Ibid.] depends, &nd depends entirely, upon the circumstance that in the relevant clause the only word which had to be construed was "varied"; I agree that Lord Greene used the word "affected," but I draw attention to the fact that the distinction was not between "affected" and "varied," but between "affected as a matter of business" and "varied as a matter of law." I have no doubt, as I have already indicated, that upon a sufficient analysis what is here suggested will "affect" the preference stockholders "as a matter of business"; but we are concerned with the question whether the rights of the preference stockholders are "affected," not as a matter of business, but according to the articles, that is, according to their meaning construed under the rules of construction and as a matter of law. I further think that having regard to the fact that the word "affected" was in the article in the Mackenzie case, [[1916] 2 Ch. 450 .] it would be wrong for this court now to say that its presence in this set of articles - and I dare say it has appeared in many others before and since that case - has so restrictive an effect upon the ordinary shareholders in the company that separate meetings of preference stockholders and shareholders would have to be held whenever it could be shown that as a matter of business, upon a close analysis, that which was proposed would, or might, affect in some degree the value of the preference shares, or the way in which the rights conferred upon them by the regulations of the company were to be enjoyed.

The result is that, with all respect to the judge, I have come to the conclusion that the preference stockholders' claim in this case is not well-founded - or perhaps I should say, as this is an appeal from an order made on a motion, that the plaintiff has not satisfied me that any such interlocutory relief as he asked for on the motion ought to be granted to him.

In those circumstances the appeal will be allowed.

DENNING L.J. I agree.

ROMER L.J.

I also agree. I add only a few words, partly because we are differing from Danckwerts J. and partly because this case may, I imagine, have a certain importance in commercial circles, and amongst practitioners in company law.  
The plaintiff's case is that the rights attached to the class of preference stockholders whom he represents are being "affected" within the meaning of article 68 of the company's articles of association; and plainly, therefore, the first question to be asked is: of what do those rights consist? - because until that is known it is impossible to form a view whether they are being affected.

The rights attached to a class of shares within the meaning of such an article as this, are those attached by the resolutions creating such shares or by the articles of association of the company as amended from time to time by any relevant resolution; and accordingly, regard must be had to such resolutions and to the constitution of the company for the purpose of finding out what the rights of the preference stockholders are.

The rights attaching to the preference stockholders are those which are conferred by articles 62 and 83; and the only relevant article for present purposes is article 83. Under that article it is provided, as my Lord has already stated, that on a poll every member present in person or by proxy shall have one vote for every share held by him, or in the case of the preference stock, one vote for every £1 of preference stock held by him. It is suggested that, as a result of the proposed increase of capital, that right of the preference stockholders will in some way be "affected"; but I cannot see that it will be affected in any way whatever. The position then will be precisely the same as now-namely, that the holder of preference stock will have on a poll one vote for every £1 of preference stock held by him. It is quite true that the block vote, if one may so describe the total voting power of the class, will, or may, have less force behind it, because it will pro tanto be watered down by reason of the increased total voting power of the members of the company; but no particular weight is attached to the vote, by the constitution of the company, as distinct from the right to exercise the vote, and certainly no right is conferred on the preference stockholders to preserve anything in the nature of an equilibrium between their class and the ordinary stockholders or any other class.

During the course of the discussion I asked Mr. Gray whether it would not be true to say that the logical result of his argument would be that the rights of ordinary shareholders would be affected by the issue of new ordinary capital on the ground that every one of the considerations on which he was relying would be present in such a case. The votes of the existing shareholders would be diminished in power; and they would have other people with whom to share the profits, and, on a winding-up, to share the capital assets. In answer to that he was constrained, I think rightly, to say that was so. But in my opinion it cannot be said that the rights of ordinary shareholders would be affected by the issue of further ordinary capital; their rights would remain just as they were before, and the only result would be that the class of persons entitled to exercise those rights would be enlarged; and for my part I cannot help thinking that a certain amount of confusion has crept into this case between rights on the one hand, and the result of exercising those rights on the other hand. The rights, as such, are conferred by resolution or by the articles, and they cannot be affected except with the sanction of the members on whom those rights are conferred; but the results of exercising those rights are not the subject of any assurance or guarantee under the constitution of the company, and are not protected in any way. It is the rights, and those alone, which are protected, and for the reasons which my Lord has given, and in view of what I have myself said, the rights of the preference stockholders will not, in my judgment, be affected by the proposed resolutions.

I accordingly agree that this appeal should be allowed.

Appeal allowed. (H. C. G. )