answers must be appended to the reclaiming note and must be boxed in terms of the Act of Sederunt and Act of Parliament respectively.

LORD MACKENZIE and LORD SKERRINGTON concurred.

LORD JOHNSTON did not hear the case and was absent at advising.

The Court repelled the objections to the competency and sent the case to the Summar Roll.

Counsel for the Reclaimers — Ingram. Agent—Isaac Furst, S.S.C.

Counsel for the Respondent—J. A. MacLaren. Agent—A. W. Gordon, Solicitor.

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*Thursday, May 25.*

## FIRST DIVISION.

## M'LINTOCK *v.* CAMPBELL.

*Company—Winding-up—Rectification of Register—Director-Shareholder Transferring Shares to Person of Straw when Company was to his Knowledge in Difficulties.*

A director of a company, when, to his knowledge obtained both as a shareholder and as a director, the company was in acute financial difficulties, transferred his shares to a person of straw. The company coming to liquidation, the liquidator presented a petition to have the transferree's name removed from the register of members and to rectify the A list of contributories by deleting therefrom the name of the transferree and adding in place thereof the name of the transferrer. *Held* (*diss.* Lord Johnston) that the transfer of the shares being absolute, the petition must be refused.

William M'Lintock, C.A., Glasgow (liquidator of the Cosmopolitan Insurance Corporation, Limited), *petitioner*, presented a petition for rectification of the register of the company by deleting therefrom the name of Kathleen Berry as holder of 400 shares and to rectify the A list of contributories by a similar deletion and by inserting in room of Miss Berry's name the name of William Campbell, *respondent*.

The *facts* of the case were — The Combined Burglary and Fire Insurance Company, Limited, was incorporated under the Companies Act 1862 to 1900 on 10th August 1905, and had its registered office in Glasgow. In 1908 its name was changed to the Cosmopolitan Insurance Corporation Limited. On 9th February 1915, at an extraordinary general meeting held at the registered office, it was resolved that the company should be wound up voluntarily, and the petitioner was appointed liquidator. On 24th March the petitioner at a meeting settled the A list of contributories, and on 15th April 1915 made a call upon all the deferred shareholders of the company, of £1 per share payable on 15th May 1915. The A list of contributories included Kathleen O'Mailie Berry, residing at 32 Monteith Row, Glasgow, as holder of 400 deferred shares, Nos. 13601 to 14000 inclusive, which had been transferred by the respondent to Miss Berry, who was his housekeeper and resided with him. The transfer was dated 22nd October 1914, and, so far as written, was in the writing of the respondent. It was signed by the respondent and Miss Berry, both of whose signatures were witnessed by respondent's law agent. The consideration was 5s., and the transfer was stamped with a 6d. stamp. It was sent to the registered office of the company by the respondent, and was passed at a meeting of the directors on 23rd October 1914, at which the respondent was present with four other directors. A new certificate in favour of Miss Berry was issued at the meeting, and was handed to the respondent, along with a counterfoil receipt for the shares to be signed by Miss Berry. The counterfoil receipt was signed by the respondent, and was thereafter returned to him for the signature of Miss Berry, which he obtained. The shares transferred to Miss Berry were £5 shares upon which 1s. per share had been paid up, leaving an uncalled liability on each of £4, 19s., or a total liability of £1980, and were the whole deferred shares held by the respondent, although he continued to hold 100 £5 fully paid preferred shares. Miss Berry made no payment to meet the call payable at 15th May 1915, nor a further call of £1 per share, payable on 9th August 1915. Miss Berry had no means, a fact which was known to the respondent, and the transfer was for the purpose of escaping liability. All the expenses in connection with the transfer were paid by the respondent, but the 5s. consideration was paid out of her wages by Miss Berry, who was told that there was a sporting chance of the shares coming right of which she would have the benefit, and who did not realise that she was taking a loss of £1980 off the respondent's shoulders. By art. 74 of the articles of association, as amended by special resolution passed at an extraordinary general meeting on 30th April 1908, the qualification of a director was the holding of shares in the company of the nominal value of £1000. As the result of the transfer the respondent no longer retained his qualification as a director. At the date of the transfer the financial position of the company was hopeless. Its last balance-sheet, issued on 17th July 1914, showed the state of the company's affairs as at 31st December 1913. At that date there was a debit balance of £13,124, 17s. 3d. exclusive of liability for unexpired risk. By the date of the transfer it was well known to the respondent, both from the balance-sheet and from his position as a director, that the position of the company was such that in all probability it would be necessary either to make a call on the shares or go into liquidation. Before October 1914 the respondent as a director had heard of a transfer by another director, Dr Maclennan, the question of whether the directors could refuse to

register his transferree having come up at a directors' meeting. Dr Maclennan's transferee was a man of no means, and as the result of that case the respondent became aware that the board of directors could not refuse to register a transferee.

Argued for the petitioner—An absolute transfer by a shareholder as such prior to liquidation to a person of no means was valid, but the *onus* of proving that the transfer was absolute was upon the transferror—*In re The Mexican and South American Company* (*Hyam's Case*), 1859, 1 De G., F. & J., 75, *per* Lord Campbell, L.C., at p. 78-79; *in re The Mexican and South American Company* (*Costello's Case*), 1860, 2 De G., F. & J., 302, *per* Bruce, L.J., at p. 306, *per* Turner, L.J., p. 307; *in re The Discoverers Finance Corporation, Limited* (*Lindlar's Case*), [1910] 1 Ch. 312, *per* Buckley, L.J., at p. 317. Upon the evidence it could not be said that this *onus* had been discharged. But in addition to his position as a shareholder the respondent was a director, and as such owed duties to the company conflicting with his position as a mere shareholder but which he was bound to perform—*Dodds* v. *Cosmopolitan Insurance Corporation, Limited*, 1915 S.C. 992, *per* Lord Mackenzie at p. 997, approving of Buckley on Company Law, p. 111-2, 52 S.L.R. 773. *In re National Provincial Marine Insurance Company* (*Gilbert's Case*), 1870, 5 Ch. App. 559, esp. *per* Romilly, M.R., at p. 562, and *per* Giffard, L.J., at p. 566, was practically on all fours with the present case, to the effect that a director could not, using his knowledge of the company's position, acquired as such, dispose of his qualification shares when the company was in difficulties. *In re Cawley & Company*, 1889, 42 Ch. D. 209, was distinguished from the present case, for the facts were different. *Huntington Copper and Sulphur Company* v. *Henderson*, 1877, 4 R. 294, *per* Lord Young at p. 299, 14 S.L.R. 219, showed how far a director was to be regarded as a trustee. The English rule was to the same effect—*Alexander* v. *Automatic Telephone Company*, 1900, 2 Ch. 56, *per* Lindley, M.R., at p. 66-7, and Vaughan Williams at p. 75; *in re Discoverers' Finance Corporation* (*Lindlar's Case*), [1908] 1 Ch. 141 and [1910] 1 Ch. 207. *In re London and County Asurance Company*, (*Jessopp's Case*) 1858, 2 De G. & J. 638, was distinguished, for there the director had done his utmost for the company and failed. Here the director failed in his duty in not endeavouring to have calls made, and this failure enabled him to get rid of his shares. The case was still stronger, for the respondent had got rid of his qualification shares. On this subject there was no authority. Buckley on Company Law, p. 35, left the matter open. The respondent's resignation as director did not become effective for fourteen days, and as he remained a director during that period he must be held to have still retained his qualification shares—*Gilbert's Case* (*cit.*) *per* Giffard, L.J., at p. 565; *in re South London Fishmarket Company*, 1888, 39 Ch. D. 324, *per* Kay, J., at p. 331.

Argued for the respondent—The facts showed that the transfer, whether by gift or sale, was absolute; they did not show that in the circumstances the only proper course for the directors to adopt was to make a call or propose liquidation; the respondent could not be held to have failed in the degree of diligence required of him—Buckley on Company Law, pp. 629-630. *Hyam's* and *Costello's* cases (*cit. sup.*) laid the *onus* of proof on the transferrer, but they must be read in the light of their peculiar facts, which were different from those in the present case. *Qua* shareholder a director could transfer as freely as any other shareholder; he might even pay a worthless transferree to take the shares. *Qua* director he was still free to transfer so long as he did not derive an advantage from his fiduciary position in so doing—Buckley (*op. cit.*), p. 35. The decision in *Gilbert's* case (*cit.*) proceeded upon such an abuse of his fiduciary capacity by a director. *Cawley's* case (*cit. sup.*) and *Lindlar's* case (*cit. sup.*) applied, and they were followed in Scotland in *Liquidator of Florida Mortgage and Investment Company, Limited* v. *Bayley*, 1890, 17 R. 525, 27 S.L.R. 419. *In re The South London Fishmarket Company* (*cit.*) turned on the interpretation of private Acts.

At advising—

LORD PRESIDENT—This is an application presented by the liquidator of a company called the Cosmopolitan Insurance Corporation, for authority to rectify the register by deleting therefrom the name of Kathleen Berry as the holder of 400 deferred shares, and by inserting in place thereof the name of the respondent. I am of opinion that the application must be refused. It appears that by a transfer, dated the 22nd of October 1914, the respondent, who was then a director of the company, transferred the shares in question to Miss Berry, who was his housekeeper. She agreed to accept the shares and take them subject to the conditions on which the respondent held them. If this was a proper transfer, if the respondent absolutely parted with the shares, if the whole burden and benefit effeiring to the shares passed to Miss Berry, then it was not disputed that the prayer of the petition could not be granted. But it was alleged that the transaction was colourable, that there was no *bona fide* transfer of the shares, that there was no real bargain or contract between Miss Berry and the respondent, and that she signed the transfer merely as a matter of form. We accordingly allowed a proof in order that the facts might be ascertained. The result of the evidence taken is to show that there is really no controversy regarding the material facts of the case. At the date when the transfer was executed the financial position of the company was hopeless. There was an uncalled liability of £4, 19s. on each of the shares. For the sole purpose of escaping this liability the respondent transferred the shares to his housekeeper, a person of no means. But there was no arrangement or understanding of any kind that the shares should under any circumstances revert to

the respondent. On the contrary, it is certain that his divestiture was, and was meant to be, absolute and unqualified. Had the respondent been an ordinary shareholder of the company it is beyond doubt that the transfer must have been held good. But it was contended that the fact that he was a director made all the difference. That contention is, in my opinion, contrary to law. The shares held by the director of a company are his separate property, and he is in no sense a trustee of them for the company. Directors of a company are not trustees of their individual interests in the company. Like any other shareholder in the company they can transfer their shares to men of straw in order to avoid a call. If the company desires to prevent directors or other shareholders thus dealing with their shares well-known means are available to effect that purpose. If such means are not availed of, then "in a vast variety of circumstances he (the director) is just as free to deal with his shares . . . as any other person"—Giffard, L.J., in *Gilbert's* case, 1870, 5 Ch. Ap. 559 at p. 565. This has been well settled law for close on half a century. Since *Gilbert's* case (*cit.*), it has never been disputed, so far as I am aware, that a director is quite at liberty to get rid of his own liability for the purpose of throwing an increased liability upon his fellow-shareholders. The reason is plain. The power to transfer is not given to him as a director. It is given to him as one of the shareholders. Consequently he is not prevented from exercising that right to transfer merely because he does it to benefit himself and not to benefit the shareholders. The cases of *in re Cawley & Company*, 1889, 42 Ch. D. 206, and of *in re Discoverers' Finance Corporation* (*Lindlar's* case), [1910], 1 Ch. 207 and 312, appear to me to conclude the question. Neither is binding on us, but it appears to me that the reasoning in both, especially that of Buckley, L.J., in delivering the judgment of the Court of Appeal in the latter case, is sound and unassailable. I do not think, indeed, that this was disputed by counsel for the petitioner. Mr Chree's effort to show its inapplicability to the case before us entirely failed. The conclusion I come to is that a transfer of his shares by a director of a company to a man of straw made for the sole purpose of avoiding a call will stand good, provided the divestiture is absolute and unqualified. In the present case the evidence shows that it was so, and consequently the transfer must stand. I should add that I have formed, and therefore express, no opinion on the question whether by the action taken by him against Miss Berry the liquidator has shut himself out from the remedy sought. The grounds I have stated are sufficient to warrant our refusal of the petition.

I must add that I sincerely regret that I am unable to concur with the opinion which my brother Lord Johnston is about to deliver, and which I have had an opportunity of carefully reading, because in my view it would require in this case legislation to do what I agree with him in thinking would be no more than justice.

LORD JOHNSTON—I regret that I cannot adopt the opinion which your Lordship has pronounced. The difference, however, between us is, I think, whether the Companies Acts as they at present stand, and the law as it is at present understood, are equal to coping with a case such as we have before us, or whether legislation is necessary. Personally I do not think that legislation is necessary, and with the reasons I am afraid that I must trouble your Lordships at some length. Your Lordship thinks that proceedings such as those which the respondent has adopted can only be checked by legislation. But as might be expected we are both heartily at one in reprobating these proceedings themselves.

In this case there is raised in a very direct form the question of the duty which a director owes to the company on whose board he sits, and how far that duty conflicts with his ordinary rights as a shareholder to transfer his shares in order to avoid liability for calls. I do not find that this question has been presented to the courts either in England or in Scotland in such a way as to cover the circumstances of this case, and the question is an important one, for if Mr Campbell, the respondent, is to escape, it can only be on grounds subversive of the common faith in the British practice of confiding the management of joint-stock concerns to boards of directors.

The question may be thus stated—Where a director must be aware that his ship is drifting on the sands—still more where by his action he shows that he is aware—can he down to the last moment, if the collective board make no move, by transfer to a man of straw save his own skin regardless of the interests of the company, or has he individually, as well as the board collectively, a duty as director to protect the company against the consequences of such action on the part of himself as well as others, a breach of which duty will leave him liable in subsequent liquidation to have his name restored to the register of shareholders if it has been removed?

I think that there is such a duty, and that in this case it has been breached with the consequences above indicated. I cannot find that both the common law and company legislation have left a door open for the escape of a director sufficiently dishonourable to use it in such circumstances, or that this Court is powerless to intervene in the interest of company morality generally, and of the company which has entrusted its affairs to him in particular. The cases in the English courts have gone very far, yet not, I think, without limit, in supporting the freedom of the individual director to deal with his own shares. There is, so far as I am aware, as yet no authority on the point in Scotland. The contrary view to that which I have expressed requires these cases to be strained to support the freedom of the individual director to take advantage in his private capacity of his own negligence in his official capacity and of the corporate negligence of the board of which he is a member. I do not think that, fairly read, they will afford such support.

[His Lordship then examined the financial history of the company up to the date of the transfer of Mr Campbell's shares, and pointed out that in the seventeen months to 31st December 1913 the company had lost its whole called capital, had ceased to make provision for unexpired risk, and was working entirely on bank overdraft, and that this was known to the directors, and was disclosed on the face of the report and accounts to the above date which was submitted to the company's meeting of 31st July 1914. He added that it could not but be known to the board also that during the months prior to that date the company's business had shown a shrinkage, which was accentuated by the outbreak of war in Europe, and had attained serious proportions before the date in October at which Mr Campbell transferred the shares. He concluded that for a considerable time prior to that date the directors, including Mr Campbell, had known that the company was hopelessly insolvent, and ought to have known that it had become their duty to inform the shareholders that the only course open to them was either to make a call on the shares or to go into liquidation. One of the most important features of the case in this respect was, his Lordship considered, the fact that in July 1914, on the issue of the company's report above referred to, Dr Maclennan, the company's medical adviser, had promptly sold 1000 shares admittedly to a man of straw; that on the transfer being laid before the board for registration the situation was regarded so seriously by the board that they took advice as to their powers to refuse to recognise the transfer, and were advised by their law agent that in the then condition of their articles they were bound to pass any transfer presented while they continued to carry on business; that after long delay the transfer was registered only a few days before Mr Campbell presented for registration the transfer of his shares to Miss Berry; and that Mr Campbell was a party to all the discussions which took place on the question of the transfer of Dr Maclennan's shares. His Lordship further examined the evidence with regard to the sale of the shares by Mr Campbell to his housekeeper, and stated his reasons for holding that although the sale might be regarded, so far as Mr Campbell was concerned, as an out-and-out transference of the shares, Miss Berry's consent to it had been obtained by fraud and under essential error, and that the sale was accordingly voidable. He made special reference to the terms in which Mr Campbell in his evidence described his own course of conduct thus:— Referred to Dr Maclennan's transfer he says —"It was also reported at the meeting that the directors could not prevent the shares being transferred because a call had first to be made. (Q) When it was brought to your knowledge in this way that the uncalled capital might be dissipated at once by transferring to people of straw, when you knew that the company had not assets otherwise to pay its debts, did it not occur to you that a call ought at once to be made?—(A) The company had uncalled capital still. (Q) But uncalled capital which might be dissipated by granting transfers to people of straw?—(A) I did not anticipate that. I could not say that the shares were transferred to people of straw. I did not anticipate my own action at that time. (Q) You told us that it was just that very incident that put it into your mind to do what you did?—(A) Yes. (Q) Because you then discovered for the first time a method, as you thought, of getting rid of your share without future liability?—(A) Yes. I spoke to my law agent on the subject. (Q) And you thought that was the right thing to do instead of making a call?—(A) I wanted to protect myself. (Q) You were a director at the time and had no duty to protect the company?—(A) I wanted to protect myself. (Q) And not to protect the company?—(A) When the directors were allowing shares to go away to such men as Dr Maclennan assigned his to there was no reason why I should not protect myself. I knew that the directors could not prevent that without making a call, and I thought it better to let it go rather than make a call, because I wished to protect myself." And then continued]—

To arrive at a conclusion on the question at issue it is necessary to look at Mr Campbell's position, first, as a mere shareholder, and second, as a shareholder director.

1st. Whether he has, regarded merely as a shareholder, effectually got rid of his call liability by transfer of his shares is, except from one point of view, a pure question of fact. For the law is settled. . . . [*His Lordship expressed doubt as to the transaction*]. . . . But the transaction, assuming it to be one of out-and-out sale and purchase, was undoubtedly obtained by Mr Campbell by imposition or fraud on Berry. . . . [*His Lordship examined the evidence*]. . . .

I conclude therefore that the acceptance by Berry of the transfer of Mr Campbell's shares was obtained by Mr Campbell by fraud and under essential error, and could have been set aside by Berry.

The case of *Lindlar*, [1910] 1 Ch. 312, is the last word in England on the subject of the shareholder's right to transfer to a man of straw to avoid liability for calls. It is not indeed a binding authority in this Court, but the law being administered is the same; and irrespective of the great authority of the Judges who decided it, particularly in this branch of jurisprudence, the conclusion at which they arrived commends itself so entirely to one's mind that I have no hesitation in accepting it, except in one incidental point. I do not delay to state again the general law on the subject as laid down in *Lindlar's* case. But I would desire to express my opinion on the one incidental point where, with respect, I cannot accept the view of the English Court. I assume that for the reasons I have stated Mr Campbell imposed upon Berry and induced her by imposition to accept a transfer of his shares. Buckley, L.J., in giving the judgment of the Court, consisting of Cozens Hardy, M.R., Fletcher Moulton, L.J., and himself, says ([1910] 1

Ch. 320)—"The investigation whether the transfer is or is not an out-and-out transfer is of course an investigation of the true relations subsisting between the transferrer and the transferree. But if this inquiry is answered by finding that the transfer is out-and-out there is . . . an end of the matter so far as any rights of the liquidator are concerned. Suppose the out-and-out transfer was procured by misrepresentation practised by the transferrer towards the transferree, this will give the latter rights against the former, but with this the liquidator is not concerned." This, though not requisite for the disposal of the case, was no mere *obiter dictum* but part of a considered judgment intended to resume the general law on the question at issue, and I am therefore fully alive to the importance of the pronouncement by a Court of such authority. But for the statement no reason is given; and there can be none, except that the matter is *res inter alios* so far as the company is concerned, and gives it directly or through its liquidator no title to complain. I humbly think that this rule is not applicable at any rate in liquidations, and I need not cumber this judgment by considering how it would be in the case of a going company. Much can, I think, be done in liquidations which cannot be so easily effected in the case of a going company, For this I have the authority of Lord Hatherley in *Waterhouse* v. *Jamieson*, 8 Macph. (H.L.) 94, L.R., 2 Sc. App. 32, 7 S.L.R. 648, where he says that a liquidator is under the statute "in a position in which he may assert rights against the company, and assume a position against the members of the company, which the company itself might not be in a position to assert." This has the further approval of Sir George Jessel, M.R., in the *National Funds Assurance Company*, 10 Ch. D. 123 and 125. Now in his judgment in *Lindlar's* case Buckley, L.J., makes no reference to the Companies Act, and to the position created by liquidation thereunder; and certain clauses thereof do appear to me to require consideration. Section 193 of the Act of 1908 provides that in a voluntary liquidation, which this is, the Court may exercise all powers competent to them in a judicial liquidation. Section 163 provides for the settling of a list of contributories, "with power to rectify the register of members in all cases where rectification is required in pursuance of this Act;" and section 32 provides, *inter alia*, that if the name of any person is "without sufficient cause entered in" the register of members of a company the person aggrieved or the company, and therefore the liquidator, may apply for rectification, which the Court may order. If the name of a man of straw had been placed on the register on a transfer induced by fraud it would appear to me to be entered therein "without sufficient cause." This expression is about as wide a one as could be selected, and not only the person aggrieved but the company is given the right to apply. I am unable to follow Buckley, L.J., where he apparently limits the liquidator's power of action to that under section 205 of sanctioning an alteration in the status of a member of the company where the transferree has initiated successful proceedings against the transferrer. In the case of *in re Kintrea*, 5 Ch. App. 95, two eminent Judges—Stuart, V.C., and Giffard, L.J.—appear to me to have taken a different view. The latter says it is clear "that if there is fraud, or if the transaction is such that it cannot stand, the name is on the register 'without sufficient cause.'" This is general language, and is not restricted to the particular circumstances with which the learned Judge was dealing. The transfer there had been obtained by inducing the signature of a document on a mere request to the transferree to sign a transfer of shares in his favour without prior bargain or explanation. The transfer was therefore *ex facie* valid, and no more void than any other document obtained by fraud, but only voidable. Fraud works in many ways, and I think that the words of Giffard, L.J., are as applicable to a more elaborate fraud such as we have here as to the more simple fraud in *Kintrea's* case.

If it be true that the name of a man of straw has been entered on, and that of a solvent holder removed from, the register in pursuance of a transaction tainted with fraud, can it be said—assuming of course that there is a liability on the shares—that rectification of the register is a matter so entirely *jus tertii* to the company in liquidation that the liquidator has no *locus* to appeal to the Court? He certainly, as representing the company, has an interest. Where, as here, A has got himself off the register by perpetrating a fraud on B, who is impecunious, and has wholly failed to meet the call made upon him, is it to be said that B, whether on a bribe from A, or out of mere unconcern with the injustice to others which the fraud on him has occasioned, is entitled to block the way to what the statute regards as the object of liquidation—viz., first, satisfaction of the claims of creditors, and second, adjustment of the rights of contributories *inter se?* I conceive that this Court has the duty and the power at common law, and at all events under the statute, to override such a situation if created. Were reduction of the transaction really necessary and B refused to give his name, I think that the Court would, in liquidation, either require him to do so, for as a member ostensibly on the register and a contributory he would come under the jurisdiction of the Court, or would authorise and direct the liquidator to proceed without him. But I conceive that an action of reduction would not be required for mere form's sake, and that statutory procedure for the rectification of the register, such as has been taken here, is all that is necessary. This Court always sets its face against circuity of action, and I cannot think that it would be doing its duty in the administration of the liquidation and the protection of creditors and shareholders from the loss entailed upon them in the winding-up, by the establishing on the register, through fraud, of an insolvent in

place of a solvent contributory, if it either allowed the greed or the caprice of this insolvent to block the ends of justice, or even insisted on the circuity of action to which I have adverted, and did not go straight to the point of rectification of the register, should the facts demand that that course should be taken. I think that this is imposed upon the Court by the position in regard to liquidation in which it is placed by the statute.

I think something of the same position has already been before the Court—though I admit it is matter of recollection only, and that I cannot lay hands on any report of the case—where there was a bankrupt trustee and a solvent truster, and the trust title was entirely *bona fide*. The question was just one of similar circuity of action—viz., was the liquidator, after having sequestrated the trustee, to be compelled to rank on the trustee's bankrupt estate, his trustee in sequestration to operate his relief, and the liquidator, on the trustee in the sequestration being put in funds by the relief, to rank again, and so on *ad infinitum* instead of getting direct access to the truster liable in the relief.

For the above reasons I am of opinion that, even if there were what the law must regard as a *bona fide* out-and-out transfer here, it was a transfer which was voidable, and that, the transferree being insolvent, rectification of the register need not be obstructed by the technicality that the transferree does not directly herself challenge the transaction.

2nd. But Mr Campbell was not a mere shareholder—he was a shareholder-director—and the most generally important aspect of the case is as his action is affected by his duty as director.

It has been said that a director is not a trustee of his shares for the company, and is free to deal with them in out-and-out *bona fide* transfer down to the last point like any other shareholder. The breadth of the statement is, I think, misleading. As shareholder the director is entitled to transfer his shares down to the last point like any other shareholder, yet as director he may find himself estopped where as shareholder he would be free. In other words, the last point for the director is not necessarily the same as the last point for the shareholder. The shareholder—such is the legal conception of his relation to the company—may part with his shares to a man of straw to escape liability even when he knows liquidation is imminent, though your Lordships have held in relation to this very company in *Dodds's* case, 1915 S.C. 992, 52 S.L.R. 773, that there is a point at which though liquidation has not been resolved upon the directors would have committed a gross breach of duty had they registered a transfer lodged with them. I think that the case of *Dodds* is not without an important bearing upon the present. The directors had at last come to the conclusion that liquidation must be proposed to the shareholders, and on 13th January 1915 they dispatched notices calling a meeting of the company for 9th February to consider, and if so resolved to pass, the appropriate resolution. On the same day a transfer by Dodds to a man Martin was forwarded to the secretary for registration. This they refused—and it was held properly refused—on the ground that "the directors ought to refuse registration if the facts are such that the rights of creditors have intervened although winding up has not commenced"—*cf.* Buckley on Companies (9th ed), pp. 111-2 The director may in circumstances transfer to a man of straw. In circumstances he may not. The last point for him is not necessarily the actual conclusion by the board that liquidation must be proposed. It is a question of circumstances and of his relation to those circumstances.

The special position of the director has emerged in three English cases, and I am not aware of any others either in England or Scotland.

In *Gilbert's* case, 1870, 5 Ch. App. 559, the circumstances were such as to make the decision very analogous to the circumstances in the present case. While recognising that a director is not necessarily a trustee of the shares he holds for the general body of creditors, Giffard, L.J., limits his freedom to deal with his shares thus, "and *in a vast variety of circumstances* he is just as free to deal with his shares . . . as any other person." He thus confirms my view that there are circumstances in which he is not free so to deal, and then he proceeds—"Here were directors who had what was unquestionably a discretion to exercise with reference to a fiduciary power, namely, a power to decide whether at a particular time a call ought or ought not to be made; and if at a particular time, namely, on the 17th of April, they had exercised that discretion by saying that a call should be made, then beyond all question the shares could not have been transferred as they have been." Now the circumstances were, that on 17th April the directors, alarmed by the declared intention of a block of shareholders to get quit of their shares coming to their knowledge, resolved that a call should be made, but the formal resolution was not passed. A transfer of shares by Gilbert, a director, to a clerk in his employment at a nominal price was registered on the 20th, and the call resolution was passed on 23rd April. Liquidation did not follow till the December of the same year. The learned Judge was of opinion that what passed on 17th of April was the key to the situation, and that the directors, knowing what they did of the position of the company "would on 17th April, if they had had any regard to the due interests of their shareholders and of the company, have made the call, as it was plainly their duty to do, on that day." There was a conflict of duty and interest. On the 17th of April, Mr Gilbert, the director in question, "ought to have done his best to have had the call made," and his co-directors ought to have done the same. Accordingly he held that the transfer could not be recognised, and that the register must be rectified by restoring the name of the director transferrer.

The case of the *South London Fishmarket*, 1889, 39 Ch. D. 324, may be cited merely to raise the pertinent question which it suggests. If one director, why may not others in concert quit the ship without any hint of the position to their shareholders? Could it be maintained that, leaving only a quorum to pass transfers, the rest of the directors might lawfully get out before an effective resolution to make a call or to propose liquidation was passed? If so a quorum of impecunious small-holder directors could effectually allow the rest of their co-directors, wealthy and with large holdings, to clear out before they acted upon the course which the duty of all dictated? And why not, if indeed a director is in all circumstances down to the point of liquidation being proposed entitled to transfer his shares like any other shareholder? The answer is that the director is estopped as director by his duty to the company, when as shareholder he is not. In the case then of a director-shareholder the point at which he may legitimately, that is effectually, transfer is a question of circumstances, and at the root of the answer is his duty as director.

The third case is that of *Cawley & Company*, 1899, 42 Ch. D. 209, which is valuable because it is an instance of circumstances in which it was held that the dealing by a shareholder-director with his shares could not be objected to. In the two previous cases it was held that it could be objected to. The transfer by the director was for a consideration which could not be called elusory, and the transferree, though not a man of substantial means, was not a man of straw. The transaction was an honest transaction, and not induced by fraud of any kind. The question arose on a demand by the transferrer that the register should be rectified by registering the transfer which the directors had delayed until a call was made—in other words to compel registration in ordinary course. The facts were that a company had a loan from bankers guaranteed by an insurance company, and that, unknown to the director transferring his shares, the insurance company had withdrawn their guarantee, and the bankers had intimated that they would not continue their advance unless a call was made. The company was not *in extremis*, and when the case was in Court there was even then no word of liquidation. The director in question was personally not satisfied with what he heard from outside sources about the company's business, and for that reason, and not because of the imminence of a call of which he had had no hint, was desirous of reducing his holding, retaining his full amount of qualification shares. The transfer was lodged and the call was attempted to be made at the same meeting at which the transfer came before the directors. Registration was refused on the view that the transferrer had become indebted to the company in the amount of the call. Whether this was so or not was the real question at issue in the case. But owing to informality the call was abortive. This case is in strong contrast to *Gilbert's* case (*cit.*). It was not only held that the abortive call had created no debt by the transferrers to the company, but it was also held that no equity in the circumstances had arisen to the company, because there was no breach or neglect of duty on the part of the director prior to the date at which he had transferred his shares, and no advantage taken of the situation so created. I think that the present case comes under the category of *Gilbert's* case (*cit.*), and not of the case of *in re Cawley & Company*.

The only means, as it seems to me, of distinguishing this from *Gilbert's* case (*cit.*), is by holding that a director, while he has all the rights of a shareholder, has no individual duty to the company, but only a corporate one, so that if his co-directors, one and all of them, make no move to take a course which is their plain duty as business men of ordinary experience and capacity to take, the individual director may plead that, as neither call nor liquidation was proposed at a board meeting he was at liberty to take advantage of his own and his colleagues' breach of duty, and clear out like any other shareholder. This is surely untenable. Giffard, L.J., in *Gilbert's* case (*cit.*), makes it clear that what is the duty of all is also the duty of each.

There will be many cases in which it is difficult to decide the question whether the point of time has arrived at which it is the duty of a board of directors, and of each of them—and they have a duty to shareholders as well as to creditors—to take such step, either by making a call or by proposing liquidation, as would stop the transfer of shares. But this is not such a case.

The true relation of a director to the company was canvassed in the case of the *Faure Electric Accumulator Company*, 1888, 4 Ch. D. 141. The director's functions are in one view those of an agent and in another those of a trustee. But the former predominate over the latter. He does not act gratuitously but for remuneration. It is true that the legal title of property of the company is not vested in him, and that his primary duty is not to conserve merely, as a trustee, the property committed to his charge, while making it with security return an income, but to apply it within definite lines at business risk. At the same time it is, I think, accepted that theirs is "an office of trust which, if they undertake, it is their duty to perform fully and entirely" — *per* Lord Romilly in *Hudson's* case, 16 Beav., at p. 491. I think that it may be correctly said that trust is involved in all agency, but a greater degree of trust in some kinds of agency than in others; and that in a paid directorship the higher degree of trust is implied as in the case of a managing partner, is made all the more pointed by the wide powers of management conferred on a board of directors and their independence of practical control from the shareholders.

I think that at least the rule applied in *Raes* v. *Meek*, 1889, 15 R. (H.L.) 83, 27 S.L.R. 8, to, and the degree of care exacted from, a gratuitous trustee may fairly be applied to and exacted from the paid director. But then it must be applied and exacted in fair relation to the class of act which is in ques-

tion. Where the question is one of acting within the scope of his powers he will be strictly judged, just as a trustee would be. Where, on the other hand, there is no question of the scope of his power, but the question is one of discretion, he will not be held liable for error of judgment or even for imprudence if in *bona fide*, because risk is of the essence of all business. But he will, I conceive, be held liable for negligence, and the diligence must be judged of as that which a man of ordinary business prudence would exercise in the conduct of his own affairs.

Now it may fairly be said that any man of ordinary business prudence would not have acted in the conduct of his own affairs as this board of directors acted when in the spring of 1914 they commenced to see that they could not go on, but must take some steps to stay their accumulating losses; still more when they had had their position focussed for them by their balance-sheet of 1912-13 produced at the end of July 1914; and yet still more when they had had another three months to see their business shrinking and their bank overdraft swelling: and even still further when they were faced by the unloading of his shares by one of their largest shareholders. I cannot come to any other conclusion than that, if there is any virtue in the obligation of directors to give average diligence to the service of their company, this board and every one of them had been guilty of crass negligence in the management of the company's affairs. It was not a case of error of judgment or of imprudence; it was a case of failure to apply themselves to the exercise of judgment, and of drifting on in the blind hope that something would turn up.

The joint liability of the board is not at present in question. But, as I have said, Mr Campbell cannot shelter himself behind the collective board. He was participant in their culpable negligence and inaction, *and individually he took advantage of it.* In other but parallel circumstances he stands just where Gilbert did, except that he condescended to an even more indefensible line of action. Passing by any general and joint liability under which he may lie, he is bound to restore the company in liquidation against the consequences of the advantage which he took of his own and his colleagues' laches. Your Lordships think that there is no power in this Court under the Companies Acts to compel such restoration. I can only say that no such difficulty was found by the Court of Chancery in dealing with the case of *Gilbert (cit.).* By virtue of sections 163 and 193 your Lordships are entitled to act under section 32 of the Act of 1908 just as the Court of Chancery acted under the corresponding section 35 of the Act of 1862.

Your Lordships have also statutory powers in liquidation under section 215 of the Act of 1908 to which resort might possibly also be had. But for disposal of the present case I do not think it necessary to make further reference to them.

Were there no remedy at all, as I understand is the judgment of the Court, and if a man can stand up in the witness-box and say, as Mr Campbell did in substance—"I wanted to protect myself by getting quit of my shares. I knew the condition of the company. I had seen what Dr Maclennan had been able to do, and I saw no reason why I should not follow suit. I was not concerned about the company but only about myself. I knew the directors could not prevent me without making a call, and I thought it better to let it go rather than make the call, because I wanted to protect myself"—then I would say with your Lordship that remedial legislation is necessary. But I believe that the Court is not so powerless as your Lordship holds, and that the law as it stands is strong enough to check such dishonourable and dishonest conduct as that of Mr Campbell.

As it happens, Mr Campbell's action only affects fellow-shareholders, as the uncalled capital is equal, I understand, to the demands upon it even if the shares of Campbell are eliminated. But it throws a heavy increase of burden upon those whom it was Mr Campbell's duty to protect, and it might well have affected creditors also.

There remains an incidental point which ought to receive some attention. In certain English cases the question whether a director is free to deal as a shareholder with his qualification shares is at anyrate reserved—nay, opinions in the negative have been expressed. I do not, however, think that the distinction between an ordinary holding and qualification shares is maintainable in the face of the Act of 1908 (8 Edw. VII, cap. 69), sec. 73, which makes the ceasing to hold his qualification *ipso facto* a vacation of a director's office. But there is in the present case the specialty that the articles provide for resignation on a fortnight's written intimation to the board. The presentation by Mr Campbell of a transfer of his shares for registration must, I think, be accepted as the equivalent of written intimation, and I think that the board were entitled and bound to postpone registration of the transfer until the lapse of the fourteen days, during which it was their duty to consider the propriety of taking steps which would have prevented Mr Campbell's sinister attempt being effected.

But the point is of no importance in this case if, as I think, for the reasons already stated, it is the duty and within the power of the Court to grant the present application.

LORD MACKENZIE—I have had an opportunity of reading both of the opinions which have been delivered. I agree in the opinion of the Lord President, though I regret that I am unable to reach the conclusion at which Lord Johnston has arrived.

LORD SKERRINGTON—I am of opinion that the petitioner has failed to prove that the transfer which the respondent executed in favour of his housekeeper was not intended by the transferrer and the transferree to operate as an absolute and irrevocable divestiture of the respondent's whole right and interest in the shares. Further, I hold that in so divesting himself of these shares

in order to avoid liability for future calls, and by the device of substituting in his place a person who was utterly impecunious, the respondent must be held *prima facie* to have exercised a right which belonged to him as the owner of the shares in terms of the statutory constitution of the company as expressed in the articles of association then in force, and that in so acting the respondent is not proved to have violated his duty as a director either by using, or by failing to use, from a selfish motive some power which had been entrusted to him as a director for the purpose of being used by him with a single eye to the welfare of the company and its shareholders. The conclusion at which I have arrived in regard to this matter does not seem to me to raise any question of general importance or to suggest any necessity for legislative interference. If it is thought that directors of companies ought not to act as the respondent did, shareholders have the remedy in their own hands by defining more carefully in their articles of association the standard of conduct which they expect from their directors. If the question had been an entirely novel one there would have been much to say for the view that a prohibition such as the petitioner seeks to enforce against the respondent might well be implied in the appointment of every director. It seems to me, however, that looking to the decisions on this branch of the law and to the general understanding as to the rights and duties of directors, it would serve no good purpose to introduce by implication a condition which, if really useful and beneficial, would have been established long ago either by judicial decision or by an alteration on the ordinary form of the articles of association adopted by registered companies.

I accordingly agree with the majority of your Lordships.

The Court refused the prayer of the petition.

Counsel for the Petitioner—Chree, K.C.—Wark. Agents—J. & J. Galletly, S.S.C.

Counsel for the Respondent—J. Crabb Watt, K.C. — Lippe. Agents — W. B. Rankin & Nimmo, W.S.

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*Friday, July* 14.

## FIRST DIVISION.

## ROBERT ADDIE & SONS' COLLIERIES, LIMITED AND REDUCED, PETITIONERS.

*Company—Process—Reduction of Capital—Petition for Confirmation—Prayer—Objecting Creditors—The Companies (Consolidation) Act* 1908 (8 *Edw. VII, cap.* 69), *sec.* 49.

In a petition for confirmation of a reduction of capital of a company it is necessary that the prayer distinguish between the different steps of process set out in section 49 of the Companies (Consolidation) Act 1908, which deals with objections by creditors and settlement of list of objecting creditors. *Form of prayer.*

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), section 49, enacts—"*Objections by creditors, and settlement of list of objecting creditors.*—(1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction. (2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction. (3) Where a creditor entered on the list whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount, that is to say—(1) If the company admits the full amount of his debt or claim, or though not admitting it is willing to provide for it, then the full amount of the debt or claim; (2) if the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court."

Robert Addie & Sons' Collieries, Limited and Reduced, *petitioners*, presented a petition for confirmation of a reduction of capital resolved upon by special resolution duly passed at an extraordinary general meeting of the company held on 27th March 1916 and confirmed at an extraordinary general meeting of the company held on 18th April 1916.

The petition narrated the relevant clauses of the memorandum and articles of association, and set forth the special resolution above referred to, and contained the following prayer:—"May it therefore please your Lordships to appoint intimation of this petition to be made on the walls and in the minute-book in common form, and to be advertised once in the *Edinburgh Gazette* and once in the *Glasgow Herald* newspaper, and to allow all concerned to lodge answers within eight days after such intimation and advertisement, and on resuming consideration of this petition, to fix a date as the date at which every person entitled to any debt or claim against the company within the