

credit of the investing members solely for the purposes provided for in the articles of association.

It appears clearly enough from the minutes of the directors that the main object they had in view was to arrest the current of withdrawal on the part of the investing members, and it must be owned that the readjustment of the capital account was important if they had possessed funds to meet it, but what they did was quite beyond their power. The investing members had as good a right to withdraw and be paid out according to the rules as the borrowing members had to receive advances and to repay them by instalments, and no general meeting had power to interfere with these rights.

I may add that I do not think the annual meeting had power to deal with this matter. The 44th rule limits such meetings to the discharge of ordinary business, which this certainly was not.

LORD CRAIGHILL was absent.

The Court pronounced this interlocutor:—

“Find in fact that the defenders at their annual general meeting, held on 29th March 1882, approved of a report by the directors recommending that in consequence of the depreciation of the heritable property on the security of which the funds of the society were invested, a sum of seven shillings and sixpence per pound should be deducted from the account of all the shareholders and placed to a suspense account, and that the defenders accordingly made a corresponding deduction from the sums standing in the books of the society at the credit of the pursuer from ninety-seven pounds two shillings and eightpence to sixty pounds fourteen shillings and twopence, which sum the defenders are willing to pay: Find in law that this reduction was validly made; therefore sustain the appeal; recal the interlocutor of the Sheriff-Substitute appealed against; dismiss the action: Find the defenders entitled to expenses in the Inferior Court and in this Court,” &c.

Counsel for Pursuer (Respondent)—Scott—Rhind. Agent—William Officer, S.S.C.

Counsel for Defenders (Appellants)—Mackintosh—Jameson. Agents—Carment, Wedderburn & Watson, W.S.

Thursday, July 16.

FIRST DIVISION.

GARDINERS v. VICTORIA ESTATES COMPANY.

Public Company—Transfer of Shares—Rectification of Register—Companies Act 1862 (25 and 26 Vict. c. 89), sec. 35—Ultra vires.

A shareholder in a public company sold his shares to the managing director, and the directors approved of the transfer “in favour of the managing director for behoof of the company.” The name of the company itself was thereupon entered on the register as holder of the shares. Six years thereafter the company, on the ground that it had no

power to hold its own shares, challenged the transaction, and replaced the shareholder's name on the register. Held that the shareholder's name having been lawfully removed in consequence of a transfer which the directors approved could not again be placed on the register.

This was a petition to have the register of the Victoria Estates Company (Limited) altered.

The Victoria Estates Company was incorporated under the Companies Act 1862 and 1867, in 1877. Its registered office was at the office of the managing director James Drummond, C.A. The business done was that of a company dealing in acquiring and erecting houses, lending money on heritable property, &c. The capital was divided into shares of £5 each. The company was a small one; its shares were not quoted on the Stock Exchange. In October 1878 W. G. Gardiner and James Gardiner, who were brothers, were each owners of 100 shares, on which £100 had been paid in each case.

Being desirous to invest their funds in their business as shipbrokers, the Gardiners resolved to realise, and one of them called on Drummond on the subject. After one or two meetings it was intimated by Drummond that the shares would be taken at par. The Gardiners, as they contended and deposed in evidence in this action, understood Drummond to be the purchaser for his own account. The transfers, which were dated 26th October 1878, bore that Drummond was transferee, but there was added the words “for behoof of the Victoria Estates Company, Limited.” In the case of W. G. Gardiner's transfer these words were interlined, and the interlineation was not authenticated. The Gardiners and the witness who witnessed their signature deposed that to the best of their recollection and belief these words were not there at the time of signature. James Gardiner alleged that in his case also the words “for behoof of the Victoria Estates Company, Limited,” had been introduced after the signature. In this process the company and Drummond both maintained that the transaction was all along intended to be, and known by the Gardiners to be, one for behoof of the company, and not of Drummond at all.

After this transaction the Gardiners believed themselves to be no longer shareholders of the company. They were not called to meetings, they received no call-letters when calls on the shares were made—as was done on several occasions—their names were not on the list furnished to the Registrar of Joint-Stock Companies, nor did they receive dividends, balance-sheets, reports, or the like.

It subsequently appeared that the shares from the date of the transfers stood in the books as the property of the Victoria Estates Company, the directors having approved of the transfers “in favour of the managing director for behoof of the company,” and the company's name having then been put on its register as owner of the shares. In the summer of 1884 the directors took the advice of counsel as to the power of the company to hold its own shares. The only provisions on the subject in the articles were—Article 15, “The board shall have power, without assigning any reason, to decline to register any transfer or transmission of shares in favour of any person whom they may consider it against the interest of the company to

admit as a shareholder, or where the transfer or transmission has been made for a gratuitous or any consideration other than a full price; and the board, before registering any transfer, may claim the shares at the price paid, or agreed to be paid, by the transferee, to the exclusion of such transferee. No number of shares less than ten shall be transferable except to the company." Article 16—"Shares acquired by the company may be retained as the property of the company, or disposed of in such manner as the directors may appoint." Article 17—"Shares in the company shall be transferred in the following form, or as near thereto as may be, or in such other form as the board may from time to time approve of:—I, A B, of in consideration of the sum of pounds, paid to me by C D of do hereby transfer to the said C D the share (or shares) numbered standing in my name in the books of 'The Victoria Estates Company, Limited,' to hold unto the said C D, his executors, administrators, and assignees, subject to the several conditions on which I held the same at the time of the execution hereof: And I, the said C D, do hereby agree to take the said share (or shares) subject to the same conditions."

There was thus in the rules no direct power to the company to hold its own shares.

The directors were advised by counsel that the company could not buy and hold its own shares. The law-agent therefore on 12th July 1884 (nearly six years after the transfers) wrote to the Gardiners—"In October 1878 you sold to this company at par 100 of its shares then held by you." The letter proceeded to say that opinion had been taken as to the legality of the transaction, and that the company were advised that it was *ultra vires* and illegal, and that the Gardiners were still shareholders. They were therefore called upon to repay the amount for which they sold the shares, and to pay up the calls made since the transfer, in all about £460 each. Subsequently the directors had the Gardiners' names re-entered on the register. On 21st September a fresh call was made, and it was intimated to the Gardiners. They repudiated liability for the shares, and brought this petition under section 35 of the Companies Act 1862, to have the register rectified by removal of their names, and, if necessary or expedient, by the insertion of such entries or entry as the Court should deem proper.

Answers were lodged for the company, and eventually Drummond, who was no longer managing director, also appeared separately. Both the company and Drummond maintained that the petitioners were well aware that they were selling to the company.

The company maintained that the transaction was *ultra vires*, and that the Gardiners were still shareholders and were rightly on the register.

Drummond maintained that while the company might or might not be owner of the shares (in the latter of which events he contended that the petitioners were still such) he himself could not be held the owner or put on the register as such.

A proof was led, when the facts above narrated appeared. It also appeared that the company was more prosperous in 1878 than in 1884.

Argued for the petitioners—The sale to Drummond was valid as far as the petitioners were concerned; they sold to him as an individual, and he entered into the transactions for his own

behalf. Even if he did so truly for the company, and that was really *ultra vires*, the petitioners had no concern with that. Their names had been removed by authority of the directors, in accordance with a transaction into which the petitioners acted in good faith. It was therefore illegal to restore the names six years afterwards. If the interlineations were authentic, and were there at the date of the transfers, they should have been initialed; in the absence of such initialing the presumption of law was that they were made subsequent to the execution of the deed. The shareholders of the company must have known of this transfer by the petitioners, and they were barred by acquiescence from now objecting.

Authorities—*Bonnington Sugar Refining Company v. Thomson's Trustees*, October 25, 1878, 6 R. 80; *Fyfe*, L.R., 4 Ch. 768; *Lindley* 780 and 1412; *Parson's* case, L.R., 8 Eq. 656; *Dronfield Silkstone Coal Company*, 17 Ch. Div. 76; *Phosphate Lime Company*, L.R., 7 Com. Pl. 43.

Replied for the company—The transfer was invalid; as the transferee's name could not validly be put upon the list of shareholders, the transferors' ought to have remained on it. The facts of the case made it unlikely that Drummond was buying for himself. The fact that no commission was charged showed that Drummond was acting for the company.

Authorities—*Gustard's* case, L.R., 8 Eq. 438; *Heritage's* case, L.R., 9 Eq. 5; *Cartmell's* case, L.R., 9 Ch. 691; *Taylor* on Evidence, 1547.

Replied for Drummond—The purchase was one solely on behalf of the company, and was formally approved by them. The interlineations were put on at the time the transfer was executed.

At advising—

LORD PRESIDENT—This is a petition under the 35th section of the Companies Act of 1862 for the rectification of the register of the Victoria Estates Company. The petitioners are the Messrs Gardiner, who were each registered shareholders of 100 shares of the said company, upon which £1 per share had been paid.

In October 1878 the Messrs Gardiner wished to sell their shares, and they entered into negotiations with Mr Drummond, the manager of the company, and their allegation is that they sold and transferred their shares to him, and that he accepted their transfer. It is clear, I think, that from 1878 to 1884 the petitioners heard no more about these shares, and they had good grounds for believing that they were no longer shareholders of the company. When the directors required to make calls, which occurred more than once between 1878 and 1884, they were not included; they were not summoned to meetings of the company; nor was any offer of unissued shares made to them as was done to the regular shareholders of the company. They were in fact all along treated as though they had ceased to be members of the company from 1878. Ultimately they were told that they were to be put again upon the list of shareholders in respect that the sale of their shares was really a sale to the company, who had been advised that they had no power to deal in their own shares.

It would indeed be hard if the Messrs Gardiner were, after so many years, to be again entered on the list of shareholders, and after they considered

that they had effectually transferred the shares standing in their names. There are, however, some legal difficulties in the way of holding these transfers effectual, and if these cannot be got over, hard as it may appear, the names of the petitioners may have again to be entered on the list of shareholders of this company.

There are, in the first place, some facts which must be carefully kept in mind, as they have an important bearing upon the decision of this case. The petitioners, for instance, say that they dealt with Mr Drummond all along as an individual, and that they had no idea that he was purchasing these shares for behoof of any other party but himself.

The respondents say that the Messrs Gardiner were all along made aware that the purchase was for the company, and that Drummond was acting for them in the matter.

Now, this is a simple matter of fact, but it is a most important fact, and I must say that I believe the account of this matter given by the Messrs Gardiner. They say that they dealt with Mr Drummond from beginning to end of this transaction as an individual, and they thought that in so dealing with them he was acting for himself, and not as the representative of any other person or body. Then, as to the transfers, one of them is wholly in manuscript, the other is partly written and partly printed. In both the name of Drummond appears as the transferee, but as these transfers now stand they bear to be transfers to Drummond "for behoof of the Victoria Estates Company (Limited)."

In the one transfer, which is wholly in writing, these words, "for behoof of the Victoria Estates Company (Limited)," are interlined, but that interlineation is not authenticated. In the other transfer there are no interlineations, because there was ample room to add the words without interlineation. Now, the Messrs Gardiner say that this interlineation was not there at the time when they executed the transfers. On the other hand, Drummond says it was. The evidence upon this point leaves the whole matter in considerable doubt, but I am willing to assume that the words "for behoof of the Victoria Estates Company (Limited)" were there when the transfer was executed. What is their effect to be? This is a transfer to Drummond as an individual—it is he that pays the money—while the cheque by which it is paid is from his own private account. In such circumstances the transferrer has no business to inquire into the objects of the transfer, or as to whether the purchaser is buying for his own behoof or for that of some third party. He has a good name given to him in the transferee, and he has no more concern in the matter. If the transfer was approved by the company, and was registered in the usual way, the effect of that would be to transfer any liability attaching to these shares from the Messrs Gardiner to Drummond, assuming of course that the company was not entitled to hold its own shares.

Now, what took place in the present case was just this. Upon the 6th November 1878 the transfers were registered, and the entry in the shareholders' ledger was in these terms, "To 100 shares transferred to the Victoria Estates Company (Limited), £100." But such an entry was quite irregular, and it had not the same effect as if Drummond's name had appeared in the list

of shareholders. He was the person whose name should have stood against these shares, and seeing that the company was not in liquidation the question comes to be, whether the company was not bound to make the entry in the register in the name of "James Drummond, for behoof of the Victoria Estates Company (Limited)." I think that they were.

They could, if they had thought fit, have refused to have accepted this transfer, but, on the contrary, they passed it, and duly recognised it as a transfer in favour of the managing director "for behoof of the company." This transfer was formally approved of by the directors. In these circumstances what the directors ought to have done was, they should have registered the transfer in these terms, and not as a transfer to the Victoria Estates Company.

I am therefore of opinion that the directors of this company are not entitled to replace the names of the Messrs Gardiner upon their list of shareholders. Their names were properly struck off at the time when the shares were transferred to Drummond, and although in putting the company's name on the register an illegal act may have been committed, yet the petitioners' names were at that time properly struck off the list of shareholders, and cannot now be replaced.

I am therefore for granting the prayer of this petition by ordering the register of this company to be rectified by striking out the names of the Messrs Gardiner.

LORDS MURE, SHAND, and ADAM concurred.

The Court ordered the register to be rectified by removal of the petitioners' names.

Counsel for Petitioner—Pearson—Dickson.
Agents—J. & J. Ross, W.S.

Counsel for Respondents (Victoria Company)—
J. Guthrie Smith—M'Kechnie. Agents—Duncan Smith & Maclaren, S.S.C.

Counsel for Respondent (Drummond)—Shaw.
Agents—W. Adam & Winchester, S.S.C.

Thursday, July 16.

FIRST DIVISION.

WHYTE v. WHYTE'S TRUSTEES.

Trust—Judicial Factor—Sequestration of Trust Estate.

Circumstances in which the Court without removing testamentary trustees sequestrated the trust estate and appointed a judicial factor thereon.

This was a petition for sequestration of the trust estate of the deceased George Whyte, proprietor of Meethil and Burnhaven, Aberdeenshire, and if the Court should consider it necessary, for removal of the trustees. The petitioner Phillis Whyte was a daughter of the trusteer, and entitled to a legacy of £1000, which was not to vest during the lifetime of one of the trustees, the trusteer's widow, who was alive and a trustee at the date of the petition. The peti-