1915. *September* 22, *November* 9, 30. WARD, J.

Company.—Liquidation.—Register of members.—Rectification.—List of contributories.—Act 31 *of* 1909, *secs.* 32 *and* 140.—*Issue of shares at discount.—Assets sufficient to pay debts.—Liability of contributories.*

The Court has power to rectify a limited company's register of members under secs. 32 and 140 of Act 31 of 1909, even after confirmation of the list of contributories; *Sichell's* case (3 Ch. 119); *Onward Building Society* (1891, 2 Q.B. 463); *Sussex Brick Co.* (1904, 1 Ch. 598) applied.

After confirmation of a list of contributories, a liquidator in a winding-up sought to call on respondents to show cause why their names should not be placed on the register in place of certain fictitious names, alleging that the shares against these names had in fact been allotted to respondents; *Held*, that the liquidator should have left the list as settled, and applied to Court to make a call upon the persons alleged to be represented by the fictitious names.

In exchange for 20,000 shares of 5s. each, a company issued 20,000 new shares of £1 each; *Held*, that persons who, with knowledge of the facts, took new for old shares, had taken them with only 5s. paid, and were therefore liable on a winding-up to be put on the list of contributories for the unpaid balance.

Held, further, the fact that the assets were sufficient to pay the debts made no difference, for if shares are issued at a discount, their holders are liable to pay for them in full to secure the adjustment of the rights of contributories *inter se* in the company's assets; *Welton* v *Saffery* (1897, A.C. 299 followed).

Return day of a rule calling upon respondents to show cause why the register of the Seta Diamonds Ltd. (in liquidation) should not be rectified by inserting their names upon it, in place of certain fictitious names.

The facts appear from the judgment.

L. Greenberg, for the applicant.

Some of the respondents appeared in person, others simply filed affidavits.

J. P. van Hoytema, for Knox: On the question of liability to contribute, see the *Rosemount* case (1905, T.H. 169), at pp. 188, 171, 204. On the question of practice, there is no provision in the company law for the rectification here asked for. If fictitious name A. is in fact B. there is no need for the application.

[WARD, J.: The application should have been to put A. on the list, and to have had a notice served on B.].

Further the list was settled two years ago. Once settled a list cannot be varied. *A fortiori* where the liquidator knew all the facts before the list was settled.

Greenberg, in reply: The decision will turn on the construction of the agreement with Bradley. In so far as it required the issue of shares at a discount it is unenforceable. The *onus* is on Bradley to prove that he gave value for the shares. The *Rosemount* case applies only to *bonâ fide* shareholders. No prejudice is caused by the procedure adopted.

Cur. adv. vult.

Postea (November 30).

WARD, J.: This company was formed in September, 1905, under the name of the Seta (Transvaal) Prospecting and Developing Company, Ltd. In 1909 the name was altered to the Seta Diamonds, Ltd. The original capital of the company was apparently £5,000, in 20,000 shares of 5s. I say apparently because I have had great difficulty in extracting the few simple facts I require from the voluminous, complicated and largely irrelevant affidavits of the petitioner. The company was formed with limited liability under the Transvaal Company Law.

On the 8th August, 1908, the company by its directors George Knox and Luke Duncombe and its secretary, Thomas Winship, entered into an agreement (Exhibit "A" of Petition) with one Edward Edmund Herbert Bradley, of Durban. The object of the agreement was for the purpose of raising a sum of £30,000 as working capital, and it authorised the issue of a prospectus which was annexed to the agreement for that purpose.

Under clause 7 of the agreement it was provided "If Bradley shall succeed in obtaining the sum of £30,000 for the company then he or his nominees in writing shall receive from the company 115,000 fully paid £1 shares in the company in return for his services in securing the said working capital but subject to the following payments:—

(*a*) To the members of the company share for share, every member receiving one fully-paid £1 share in the increased capital for every one 5s. share held.

(*b*) To members of the company who have purchased from and paid the company £11 each for their shares in the former increase of capital, provided that such shares are held by them when the increase of capital herein contemplated is determined, 6 fully paid £1 shares for every one above-mentioned share held.

(*c*) To every holder of an option to purchase one 5s. share in the company at the price of £4 sterling each, one fully-paid share in exchange for such option.

(*d*) To the legal holders of the present bond of £4,500 over the company's property, in exchange for the cancellation of such bond, £6,100 fully paid £1 shares. But if the bondholder refuse the option of taking shares for his bond then 4,500 shares to go to the company and 1,600 shares to go to the bondholder.

Clause 8 provided that if Bradley should be able to obtain part only of the £30,000 cash and the directors decide to proceed to allotment, then the shares to be paid to him shall be *pro rata* to the amount of cash so obtained plus (2,000) shares, but he will in any event be bound to pay thereout the shares stipulated in clause 7.

It was provided also that the company should change its name to the Seta Diamonds, Ltd., and its shares to the nominal value of £1 each.

The prospectus started as follows:—

Prospectus referred to in agreement of 8th August, 1908.

For private circulation.

Seta Diamonds, Ltd.

Registered under the Joint Stock Companies Limited Liability Law of the Transvaal Colony.

Capital £160,000.

Directors.

.....

The above directorate will be subject to confirmation or alteration by the shareholders, and E. E. H. Bradley will join the Board on or after allotment of shares.

Transvaal Committee and Secretary,

A. Kemp Esq., etc.,

Bankers.

.....

Solicitors.

.....

Auditor,

Chief Secretary and Office,

Thos. Winship, Chartered Secretary,

.....Durban.

"Increase of capital and alteration of name Seta (Transvaal) Prospecting and Developing Company, Ltd., formed in September, 1905, and now to be called Seta Diamonds, Ltd."

Distribution of Capital.

To present Shareholders or their Nominees.

Cost of obtaining working capital, etc., *re* shares	£115,000
Working Capital	30,000
Reserve Capital	15,000
	£160,000

The above 30,000 shares are now offered for subscription.

"Terms of payment 5s. on application; 5s. on allotment; balance when required in 5s. calls at 30 days' notice.

"All applications for shares must be accompanied by cheque for deposit, etc.

"The directors reserve to themselves the discretion of allotment, and the right to allot the above shares whether the whole of the shares now offered for subscription have been applied for or not, and the old Articles of Association will be adopted as far as possible."

There follows a further 13 foolscap pages of matter relating to the assets of the company and its prospects and Engineers' reports. The only sentences I have been able to find in all these 13 pages which by any stretch of imagination can be considered relevant to the present enquiry is a paragraph on page 5 stating the objects for which the £30,000 working capital is required.

On the top of page 5 is a statement that £130,000 will probably be the amount on which dividends will be payable.

I gather from the voluminous and hopelessly involved affidavits of the liquidator in reply to each of the respondents that Bradley under his agreement succeeded in raising £14,568, and the company in accordance with its agreement issued:—

To Bradley	75,307 shares.
To subscribers	14,568 do.
Unissued	10,125 do.
	100,000 shares.

Under the agreement 20,000 of Bradley's shares had to go to the shareholders and probably more under clause 7 of the agreement above referred to.

The liquidator in his affidavits refers to all the 75,307 shares as bonus shares, and states the company through Bradley gave away these shares indiscriminately to its old and new members.

The facts appear to be that a certain number of shares were allotted to Bradley's nominees and a certain number to the shareholders of the company. The latter were allotted to the shareholders to replace their shareholding in the old company under clause 7 of the agreement.

The former were allotted to persons, shareholders or otherwise who had assisted Bradley in raising the £14,568 and to whom he promised remuneration.

The exact figures with regard to each of these classes I am unable to find.

I am not told what steps were taken by the company to register its new name and new capital; but I infer that practically a new company was formed with a capital of £100,000 in £1 shares. I am not informed what became of the assets, whether they remained registered under the old name, or what became of the shares of the old company.

The company was placed in liquidation by order of the Supreme Court, Local Division, on the 22nd January, 1913.

The petitioner whose name is mentioned in the prospectus above referred to as a member of the Transvaal Committee and Secretary, was appointed Liquidator on the 3rd March, 1913.

A list of contributories of the company was duly settled in the month of October, 1913.

The petitioner now alleges that a portion of the 75,307 shares issued to Bradley were allotted "in the names of fictitious persons and of nominees of the said Bradley at his request."

The petitioner obtained a rule calling upon the respondents in the present case to show cause why their names should not be placed on the register instead of certain fictitious names. The reason given being that these shares were really allotted to the respondents and accepted by them, but the fictitious names were placed upon the register; that the shares were issued under the agreement with Bradley, and allotted under it, and since that agreement is null and void no consideration was given for those shares, and consequently the names of the respondents would ultimately come upon a list of contributories.

Each of the cases has to be taken separately, but, before con-

sidering the cases there are a certain number of objections raised which concern all of the respondents, and these I will deal with first.

The list of contributories has been confirmed, and it is admitted that I should not make an order in this case unless I am satisfied that the person whose name is put on would be liable to pay a contribution.

The first point raised is that as the list of contributories has been confirmed, the Court cannot now vary it or alter it. I am not sure that the application is for an alteration or variation. The liquidator might have come to the Court and said on the list of contributories is the name A; this name is one taken by B for the purpose of having shares allotted to him. To change the A to B is not to my mind altering the list of contributories. On the other hand I see no reason why the liquidator should not leave the list as it is and apply to the Court to make a call upon the persons represented by the fictitious name. B cannot avoid having a call made against him simply because he appears on the list under the name A.

However, that may be the rule calls upon the respondents to show cause why the register of the company shall not be rectified by inserting their names upon it. The objection raised is that I am not able to grant such an order after the list of contributories has been settled.

Under sec. 140 of the Act so soon as may be after making a winding-up order the Court shall settle a list of contributories with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act.

This clause is the same as sec. 163 of the English Companies Consolidation Act, 1908, and the clause means that the Court may order the rectification under the powers given it under sec. 32; see *Sichell's* case (p. 3, Ch. 119). But it also means that it may restify the register at the time, and at the time only, that it is resettling the list of contributories.

The point came up for decision in the case of *In re Onward Building Society* (1891, 2 Q.B. 463). The MASTER OF THE ROLLS, LORD ESHER, says in respect of sec. 98 of the English Companies Act of 1862 which corresponds to sec. 163 of the Act of 1908. "The Court is to settle a list of contributories, with power to rectify the register of members in all cases where such rectifica-

tion is required in pursuance of this Act. I think that limits the power to rectify the register to the time when the Court is settling the list of contributories. I do not think that, if after the list of contributories is settled nothing further is done to it, the Court can order the register to be rectified."

But he goes on to show that the list of contributories may be altered after it has been confirmed. He says "Therefore the list may be re-settled. When it is being re-settled it is being settled; and the Court at the time when it is being settled, has power to rectify the register. Therefore, on a proper application the County Court Judge might have made an order that the contract should not be void and had power thereupon to re-settle the list of contributories and to rectify the register accordingly."

The MASTER OF THE ROLLS proceeds to state that if the Court is of opinion that the case is one for the exercise of the discretion of the Court the summons may be amended so as to include a claim for re-settling the list of contributories.

Now I am not prepared to say that in no case will the Court entertain a claim for rectification of the register except as a portion of a claim or, at the same time, as a claim for settling or re-settling the list of contributories; see *In re Sussex Brick Co.* (1904, 1 Ch. 592),but I think in the present case the procedure is wrong. This is the more apparent when one considers the fact that the liquidator must have known all the facts of the case at the time when the list of contributories was settled. It is said in answer to this that this was done by the Master without consulting him. I do not know if it is so, but that does not prevent him from adopting the proper procedure in the present case. As I pointed out in the argument, and as I have stated above, I do not see that there is any necessity for a rectification for the liquidator to obtain what he wants.

At the same time if all the facts are before me, and as the proceedings must have been very costly, I think it would be advisable for me to give a decision on the other points in the case if possible.

The second point raised is that the contract with Bradley was a legal and binding one, and, therefore, the shares issued to his nominees were issued for a consideration, and were, therefore, fully paid. And in consequence, even if the names of the respondents were put on the list of contributories they would not be compelled to contribute.

Now it was admitted in argument if the contract with Bradley were that he was to raise £30,000 or such sum as the directors agreed to and for so doing he was to receive shares by way of commission the contract would be good, and the shares issued to him for remuneration would be fully paid up. But Mr. *Greenberg* contended that the agreement that he should return a portion of the shares to the shareholders was an indivisible portion of the contract and rendered the whole contract void.

I do not think this contention is sound—the contract appears to me to be clearly divisible into three parts:—

(1) Shares to be delivered against cash,

(11) Shares to be delivered to Bradley or his nominees for services rendered by Bradley.

(111) Shares to be delivered to the former members of the company as against the shares already held.

With regard to (1) it is clearly good; as to (11) it was admitted that this was good provided it was not vitiated by (111). There is insufficient information before me to say whether it is good or not. Now if it is to be held that the fact that shares were to be delivered to the shareholders is to vitiate the whole contract then the company should return to Bradley and his nominees the sum of £14,500, which he subscribed, and this cannot be done.

It must be borne in mind that this is not an action against the directors for malfeasance or misfeasance but an application to put certain persons on the list of contributories because they have contracted with the company to take shares and have had the shares allotted to them and have not paid for them.

Therefore, I have only to consider those shares which were allotted to shareholders in the old company in return for their 5s. If the company had constructed an entirely new company and sold the assets of the old company for the consideration of one share in the new company for one share in the old there would have been no objection to the course adopted. But that was not what was done here, although so far as the company was concerned, the result arrived at was the same.

As I understand it the company was the same, though the name was altered, the capital was altered and the denomination of shares was altered. How this result was technically arrived at I have not been informed; but the point was not taken on behalf of the respondents that the Seta Diamonds Ltd. was a new company and an entirely new entity to the old company.

It is was a new company then, of course, there is no doubt that there was an agreement between Seta Diamonds, Ltd. and its old members whereby the latter got £1 shares for these 5s. shares; for I take it the form of allotting the shares to Bradley and his allotting them to the shareholders was a fictitious transaction.

If the proposition is put in that way it is clear the transaction cannot stand. A company is not entitled to deal in its own shares, or become a shareholder in itself, on the simple ground that such a transaction means a reduction of capital,—though there is no objection to a shareholder handing up shares in a company in return for others of an equal denomination provided the shares handed up are not cancelled; *Powell* v. *John Powell & Sons, Ltd.* (1891, 2 Ch. 609).

But the effect in the present case of what was done was to issue shares to the old shareholders at a discount. A shareholder had a number of shares of the nominal value of 5s. and of these there were 20,000; in their place 20,000 new shares were created of £1 each and exchanged for the 20,000 5s. shares. In other words the capital of the company was increased to £100,000 and then decreased to £85,600 by the issue of 20,000 shares to people who were only entitled to 5,000 shares.

The persons, therefore, who took the new shares for the old ones had taken shares with only 5s. paid, and should be on the list of contributories with the liability of 15s. a share.

It was urged in the first place that there was no contract by them with the company to take shares, and in any event the company is estopped from saying that the shares are not fully paid because the shares were issued as fully paid.

This argument is unsound; the shares were allotted and accepted and must, therefore, be paid for if the allottees knew all the facts of the case.

Then it is urged that the contributories can only be made to contribute for the debts and expenses of the company in liquidation, and the assets are sufficient to pay the debts, seeing that the bondholder had agreed to accept £2,000 to release his bond. I do not think it necessary to discuss this point at length—it was decided in the case of *Welton* v. *Saffery* (1897, A.C. 299) that the shareholders, if shares are issued at a discount, are liable in a winding-up for calls for the amounts unpaid on their shares for the purpose of adjusting the rights of contributories *inter se*.

I now deal with each of the respondents separately.

(1) *Winship's case.*

It is desired to place Mr. Winship's name on the list in the place of Brown for 300 £1 shares.

I have been unable to find out in the voluminous affidavits what these 300 shares are for.

In the liquidator's replying affidavit sec. 6 it is alleged "On the 13th April, 1909, the respondent signed a receipt to the company in the name of John Brown acknowledging to have received from the company 30 share certificates for 300 of its £1 shares, and gave his own address as the fictitious John Brown.

That he subsequently transferred 80 of these shares to people who still retain the scrip and that the said respondent gave the company consideration for these shares."

This is in reply to Winship who says that he received fully paid-up shares from Bradley in terms of an agreement with him which stipulated fully paid shares in return for services rendered to him. "The services rendered quite independently of my position in the company included procuring subscribers and the circulating of thousands of prospectuses." It is impossible from this for me to find that Winship falls within the class who surrendered 5s. shares for £1 shares.

The making of an order is in the discretion of the Court. I do not think that discretion should be exercised unless that it is shown clearly that a call can be made on the respondent.

It has not been established that such a call can be made and the application fails. This does not prevent the liquidator from applying to the Court to make such a call if the proper facts can be established. The application is dismissed with costs.

(2) *van Zuilecom's case.*

The rule is to place A. M. van Zuilecom's name as holder of 1,280 shares in the name of A. M. Vane, and also in place of the fictitious name of Jas. Bounder for 250 £1 shares.

Van Zuilecom says that the name J. S. Bounder does not represent him. A receipt is produced signed by him for 250 shares, —on this in pencil is the name J. Bounder but he says this name was put there after he signed the receipt. He says Bradley offered him these shares for his trading rights and he refused them.

With regard to the shares in the name of Vane he says there

are original shares he had which were exchanged for £1 shares. He says he parted with these shares before Bradley's contract. But he says he was asked to send in 1,250 5s. shares which he did, and received in exchange 1,250 £1 shares. This he stated in the course of his argument. He said he knew nothing about Bradley's agreement and had no connection with the company at that time and was not in the Transvaal.

The facts are meagre, but the claim as to the 250 shares clearly fails.

With regard to the 1,250 shares I am not satisfied that van Zuilecom is liable. He was asked to send in shares in one company and got shares in a company of a different name. If he was ignorant of the facts it seems to me the company is estopped from saying the shares were not fully paid up. There was no reason to suppose that there had not been a reflotation, and that matters were not done legally.

The statement was made by van Zuilecom in argument, but I am not prepared in the face of that statement to say that the liquidator has made out a case and, consequently, I am not prepared to allow an amendment of the rule and exercise my discretion in favour of the liquidator. This case fails and must be dismissed with costs.

(3) *J. B. Nancarrow's case.*

The rule is to place J. B. Nancarrow's name in place of the fictitious name of Percy Webb as holder for 100 £1 shares.

The information is that Nancarrow signed a receipt in the name of Percy Webb for 100 shares. He says the shares were issued to Bradley and he gave consideration to Bradley for the shares. There is nothing to show that these shares were handed over to Nancarrow in exchange for 5s. shares.

(4) *George Knox's case.*

The rule is to place George Knox's name in place of the fictitious name of John Tanty as the holder of 1,448 £1 shares.

George Knox says that Bradley asked him to subscribe for 300 shares, which he agreed to do. He also procured for Bradley 1,500 to 2,000 other subscribers. For this Bradley desired to remunerate him by handing him 1,296 fully paid shares in the name of John Tanty. He refused these shares, but while he was away Bradley handed them to his wife in her name.

The liquidator says that Knox signed for 150 further shares in

the name of Tanty. But this is denied *in toto* by the respondent, who denies that he ever had such shares.

The 1,296 shares it appears were afterwards transferred into the name of Knox's wife prior to the liquidation.

There is nothing to show that the respondent's story is not true, and that he did get the shares from Bradley for services rendered. As to the other 150 shares it is impossible to hold on the affidavits that any case is made out. The application therefore fails.

(5) *S. A. Goble's case.*

The rule is to place S. A. Goble's name in place of the fictitious name of S. A. Elbog as holder of 168 £1 shares.

This respondent had 37 5s. shares in his own name. For these he got 37 £1 shares in his own name. The shares in the name of Elbog came from Bradley apparently. There is nothing to show that they were given in exchange for 5s. shares. The application fails.

(6) *T. Duncombe's case.*

The rule is to place T. Duncombe's name in place of the fictitious name of John Hartley as holder of 150 £1 shares.

These shares were acquired from Bradley for services rendered. Any shares he may be liable on appear to be in his own name. The application fails.

(7) With regard to Bradley and Abrey they have not filed any affidavits. But there is nothing in the petition to show that there is any liability on the shares in the fictitious names. If the liquidator wishes he can apply on a proper case shown to have a call on these parties or any of the parties.

Applicant's Attorney: *H. Lindsay*; Knox's Attorneys: *Van Hulsteyn, Feltham & Ford.*

[G.H.]