

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Clara B. Jones and another v. The North Vancouver Land and Improvement Company, Limited Liability, from the Supreme Court of British Columbia ; delivered the 18th March, 1910.

Present at the Hearing :

LORD MACNAGHTEN.

LORD ATKINSON.

LORD COLLINS.

LORD SHAW.

[*Delivered by Lord Atkinson.*]

This is an Appeal from the Judgment of the Supreme Court of British Columbia, dated the 7th June, 1909, affirming the Judgment of the Trial Judge, Mr. Justice Clements, who dismissed the action with costs. The Suit, considering the relationship of the parties (they are husband and wife), and the conduct and action of the male Plaintiff, is somewhat peculiar in its incidents.

It was originally commenced on the 27th May, 1907. The original Statement of Claim set

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forth that the Plaintiff, Clara B. Jones, was the wife of the Plaintiff, H. A. Jones, a real estate agent, both residing in the City of Vancouver, in the Province of British Columbia, that she was, since the 26th September, 1893, owner of 240 shares of \$100.00 of the Capital Stock of the Defendant Company, for which their Certificate, No. 237, dated the 26th September, 1893, was issued; that she held these shares in trust for him, and had by assignment (dated the same 26th September, as it turns out), assigned all her estate and interest in the shares to him, and further alleged that the Defendant Company had wrongfully and illegally declared the shares to have been forfeited, and had persisted in so treating them, and claimed the following relief:—

1. That it might be declared that the shares had not been forfeited; and

2. That the Plaintiff, H. A. Jones, might be declared to be the owner of the shares, and to be entitled to be registered as such.

To this Statement of Claim the Defendant filed a defence alleged to be substantially identical with the Amended Defence, alleging amongst other things that the forfeited shares were in reality the property of H. A. Jones; that the calls made during the three years from the 21st May, 1895, to the 26th May, 1898, were unpaid, though notice had been duly given to Clara B. Jones of that fact, and of the intended forfeiture, and that H. A. Jones had been present at a meeting of the Directors, of whom he was one, on the 29th June, 1895, when a resolution was passed that the shares registered in his wife's name with others should be declared delinquent, and that he himself had seconded a resolution, that all necessary arrangements should be made to sell the same to pay the delinquent assessment.

On the 8th January, 1908, he was examined on Discovery, and stated in effect, if not expressly, that these shares were assigned by him to his wife to protect him from his creditors, and identified a letter of his to the Company, dated the 28th August, 1906, containing the following passage :—

“ Under these conditions I do not think it was either just or fair of the Company to try to cancel my stock, although the same was held in trust for me by Mrs. Jones, as any liability I was under to the Company was more than off-set by the amount due for the services mentioned, and I trust you will arrange this matter, giving me credit for the amount due, thus placing the stock in its proper condition in your Company.

“ Trusting you will favour me with a reply in regard to this at your earliest convenience, I am, yours very truly, “ H. A. Jones.”

Five days before this, namely, on the 3rd January, 1908, the Statement of Claim was amended. The husband was practically suppressed. The wife is stated to be the owner of the stock. And the relief prayed is simply that it may be declared that the shares have not been forfeited. At the trial it was stated by Mr. Martin, K.C., that H. A. Jones had been made a Plaintiff by mistake ; that a motion had been made to strike out his, Jones', name from the Record ; that this was ordered to be done on the terms of his paying some Costs which he had incurred ; that he had refused to pay these Costs, and therefore remained a party to the Record. In his examination at the trial he endeavoured, however, to set up the new case, which was obviously resorted to in order to escape from the consequences of his, Jones', own action in being party to, and approving of all the steps which had been taken to forfeit these very shares. The defence was that the house in which they lived, and which was their home, really belonged to his wife,

Clara B. Jones, that she had consented to this house being mortgaged to obtain money to pay for these shares, and that thereupon he assigned them to her to be held as her own ; but on the certificate being produced it was seen that on the back of it was an assignment to the husband dated the very day the certificate was obtained.

It is in their Lordships' opinion clear that the second story is an after-thought, as the Trial Judge and the Supreme Court have in effect found it to be ; that Clara B. Jones' name was, as it has been styled, a mere *prête-nom* ; that her husband was the real owner of these shares, and that even if through some informality it should appear that the shares were not legally forfeited, his right to the relief he seeks, or his wife, his *alter ego* in this action, seeks for him, must, having regard to the history of the Company and the vicissitudes through which it passed, be determined with reference to his own conduct and his own participation in its affairs.

The Company was incorporated on the 28th July, 1891, under the provisions of a British Columbia Statute called the Companies Act, 1890 (6. of 1890), which latter Act was amended by Chap. 7 of the Act of 1892. Its head office was at Vancouver. It was formed to carry on a most speculative and risky business—jobbing in real estate. Its first meeting was held on the 6th November, 1891. It was then proposed by H. A. Jones, and seconded by one J. Wulffsohn—(1) That five persons, of whom the proposer and seconder were two, should be directors for the ensuing year. (2) That the subscribed stock be \$150,000, of which \$25,000 had been paid up, and that certificates be issued accordingly ; and (3) That two calls be made, the first at 2 per cent., on the 1st December, 1891, and the second one of 25 per cent. of the subscribed capital on the 1st January, 1892.

The prospects of the Company were apparently fair at first, for on the 27th January, 1892, a resolution to the following effect was passed :—“ In view of the fact that the property since it was purchased has risen in value \$100,000, it is resolved that \$250,000 stock be issued to the shareholders upon which \$150,000 be paid up.”

From the Company's formation down to the 26th September, 1893, H. A. Jones was a shareholder of 250 shares ; from thenceforward of 10 shares. From 1891 to 1902 he was an active Director. He attended almost every meeting, and proposed and seconded resolutions calling up 47 per cent. of the capital. He then transferred 240 shares to his wife, retaining 10, as he said, to enable him to be a Director.

It is quite apparent from the minutes of the meeting of the 23rd July, 1894, and subsequent meetings, that the financial difficulties had begun, which culminated seven or eight years afterwards in great embarrassment not far removed from insolvency.

On the 21st May, 1895, a meeting was held at which H. A. Jones was present, when a resolution was proposed and carried unanimously, to the effect that a call be made of \$2.50 per share on the stock of the Company ; that any stock on which this call should remain unpaid on the 29th June, 1895, should be declared delinquent and be sold by auction on the 15th July following unless the call be paid in the meantime.

A notice of this resolution was on the 22nd May mailed by Johannes Buntzen, the Secretary of the Company, to “ Clara B. Jones, Vancouver.” This is the address given by her husband in all the proceedings connected with the Company from 1891 onwards, and in both the Statements of Claim. No address is given on the certificate of the shares.

On the 29th June following, another meeting of the Directors was held, H. A. Jones being present, at which two resolutions were proposed and carried unanimously, the second being seconded by H. A. Jones; the first was to the effect that the shareholders whose names were set out in the list subjoined, were defaulters to the amounts set opposite to their names respectively, and that their stock should be declared to be delinquent. And the second "That the Secretary be authorized to advertise the delinquent stock for sale by public auction on the 15th July then next, and to prepare conditions of sale and make all necessary arrangements for the proposed sale of the stock to pay delinquent assessments."

In that list the name of Clara B. Jones appears as an owner of 240 shares, the amount unpaid on which was \$600.00, and H. A. Jones as owner of 10 shares, the amount unpaid on which was \$25.00. As appears from the minutes of the meeting of the 18th September, 1895, at which H. A. Jones was present, the shares of several shareholders, including Clara B. Jones, were offered for sale on the 15th July as directed, and again at adjourned sales on the 5th August and 3rd September, but as no bids were made the Stock was withdrawn from sale.

At this time it was reported to the directors by their president that owing to the failure of a portion of the shareholders to pay up their assessments the Company had not been able to pay its taxes and was obliged to get an extension of time, and the president had agreed to pay \$500 in advance upon his shares to discharge the debt. H. A. Jones was present at this meeting.

Such were the difficulties of the Company that H. A. Jones himself proposed on behalf of a correspondent to purchase the property of the

Company at \$150 an acre, and this was accepted on certain terms but never carried out. On the 13th March, 1896, another call of \$6 per share was by resolution, seconded by Jones, made on the capital of the Company, with a threat that if the shareholders failed to pay, their shares should be declared delinquent, and be sold on Saturday the 4th July, 1896. On the 9th June, 1896, a resolution was, at a meeting of the Directors, seconded by Jones that the shares upon which the call of 6 per cent. remained unpaid should be declared delinquent. Another resolution was proposed by Jones that legal proceedings be commenced against the holders not later than July then next.

In this list the name of Clara B. Jones appears as owner of 240, owing \$1,440 for calls, and H. A. Jones as the owner of 10 shares, owing \$60. It thus appears that H. A. Jones had no objection to propose and get passed resolutions that he and his wife should pay or that their shares should be declared delinquent and sold. That, however, was the only aid he gave the Company in its difficulties. His assistance never sounded in money. Neither in his own character, nor when masquerading as his wife, did he ever pay 6d. of all the calls which subsequent to September, 1893, he made on himself and others. These sales which Jones so persistently directed should take place proved entirely abortive, and at last on the 26th May, 1898, at a meeting at which H. A. Jones was present, two resolutions were proposed and carried, the first reciting that the shares standing in the name of Clara B. Jones, amongst others, were on the 29th June, 1895, declared delinquent in respect of this levy of \$2.50 per Share levied on the 21st May, 1895, and further reciting that these shares had been offered for sale on the 3rd September, 1895, but there was no bidding, it was

resolved that notice in a certain form should be served upon the shareholders requiring payment on or before the 24th June, 1898, after which if no payment were made the shares should be forfeited.

And the second was similar in character dealing with the call of 6 per cent., made on the 13th March, 1896.

On the 27th May, 1898, F. J. Procter, the then Secretary of the Company, posted to the same address a letter of which the following is a copy :—

“ The North Vancouver Land and Improvement
 “ Company, Limited Liability.
 “ Head Office, Vancouver, B.C.
 “ 519, Hastings Street,
 “ 27th May, 1898.

“ Madam,—The \$600.00 payable by you on the 240 shares numbered from 1751 to 1990 both inclusive, held by you in the North Vancouver Land and Improvement Company, Limited Liability, in respect of the assessment of \$2.50 per share levied on the 21st day of May, 1895, and notified to you on the 22nd day of May, 1895, still remaining unpaid, the said 240 shares held by you were on the 29th day of June, 1895, duly declared delinquent.

“ Notice is now given that you are hereby required to pay the said sum of \$600.00 to E. Mahon, the President of the Company, at the Company’s head office, Room 5, Thompson-Ogle Block, 519, Hastings Street, Vancouver, B.C., and that unless the said sum of \$600.00 is paid as aforesaid on or before the 24th day of June, A.D. 1898, the shares whereon such payment is not made will be liable to be forfeited at any time thereafter before payment.

“ By order, F. J. PROCTER, *Secretary*.

“ To Clara B Jones, Vancouver, B.C.”

The receipt of this letter by Clara B. Jones is admitted. On the 25th June, 1898, a meeting of the directors was held, at which Jones was present. A resolution was proposed, reciting that Clara B. Jones was, on the 21st May, 1895, holder of 240 shares in this Company, that the Board of

Trustees duly levied an assessment of \$600 upon the said shares, that on the 29th June, 1895, this sum remaining unpaid, the said shares were by the resolution of the trustees declared delinquent, that the said delinquent shares were, on the 3rd December, 1895, offered for sale, but that no bid was given, that the assessment remaining unpaid, the trustees resolved that the notice subsequently given on the 27th May, 1898, should be given, the said 100 shares were declared forfeited to the Company, to be the property of the Company, to be disposed of in manner provided by the by-laws of the Company. The number "100" is an obvious error for 240. That is plain from the earlier recitals, and any persons having to construe the document would naturally and properly read it so. An attempt appears to have been made to correct this error since action brought. It was, in their Lordships' opinion, entirely unnecessary. Whoever else might have been misled by the erroneous number, H. A. Jones obviously was not; for it appears from a memorandum in the minute book at foot of the resolution, that he objected to the forfeiture, and offered to pay \$100; and that the president thereupon said, "Pay by all means and we will be glad to get the \$100." Jones, however, declined to pay unless the directors gave him an assurance that the stock would not be forfeited for six months, and that being refused, the stock was declared forfeited. Jones by this offer was obviously dealing with all the shares, not with 100 of them. On the 1st June, 1899, a meeting of the directors was held, at which Jones was present. The president reported the then condition of the share list. Under the heading forfeited shares appears the name of Clara B. Jones for 240 shares. Until these 240 were forfeited, calls were made upon them as they were on the register, when made on others; but

no notice of the making of these calls was given to the Plaintiff or his wife in reference to these shares nor any demand made in respect of them.

The embarrassment of the Company steadily increased. In the year 1906 it had difficulty in keeping "its head above water." It was only saved by some of the directors coming to the rescue and advancing their own money to pay its debts. From January, 1902, onwards, H. A. Jones apparently took little interest in it. He lay by. He, in truth, left it derelict; not even rendering the poor but accustomed service of proposing resolutions that others should pay calls which he himself refused to pay. It has weathered the storm. Its shares are becoming valuable. And now, twelve years after this call of \$600 was made in respect of the 240 shares which are really his; nine years after they were in his presence, despite his efforts to save them, declared to be forfeited without his wife or he himself ever having protested against what was done, or paid sixpence in respect of the debt they owed the Company, he brings this action complaining, in effect, that notice of what were really his own acts was not served with all the due formalities upon himself, and, worst of all, that he and his co-directors were illegally appointed, that everything they did was void *ab initio*, that consequently the shares they allotted were not legally allotted, the calls they made were wrongly made, and, as a consequence, that the money paid in respect of them might be required to be refunded; complaints which, if they could be sustained, would necessarily involve the affairs of this Company in inextricable confusion, and might possibly bring about its insolvency. A proceeding more unmeritorious, more cynically audacious, could not well be conceived, even if the notices given were, in fact, defective in form, which, in their Lordships' opinion, for

the reason hereafter stated, they are not, or if the service of these notices were irregular, which their Lordships think it was not. The principles laid down in *Prendergast v. Turton* (1841), 1 Y. & C. 98, and by Lord Lyndhurst 13 L. J. (N.S.), Ch. 268, and the line of cases which followed it, fortunately it would seem, in the interest of that honesty and fair dealing which ought to regulate the conduct of commercial affairs, and the management of companies such as this, are strong enough to defeat such mischievous designs. These authorities show that the Plaintiffs must in this case be held to have by their own conduct disentitled themselves to the relief they pray for.

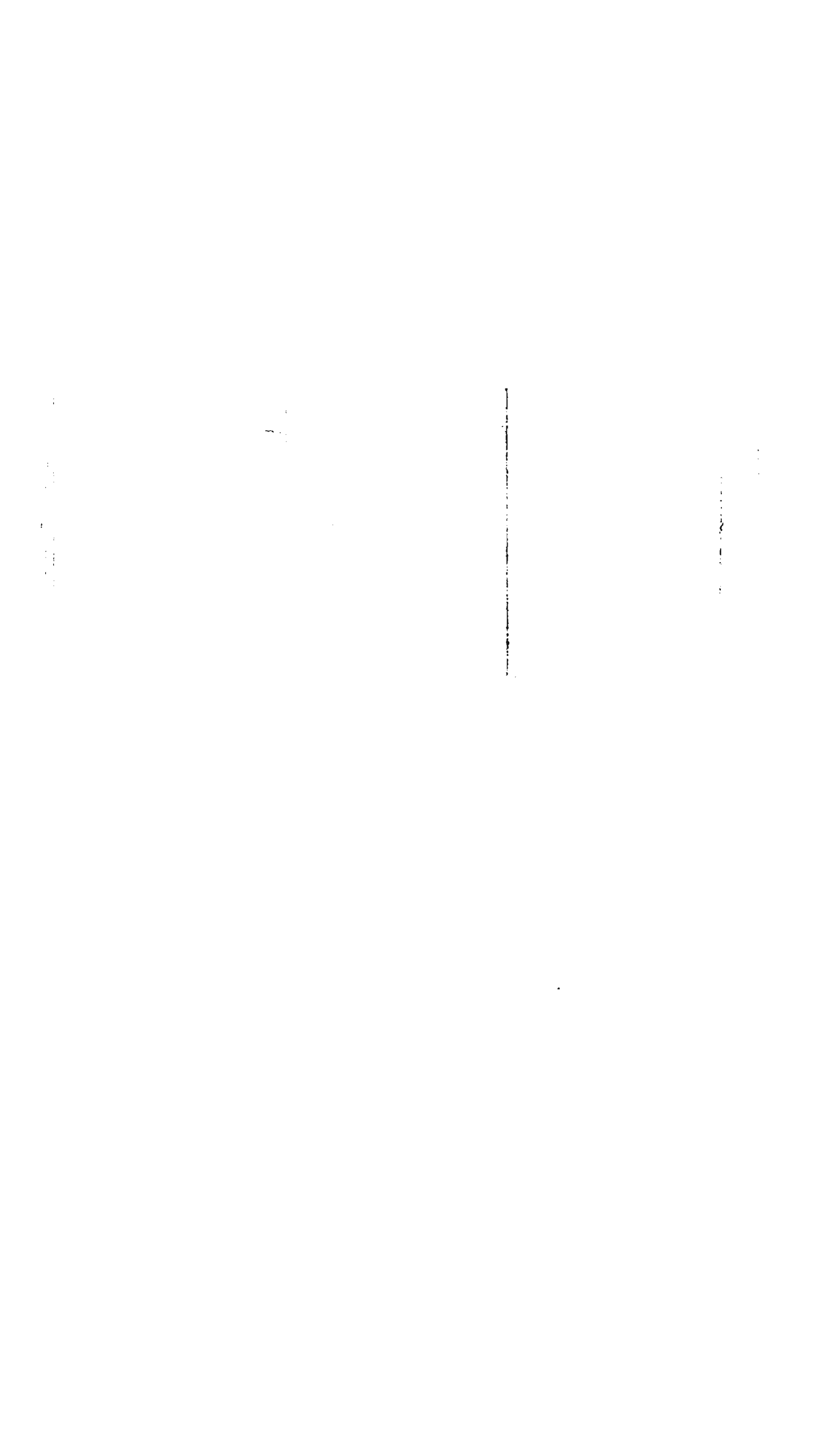
Their Lordships are of opinion that the notice sent by Buntzen, the Secretary, on the 22nd May, 1895, fulfilled all the requirements of the 33rd and 35th Sections of the Canadian Statute, The Companies Act of 1890 and the 9th and 10th of the Bye-laws of the 5th November, 1891, which were operative when it was sent. It stated the fact that the call had been made, the place at which after an interval of 22 days it should be paid, and gave the warning that if the call was not paid on or before the day named the shares would be deemed delinquent. This notice was in the words of the 9th Bye-law mailed to the nominal shareholder Clara B. Jones. Sec. 35 of the Statute provides that if the Call be not paid within the time thus fixed by the notice prescribed by the Bye-law No. 9, *i.e.*, 14 days the Trustees may forfeit the Shares.

The best that can be said of the objections to the service of this notice is that they are frivolous.

The notice was not sent to Clara B. Jones' registered address for the very sufficient reason that she had no registered address. It was sent,
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however, to her husband's then address. This has remained his address from 1891 and is still the address of both as given in the Pleadings. There is no suggestion in the case that they were living apart, so the natural and reasonable conclusion from the evidence is that they were living together. His address was therefore her proper address, and a letter or circular addressed to her there is "properly addressed" within the meaning of the 10th of the above-mentioned bye-laws.

Their Lordships are, therefore, of opinion that the decision appealed from was right and that this Appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.



In the Privy Council.

CLARA B. JONES AND ANOTHER,

vs.

**THE NORTH VANCOUVER LAND
AND IMPROVEMENT COMPANY,
LIMITED LIABILITY.**

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