wages and receives no benefit at all it would seem unreasonable to deny him recovery of the wages paid on the ground that they represent less than the true measure of his loss.

The practical problem, of ensuring that the resuscitation of the action does not give rise to a position where the wrongdoer will have to meet liability twice over for a part of the loss arising in personal injury situations, remains for the consideration of the courts. If wages and medical expenses paid by the employer to or on behalf of his injured employee are properly to be taken into consideration, in mitigation of the damages payable by the wrongdoer to the servant in the servant's action, the problem will not arise. But the law in this area is still unsettled.[36] So far as the action makes possible recovery for loss which would otherwise go uncompensated, it is limited in respects favourable to the wrongdoer. The plaintiff must be a "master" in the strict common law sense of that term. No recovery may be had by the Crown where the injured party is a "public officer". Fiscal policy would appear to demand a restoration of the Crown to a position of equality with private employers. There is room, moreover, for an action more broadly based. Where a person other than a master has become obliged to pay wages or medical expenses to or on behalf of the injured employee there appears to be no reason on the assumed principle why the defendant should escape liability.

No doubt the preoccupation of the High Court with the history of the action *per quod servitium amisit* was essential in order to restore the action to its full potency. But it is in the very alive and contemporary issue concerning who is entitled to what damages in personal injury situations that the practical significance of the decision in *Scott's Case* will emerge.

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INVESTMENT TRUST MANAGERS AND MANAGEMENT OF CORPORATIONS

AUSTRALIAN FIXED TRUSTS PTY. LTD. AND OTHERS v. *CLYDE INDUSTRIES LTD. AND OTHERS*
UNION INSURANCE SOCIETY OF CANTON LTD. v. *CLYDE INDUSTRIES LTD. AND OTHERS*

The defendant in both these cases,[1] which were heard together, was Clyde Industries Ltd., a public company carrying on a large engineering business. The plaintiff companies were involved in the cases by virtue of their positions as "managers" under certain investment schemes whereby shares in the defendant company were held by "custodian trustees" in trust for their respective managers. The issue between the parties arose from an attempt by the directors to alter the Articles of Association of the defendant company in such a way as to restrict the voting rights attached to shares held by custodian trustees under this type of scheme, and the question before the court was whether or not a special resolution incorporating the alteration was a valid resolution of the company.

The investment schemes which were involved in this case were of the type known as unit trusts. Under such a scheme a "manager" purchases blocks of shares in a number of different concerns and vests them in "custodian

[36] In the recent case of *Paff* v. *Speed* (as yet unreported) before the N.S.W. Supreme Court, Dovey, J. ruled that evidence was admissible that the plaintiff was entitled to a total disability pension as a result of injuries inflicted by the defendant. The ruling was not specifically appealed against, and the Full Court, while it accepted the ruling for the purpose of the appeal, confined itself to the question whether a new trial should have been granted on all the evidence. The High Court has granted special leave to appeal against the decision of the Full Court and it may be that the High Court will review the whole position of mitigation of damages by collateral payment.

[1] (1959) S.R. (N.S.W.) 33.

trustees", the beneficial ownership of each share being divided into smaller holdings known as units or sub-units which the public are invited to purchase. The relationship between manager and custodian trustee is defined by a trust deed which generally provides either that the manager "shall"or that he "may" direct the custodian trustee as to the manner in which the latter shall exercise the voting rights attached to the shares allotted to him. By this type of scheme the resources of many investors handicapped by lack of experience in company matters, or by lack of sufficient funds to make worthwhile investments, can be combined and invested under the direction of the manager in a wide variety of securities, thus spreading the risk and insuring a steady dividend. A unit trust may be "flexible" or "fixed" depending on whether or not under the terms of the trust the manager has power to vary the investments.

In these cases the defendant company had on or about 20th November, 1956, sent out to its shareholders a notice convening an extraordinary general meeting to be held on 17th December, 1956, to consider the addition of a new article to its Articles of Association. The provisions of the article were to apply to any member holding ordinary shares in the company as trustee for holders of units, sub-units, stock or shares in any public unit, flexible trust, public investment trust or any trust to which the public might subscribe as beneficiaries, and were to operate to prevent such member from casting any vote to which his shares entitled him until he had received the direction of a majority of all the holders of such units, sub-units, stock or shares as the case may be, as to the particular manner in which the vote should be cast. These provisions were to apply also in the event of a poll being demanded, and it was to be left to a resolution of the directors to determine whether or not any such member had complied with the provisions. It was specified that this clause should not affect the voting rights of members in respect of shares which they held as trustees for beneficiaries not included in the classes mentioned.

A large majority of the votes at the meeting were cast in favour of the resolution, these being chiefly personal votes of the directors and votes exercised by them under proxies. The two plaintiff companies in the interests of their respective custodian trustees who were to be thus adversely affected then proceeded by Statement of Claim against the company, seeking injunctions (a) to restrain the defendant company from acting on the special resolution as a valid resolution of the company, and (b) to restrain any meeting called to pass a resolution in the form, or to the effect, of the proposed article.

The content of the proposed resolution was attacked on three main grounds, but McLelland, J., in his judgment dealt only with the first ground, namely, that the resolution was not a valid exercise of the power of amending the articles given by s.20 of the Companies Act 1936. Section 20 reads as follows:

> (1) Subject to the provisions of this Act and to the conditions contained in its memorandum a company may by special resolution alter or add to its articles.
>
> (2) Any alteration or addition so made shall be as valid as if originally contained in the article and be subject in like manner to alteration by special resolution.

As His Honour pointed out,[2] despite the wide terms of the section, the courts have implied limitations on the extent of the power, and he went on to discuss some of the cases which have sought to define these limitations.

Most discussions by the courts on this subject begin by quoting Lindley, M.R. in *Allen* v. *Gold Reefs of West Africa Ltd.* where he said:

> . . . the power (of alteration of the Articles of Association) must, like all other powers, be exercised subject to those general principles of law and

[2] *Id.* at 53.

> equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded.[3]

The requirement that an alteration can only be made if it is *bona fide* for the benefit of the company as a whole has been generally adopted in subsequent decisions, although there have been some differences of opinion as to the interpretation of this expression.[4] A modern summary of the principles to be derived from the cases, which provides a useful guide, was given by the Court of Appeal in *Greenhalgh* v. *Arderne Cinemas Limited*[5] and set out by Evershed, M.R. as follows:

> Certain principles, I think, can be safely stated as emerging. . . . In the first place, I think it is now plain that "*bona fide* for the benefit of the company as a whole" means not two things but one thing. It means that the shareholder must proceed upon what, in his honest opinion, is for the benefit of the company as a whole. The second thing is that the phrase "the company as a whole", does not (at any rate in such a case as the present) mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body. That is to say, the case may be taken of an individual hypothetical member and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour for that person's benefit. . . . I think that the matter can, in practice, be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders so as to give to the former an advantage of which the latter were deprived. When the cases are examined in which the resolution has been successfully attacked, it is on that ground.[6]

The only Australian High Court case to deal directly with this question was *Peter's American Delicacy Co. Ltd.* v. *Heath*.[7] Some of the statements made in that case, in particular by Dixon, J. as he then was, might indicate that the Court there took a less rigid view of the limitations imposed on the power to alter articles than that contained in the judgment of Evershed, M.R. For example, Dixon, J. said:

> The reference to "benefit as a whole" is but a very general expression negativing purposes foreign to the company's operations, affairs and organisations. . . . If the challenged alteration relates . . . to an article affecting the mutual rights and liabilities *inter se* of shareholders or different classes or descriptions of shareholders, the very subject-matter involves a conflict of interests and advantages. To say that the shareholders forming the majority must consider the advantage of the company as a whole in relation to such a question seems inappropriate, if not meaningless, and at all events starts an impossible enquiry.[8]

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[3] (1900) 1 Ch. 656, 671.

[4] *E.g.* Ashbury, J. in *Brown* v. *British Abrasive Wheel Co. Ltd.* (1919) 1 Ch. 290, 295 said that "*bona fide*" and "benefit of the company as a whole" constituted two separate tests; but in *Sidebottom* v. *Kershaw, Lease & Co. Ltd.* (1920) 1 Ch. 154 the Court of Appeal held that the two expressions comprised a single test of validity and this is now the accepted view. Another difference of opinion was on the question of who was to decide what was, or was not, for the benefit of the company as a whole. Peterson, J. in *Dafen Tinplate Company Ltd.* v. *Llanelly Steel Co. (1907) Ltd.* (1920) 2 Ch. 124 said he thought the question should be determined objectively by the court. But subsequent cases have followed the view first expressed by members of the Court of Appeal in *Shuttleworth* v. *Cox Brothers & Co., (Maidenhead) Ltd.* (1927) 2 K.B. 9, 18, 27 where it was held in the words of Atkin, L.J. that the question was "solely for the shareholders acting in good faith" unless the alteration is "so extravagant that no reasonable man could really consider it for the benefit of the company".

[5] (1951) 1 Ch. 286. [6] *Id.* at 291. [7] (1939) 61 C.L.R. 457. [8] *Id.* at 480.

McLelland, J., however, appeared to base his judgment squarely on the principles set out in the English cases as summarised by Evershed, M.R.,[9] and did not indicate that he thought the tests suggested by the High Court in *Peter's Case* differed appreciably from them. Going on to discuss the particular case before him, his Honour pointed out, first, that the inference was clear that the provisions of the articles would apply only to the custodian trustee shareholders and he was of opinion that if the right of this particular type of shareholder to vote had not in substance been taken away altogether its effectiveness had at least been greatly reduced.[10] His Honour also noted the fact that both plaintiff companies were responsible and reputable firms and there was nothing to suggest that they would not remain so. The argument of the defendant company that custodian trustee shareholders' voting rights should be restricted since they normally held large numbers of shares in competing businesses did not carry much weight since this was not a characteristic confined to this particular type of shareholder. As regards the stated purpose of the article, namely, that the persons having a financial interest in the company should control the voting power of the shares of which they were the real owners, his Honour found that this object could not be achieved by the article since it was confined in its operation to only one type of shareholder falling within the stated purpose.

As the value of voting rights attached to ordinary shares not affected would thus increase, it was held that the effect of the proposed new article was to discriminate between the majority and the minority shareholders by giving the former an advantage not given to the latter. There were no grounds, he thought, upon which reasonable men could decide that the article was for the benefit of the company as a whole, and therefore that the passing of the special resolution approving the article could not constitute a valid exercise of the power of alteration conferred by s.20 of the Companies Act, 1936. He did not grant any relief on the wider ground sought in relation to any article to the like effect which might be proposed in future.

The second of the three grounds for invalidity argued before McLelland, J., but one which was not discussed in his judgment, was that the proposed new article involved a modification of a class right of the ordinary shareholders. This involved three separate considerations. First, there was the question of whether the right to vote is a "class right". It was argued that because the right to vote is generally enjoyed by every member it cannot be described as a special right of any particular class of members. Jenkins, L.J. in *In re John Smiths Tadcaster Brewery Co. Ltd.*[11] appeared to support this view, and it was put forward for the defendant company in the present case. However, Professor Gower suggests that this approach is inconsistent with that adopted by other members of the court in that case, and is not adopted in any other case. This learned writer would seem to be correct when he suggests also that once shares have been divided into different classes any rights relating to certain matters, including voting, will be regarded as special rights when spoken of in reference to a particular class.[12]

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[9] (1951) 1 Ch. 291.

[10] This result was due to several factors including the power of the directors to declare without giving reasons that the provisions of the article had not been complied with, the fact that on its true construction the article contemplated a majority in numbers and not in interest, and moreover, applied trust by trust so that a custodian trustee would have to receive the same direction from a majority of holders in each and every trust before he could record a vote, the consideration of the large expense involved in attempting to obtain the direction of unit holders and finally the evidence of persons experienced in these matters which suggested that in any case the majority of unit holders were in general persons inexperienced in company matters and likely to ignore a request from the custodian trustee shareholder for a particular direction as to how he was to exercise his vote.

[11] (1953) Ch. 308, 319-320.

[12] L. C. B. Gower, *The Principles of Modern Company Law* (2 ed. 1957) 491, 492.

If it were decided that the right to vote is a class right the second question to decide would be whether or not the proposed article involved a modification of that right or merely regulation of its enjoyment.[13] It was argued for the plaintiff companies that if the proposed article were put into operation it would clearly modify the right itself by rendering its exercise impossible in the practical sense. Further (it was argued), even though it applied only to a particular type of holder of ordinary shares, namely the custodian trustees, the rights of the whole class would be affected indiscriminately, each share carrying the disability that in the event of it being held by a custodian trustee certain adverse consequences would follow. The defendant company, on the other hand, argued that since the disability attached to the holder of the shares for the time being, if he satisfied a particular description, and not to the shares themselves, the new article involved mere regulation of the exercise and enjoyment of the right to vote. And even if this proposition were unacceptable, they submitted that since not all members of the class were affected the right was not modified on a class-wide basis so as to fall within the modification of rights article.

Had the question come to be decided by the court it seems unlikely that the claims of the defendant company on this point could have been supported. It is hard to see how rights attached to shares can have any value except by subjective reference to the holder of the shares for the time being and the rights to which his holding entitles him. If one of these rights is restricted because an individual holder satisfies a particular description, one of the rights attached to his shares has been modified. Since the same result follows as long as he or anyone else satisfying the same description holds his shares or any other shares of the type affected it must be said that the right has been modified on a class-wide basis.

If a modification of the right to vote were found to be involved the third question would arise, which is to determine whether the appropriate procedure has been followed to effect the change. This depends on the construction of the Memorandum and Articles of Association of the particular company and the interpretation put on s.164 of the Companies Act. Article 54 of the then current Articles of Association of the defendant company was a modification of rights article in the usual terms providing for the alteration of special class rights by an extraordinary resolution passed by the holders of at least three-quarters in nominal value of the issued shares of the particular class at a separate general meeting of the class affected, or by consent in writing of three-quarters in nominal value of the issued shares of that class. Section 164 of the Companies Act 1936 provides that wherever class rights are altered pursuant to a modification of rights article such as this, non-assenting shareholders being the holders in the aggregate of not less than 15 *per centum* of shares of that class may apply to the court to have the alteration cancelled. An assumption which could be drawn from such a provision as this is that the Act does not envisage that class rights could ever be modified other than pursuant to the modification of rights article in any case where such an article appears.

In spite of the specific provisions of Article 54 and the related s.164 of the Act, it was argued by the defendant company that the modification of rights provision, being itself part of the articles, could be altered in the ordinary way by special resolution. Hence the special resolution of 17th December, 1956, being duly passed by the company in general meeting by implication displaced Article 54 insofar as it might have stood in the way of effect being given to the new article. The plaintiff companies argued, however, that the resolution was invalid because the necessary three-quarters class majority required by

[13] This is generally held to be allowable. See e.g. *White* v. *Bristol Aeroplane Co.* (1953) Ch. 65, 74, 82.

Article 54 had not voted in its favour. The power of alteration of the articles conferred by s.20 of the Act must, they said, be read subject to s.164, the enactment of which prevented the express or implied elimination of a modification of rights article by ordinary special resolution. If this were not the case s.164 would be virtually useless. In other words, the modification of rights article itself created special rights which could not be altered except by proper consent of the class of shareholders affected by it.

Although there is no binding authority on this question[14] it would appear that the arguments of the plaintiff companies on the modification of rights question would have prevailed. Contrary to the *dicta* of Jenkins, L.J. in *In re John Smiths Tadcaster Brewery Co. Ltd.*,[15] the right to vote is more generally assumed to be a class right. If this be so there is little doubt that the proposed resolution did in fact involve a modification of the right of the ordinary shareholder to vote; and finally, s.164 of the Act seems to imply that where a modification of rights is involved and a special provision for variation is defined in the articles this procedure must be strictly followed.

The third and final argument of the plaintiff companies was that in requiring the company to take notice of equitable interests the proposed new article was contrary to s.84 of the Companies Act, 1936. This section provides that "no notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the Registrar-General". The plaintiffs contended that this section prevented the company from being in any way concerned with equitable interests in its shares. They referred to *Re Perkins*[16] where Lord Coleridge said "it seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relation between trustees and their *cestuis que trustent* in respect of the shares of the company".[16a] In addition the plaintiffs claimed that by requiring the trustee to act in accordance with a direction of the majority of beneficiaries the proposed article conflicted both with accepted principles of equity and with the particular provisions of the trust deeds defining relations between custodian trustees and unit holders.

The defendant company on the other hand contended that s.84 in no way prevented the company from taking notice of equitable interests if it so wished. By its express terms the section was limited to the inclusion on the register, or other public documents held by the Registrar-General, of notice of trusts. Its purpose has been said to be to relieve a company from liability which might otherwise arise wherever it has notice of equitable interests,[17] and it was claimed by the defendant company that the section went no further than this. The fact that the article disrupted the existing relationship between the custodian trustees and their unit holders was said to be no concern of the company.

From the strictly legal point of view there appear to be no grounds on which to hold that the proposed article conflicted with s.84. For practical purposes on the other hand the specific provisions of the section make it hard to imagine how the article might be put into effect. It would involve the keeping of two share registers, a public register of the legal owners to be lodged at the Registrar-General's and a secret register of the equitable owners to be kept by the company. Reference would have to be made to the latter wherever a vote was cast by a custodian-trustee-shareholder to ensure that the provisions of the article had been complied with. Voting by the custodian trustees where a poll was demanded would be virtually impossible. However, in the absence of

[14] But see e.g. *Lord St. David's Case, The Times* 23rd Nov., 1934 which as far as it is good authority supports the plaintiffs' views.

[15] (1953) Ch. 308.

[16] (1890) 24 Q.B.D. 613.

[16a] *Id.* at 616.

[17] *Simpson* v. *Molson's Bank* (1895) A.C. 270.

fraud or oppression, the role of the courts is generally to ratify what the shareholders decide on behalf of the company, so long as this is within the limits of the law. And since, as far as s.84 is concerned, the resolution is not outside those limits, the plaintiff companies' objection that the special resolution was contrary to s.84 of the Act seems entitled to little weight.

Whatever the legal implications and consequences of the special resolution of 17th December, 1956, its purpose in the minds of the company's directors clearly was to counter what they regarded as a real danger to the company as an engineering enterprise. Rapidly increasing numbers of shares were being purchased under investment trust schemes, and the strength of the managers behind them made the prospect of the latter eventually gaining control of the company's affairs not too remote. The existing Board of Directors, which was largely made up of persons experienced in the engineering field, could not be accused of purely selfish motives in attempting to keep control of the company of its own hands in preference to control of a Board composed of investment trust nominees. The directors of a company controlled by such interests could, for example, without *mala fides* on their part, believe that it would be of greater benefit to the company as a whole to encourage maximum returns for as long as possible without keeping in view the continued development of the company as, in this case, an engineering enterprise.

Without intervention by the legislature it is hard to see how a company could protect itself from the possibility of thus losing control of its affairs to investment trust interests. Any steps taken by existing directors and shareholders would be met by such objections as those discussed in the preceding pages. In the State of Victoria certain amendments to the Companies Act in 1955 have to a large extent solved this problem.[18] Although the main purpose of the amendments seems to have been to protect the shareholders in investment companies, certain of the new provisions have the effect of protecting also other companies in which their capital is invested. It has been provided that no investment company can invest more than ten per cent of its paid up share capital in any one company[19] or, more importantly, hold more than five per cent of the subscribed ordinary share capital of any one company.[20] When current proposals for review of New South Wales company law come before the legislature, it may be desirable to include similar safeguards for protecting existing companies from the possibly adverse consequences of control by investment company interests.

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OPERATION OF IMPERIAL ACTS IN AUSTRALIA
COPYRIGHT OWNERS' REPRODUCTION SOCIETY LTD. v. *E.M.I. (AUSTRALIA) PTY. LTD.*

Although it is likely that the questions raised in the *E.M.I. (Australia) Pty. Ltd., Case*[1] will be the subject of legislation in the near future,[2] it will remain of interest as a discussion of the effect of a United Kingdom departmental inquiry, the order made pursuant to the inquiry, and confirming legislation of the Imperial Parliament upon the law of a self-governing dominion.

The Imperial Copyright Act, 1911, was adopted by s.8 of the Commonwealth Copyright Act 1912-1950 and forms the Schedule to that Act. Section 8

[18] See generally ss.284-293 of the Companies Act 1958 (Vic.).
[19] See s.286(1). [20] See s.286(2).
[1] (1958-9) 32 A.L.J.R. 306.
[2] At the time of writing a commission is sitting receiving submissions with a view to reform of the present copyright law and the recommendations may be public by the time this Note is published.