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SELLING NEW SHARES AT LESS THAN PAR.

HANDLEY v. STUTZ, 139 U. S. 417.
OOREGUM GOLD MINING COMPANY OF INDIA v. ROPER, [1892] A. C. 125, H. L.

The recent affirmance by the law lords of the House of Lords of the doctrine that a subscriber to the shares of a corporation is liable for the last penny of the unpaid portion of his shares, is in such striking contrast to the recent decision of the United States Supreme Court in Handley v. Stutz, as to be worthy of special examination. The decision is also notable as being the first distinct utterance of the English court of last resort on a question which, although pronounced on by the Court of Appeal, was still regarded as debatable. It may therefore be justly classed as a "leading case" on a very important question of the law of private corporations.

The case is that of The Ooregum Gold Mining Company of India v. Roper, and is reported in [1892] A. C. 125, H. L.

The facts were these. The Ooregum Gold Mining Company, being on the verge of bankruptcy, held a general meeting of the stockholders at which it was voted to issue 120,000 preference shares, at £1 each, to be sold and issued as fully paid up for 5s. per share. At that time the ordinary shares were worth but 2s. 6d. per share. In pursuance of this resolution upwards of 100,000 preference shares were sold at 5s. per share, and the transaction duly registered in accordance with the statute. The capital so raised tided the company over its difficulties, and, by the fortunate discovery of rich gold deposits, it became so prosperous that its ordinary shares sold for 40s. in the market.

Some four years after these preference shares were issued, Roper purchased on the stock exchange some of the ordinary shares of the company. Soon after he brought an action against the company, and one Wallroth (as an original allottee of preference shares and trustee for the others) to have the issue of
preference shares at 15s. discount declared *ultra vires*, and to compel the holders of such shares to pay into the company the 15s. per share remaining unpaid. As a more special ground of relief he alleged that certain debentures issued by the company were made a charge on all its property, whereas, if these preference shares were fully paid, the sum so realized would cover the debentures, and extinguish the general liability of the company.

When this case reached the House of Lords on appeal, it was a case of first impression so far as that court was concerned. The Court of Appeal had, it is true, decided the question in 1888, in the case of the *Almada and Trito Company*, but that decision could not control the court of last resort, and was in this case to be either approved or disapproved.

The question involved was precisely the same question as was involved in *Handley v. Stutz*. That question, as stated by one of the law lords, was, "whether it is or is not competent for a company limited by shares to issue shares at a discount so as to relieve persons taking shares so issued from liability to pay up their amount in full. It was suggested that different considerations might apply to shares in the capital with which a company is originally registered and shares in additional capital created afterwards." The question as stated by Mr. Justice Brown, in *Handley v. Stutz*, was, "whether an active corporation, or as it is called in some cases, a 'going concern,' finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market and sell it for the best price that can be obtained."

In *Handley v. Stutz* the Supreme Court also declares the question to be a new one, and that the court is, consequently, "not embarrassed by any previous decision on the point."

We have, therefore, these two cases, involving practically the same question, each decided in the court of last resort, each declared to be (with what show of reason in the case of the
American court need not be considered) without precedent, and each of the very highest importance to the commercial world. The decision in *Handley v. Stutz* is well known to the profession and has provoked more discussion in professional circles than any other decision of the Supreme Court in recent years. That decision is, in effect, that a corporation may, when it is necessary or desirable to increase its capital stock, sell the new stock for what it can get, and that the purchasers are not liable either to the corporation or to creditors for the difference between the amount paid by them for their shares and the par value of the shares.

The decision in *Ooregum Gold Mining Company of India v. Roper*, is precisely the opposite. The House of Lords expressly holds that where a corporation puts its new stock on the market and sells it for the best price it can get, — in this case for double what the old stock was selling for, — the purchasers are liable for the difference between what they paid and the par value of the stock, not only to the creditors of the corporation, but also to the corporation itself. In the opinion read by the Lord Chancellor (Lord Halsbury), he says:

"It may be that such limitations on the power of the company to manage its own affairs may occasionally be inconvenient, and prevent its obtaining money for the purposes of its trading on terms so favorable as it could do if it were more free to act. But, speaking for myself, I recognize the wisdom of enforcing on a company the disclosure of what its real capital is and not permitting a statement of its affairs to be such as may mislead and deceive those who are either about to become its shareholders or about to give it credit.

"I think, with Fry, L. J., in the *Almada and Tirito Company’s Case*, that the question which your Lordships have to solve is one which may be answered by reference to an inquiry: What is the nature of an agreement to take a share in a limited company? And that question may be answered by saying, that it is an agreement to become liable to pay to the company the amount for which the share has been created. That agreement is one which the company itself has no authority to alter or qualify, and I am therefore of opinion that * * * the
company were prohibited by law, upon the principle laid down in *Ashbury Company v. Riche*\(^1\) from doing that which is compendiously described as issuing shares at a discount."

It is true that the decision in this case turned upon the clauses in the Companies Acts of 1862 and 1867 limiting the liability of members to the amount unpaid on their shares, but as those clauses merely enact a principle, which has always been recognized and enforced by the American courts ever since the cases of *Wood v. Dummer*, 3 Mason 308, and *Sawyer v. Hoag*, 17 Wall. 610, the case has precisely the same force as if the statutory provision were, as with us, embodied in judicial rules. The real point in issue in both the English and American cases was whether the rule should be extended to new issues of stock put upon the market by a company already organized.

The only dissent from the decision of the House of Lords in this case was by Lord Herschell, who, while assenting to the general doctrine announced by the court, thought it ought to be applied only in a "winding-up" of the affairs of the company, "and then only so far as necessary for the discharge of the obligations of the company and the costs of the winding-up."

His argument upon this point would probably commend itself to the profession in this country, and is certainly in accordance with the doctrine of the American courts previous to *Handley v. Stutz*. Indeed, had *Handley v. Stutz* not been decided some year and a half before *Ooregum Gold Mining Company of India v. Roper*, the American lawyer who chanced to read the latter case in the English reports would undoubtedly have said that Lord Herschell's opinion was in entire accord with the American doctrine. It is founded in reason, in justice, and in commercial convenience. It enables a corporation to make such contracts with its own members as may best subserve the interests of the parties concerned, while it protects the public generally, and creditors specifically, against injuries resulting to them from such contracts. It avoids the stringency of the English rule on the one side and the looseness of the new American rule on the other. It marks, so to speak, the point of rest of the pendulum

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\(^1\) L. R. 7 H. L. 653.
between the extremes of judicial decisions. *Medium tenuere beati.*

Prophecy is a thankless office, and has even been a dangerous one. But I venture to add, that if the uneasiness of the legal mind at the decision in *Handley v. Stutz* means anything it means that the reason and conscience of the profession have been shocked at the doctrine in that case and will not again be at rest until the earlier doctrine, and the doctrine in *Ooregum Gold Mining Company of India v. Roper*, as limited by Lord Herschell, is firmly re-established.

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