ORR, ET AL., ... APPELLANTS.

GLASGOW, AIRDRIE, AND MONKLANDS JUNCTION RAILWAY COMPANY, ET AL., ... } RESPONDENTS.

1860. *April 23rd and 24th.*

Joint Stock Company—Remedies of Shareholders.—An action by shareholders for reduction of calls,—on the ground of misapplication of the money raised by the calls,—Held unsustainable.

A summons with petitory conclusions for count, reckoning, and payment by shareholders against the Directors or Managers of a Joint Stock Company held unsustainable.

Per Lord Cranworth: The remedy is not directly against the Managers, but through the Company against the Managers; for the Managers are the servants, not of the individual shareholders, but of the Company, and therefore the course of the individual shareholder is to call upon the employers of those Managers to bring them to account, and to get relief from the Company; p. 804.

This, however, always supposes that the conduct charged against the Managers is of such a character that it may be condoned, adopted, or ratified by the Company (*a*).

The shareholders of a Joint Stock Company, when they conceive themselves aggrieved by the Managers, may, by convening a general meeting of the whole body, obtain justice.

Diligence to produce Documents.—This is in the discretion of the Court; but in general such diligence ought not to be granted till the relevancy, if disputed, has been ascertained.

THIS case is very fully reported in the Second Series of the Court of Session Cases (*b*).

The action was instituted in the Court of Session by the Appellants as shareholders in the railway of the

(*a*) See the preceding case. (*b*) Vol. xx. p. 327.

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above Company. The summons concluded for the reduction of certain calls and for count and reckoning against the Directors.

The *Lord Ordinary* on the 19th July 1856 found that there were no relevant averments on the record to justify the reduction of the calls, nor any relevant averments sufficient to support the conclusion for count, reckoning, and payment.

Against this Judgment the Appellants presented a Reclaiming Note to the Judges of the Second Division of the Court of Session who pronounced judgment that the averments were insufficient to support the conclusions of the action, and that the Directors were liable to account to the Company alone.

The Appellants had applied for a diligence to compel production of certain documents. The *Lord Ordinary* refused to grant this diligence, the relevancy of the allegations being disputed.

In support of the Appeal the *Attorney-General* (*a*) and Mr. *Roundell Palmer* cited *Solomons* v. *Laing* (*b*) and *The North British Bank* v. *Collins* (*c*). They also cited *Davidson* v. *Tulloch* (*d*) recently decided by the House.

[The LORD CHANCELLOR (*e*): That was a case for damages *ex delicto*. This by your own showing is a count and reckoning.]

Sir *Hugh Cairns* and Mr. *Mure* for the Respondents (*f*). A demurrer would have lain in this case. No individual shareholder can sue as here attempted.

(*a*) Sir Richard Bethell. (*b*) 12 Beav. 339.

(*c*) 1 Macq. Rep. 369.

(*d*) See the case which immediately precedes the present in this volume.

(*e*) Lord Campbell.

(*f*) The Lord Chancellor intimated that the House did not require to hear the Respondents' Counsel as to the reduction of the calls.

If each shareholder could bring such an action, the business of no Joint Stock Company could go on. The Pursuers never complained till required to pay the calls. Every act impeached by them is capable of confirmation by a general meeting. In *Moseley* v. *Alston* (*a*) Lord *Cottenham* refused to entertain a bill by shareholders where the injury complained of, if it was an injury, was an injury not to the Plaintiffs personally, but to the corporation. Prior to that case Vice-Chancellor *Wigram* proceeded on the same views in *Foss* v. *Harbottle* (*b*).

Lord Chancellor's opinion.

The LORD CHANCELLOR:

My Lords, in my opinion the Interlocutors appealed against ought to be affirmed.

The first Interlocutor is for refusing diligence. Now, when I look at the nature of this action I think that the diligence at the time it was applied for was properly refused, because then the question arose as to relevancy, and until that question was determined I think there was no obligation to grant diligence. The granting of this is generally a matter of discretion; but in this case I think the discretion was properly exercised in withholding it until it was ascertained whether the action could lie, giving credit to all the allegations in the condescendence.

Then the next ground of appeal is respecting the reduction of the orders for the two calls. Now upon that point I never entertained the smallest doubt. It is not disputed that these calls were lawfully made. They were made at a time when the Company was in full vigour, and they were made by those who had a right to make them. The only ground upon which it is now sought to reduce them is that there has been

(*a*) 2 Phill. 790. (*b*) 2 Hare, 461.

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a misapplication of the money raised by those calls. If there had been such a misapplication, that might have been, when it was going on, a ground for an interdict, but it cannot possibly be a ground for declaring that that was null and void *ab initio* which we are of opinion was perfectly valid in all respects.

Then we come to the petitory conclusion of the summons. And it must be observed that this is not, as was the case in *Tulloch* v. *Davidson*, an action founded *ex delicto* for damages in respect of a deceitful representation, or damages in respect of fraudulent conduct. It is for count and reckoning,—it is with a view to surcharge and falsify accounts which have been rendered.

Now, if this had been a common partnership, and the partnership had come to an end, and there had been assets to be distributed and accounts to be settled, I should have thought that no doubt in Scotland, as in England, a suit might have been instituted for the purpose of having the accounts adjusted and a distribution made. But that is not the nature of this case. Here you have a Joint Stock Company, a corporation, and although there is not in Scotland, as there is in England, any process provided for winding up the concerns of the Company when it is dissolved, there are special opportunities and means given to all the shareholders from time to time to see that proper accounts are rendered, and that their affairs are properly conducted; and the accounts are to be periodically submitted to the general meetings of the shareholders and balances are to be struck.

Now, it seems to me that under these circumstances, until there has been a complaint made, and until there has been an effort made to obtain justice by applying to the Company, this mode of bringing an action at the suit of one or of several of

the shareholders is incompetent. It may probably be unnecessary. At all events it would be right to try what could be done without appealing to a Court of Justice. Such an appeal to a Court of Justice under such circumstances evidently leads to the most inconvenient consequences, and unless it be absolutely necessary, I think it ought not to be permitted. Now here there has been no complaint at any public meeting of the Company, as far as we know, and no attempt to make any such complaint of the accounts rendered, or to call a meeting for the purpose. There are means of calling a meeting, but none of them have been resorted to. But this action is brought by several gentlemen against the Company and against the Directors of the Company, and I think that according to the analogy of the cases that have been decided in England, which rest upon principles that are equally applicable to Scotland, this ought not to be permitted. If one shareholder is allowed to bring such an action, then each individual who has a different complaint of his own on different parts of the accounts which have been rendered may follow the example, and the Company may be torn in pieces, and utterly ruined by the litigation in which it is involved.

It seems to me, therefore, that this is a case in which in the first instance, until application has been made to obtain justice by the means which the Legislature has put in the possession of every shareholder, such an action cannot be maintained. I do not find here anything which might not have been ratified and adopted by the Company if they had thought fit. I think that Sir *Hugh Cairn's* observations upon the allegations respecting the misconduct of the Directors are well founded; because, although the acts that were done by the Directors were *ultra vires* of the

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Directors, I do not think it was necessarily *ultra vires* of the Company to have condoned the acts done by the Directors, and to have adopted them.

For these reasons, my Lords, I think, without going into the circumstantial facts of the case, and the authorities cited, I must advise your Lordships that this Appeal be dismissed with costs.

Lord Cranworth's opinion.

Lord CRANWORTH :

My Lords, I concur with my noble and learned friend in thinking that there is no ground whatever which ought to induce your Lordships to interfere with these Interlocutors. I think that they have been correctly decided.

First, as to the Interlocutors which relate to the merits of this case ; in my opinion the merits of the case are to be looked at with reference to those cases which have been decided in England, and which have been decided on a principle not confined to the peculiar jurisdiction of the English Courts, but applicable to the jurisdiction of Courts everywhere. And that principle appears to me to resolve itself into this, that where there are shareholders in any incorporated body who have, or think they have, a right to complain of the conduct of those who are managing the affairs of that body, their remedy is not directly against the Managers, but through the Company against the Managers, and through the Company only. And upon very obvious principles ; the Managers are the servants not of the individual shareholders, but of the Company ; and the course, therefore, that any shareholder must take if he is aggrieved is to call upon the employers of those Managers to bring them to account, and then, that being done, to get relief from the Company itself. If, indeed, there be any collusion that can be suggested, or any specialty, to show that the

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ordinary course being pursued would lead to injustice, that would give rise to different considerations; but nothing of that sort occurs here.

Now Mr. *Roundell Palmer*, with great ability, tried to make a distinction in this case, arising from the circumstance that the object of the Company had here come to an end, that there was no railway to be made; and, therefore, he likened it to the ordinary case of a partnership where the partnership has come to an end, and where there might be a suit by any partner for an account and administration of assets. But it appears to me that the position in which these parties stand here towards these Directors is not at all affected by the circumstance that it has become impossible to make the railway. What these parties complain of is that in the progress towards making the railway, funds got into the hands of the Managers of this Company, and that those funds have not been duly and properly accounted for. Now, it appears to me that the principle which would have regulated this case if it were still possible to make the railway, will regulate it exactly in the same way now that the object of the Company has come to an end. There can be no difficulty in the way of these parties having a general meeting called for the purpose of winding up the concern. There is no doubt that such a meeting could be called; and that, with the sanction of that meeting, a suit might be brought against the Directors on the part of the Company. That they could have done just as well now that it has become impossible to make the railway as if no such impossibility had existed.

At one time I was much struck with the observation, that in one of the articles of the condescendence there is an averment that no proper account had been

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taken. Consequently it was said that something had been done that was in violation of the Act of Parliament, and, therefore, *ultra vires*. That, in my opinion, is a misapplication of the principle of *ultra vires*, the meaning of which is, that if a corporation, having been constituted for a particular object, appropriates its funds to something else than that object, it is doing something that impliedly it is forbidden to do by the Act of Parliament; that is *ultra vires*. But to say that it is *ultra vires* of the Company that the accounts have not been accurately kept, seems to me to be confounding together two grounds of complaint which are altogether distinct. The very object of the suit for calling the Directors to account is to have corrected any irregularities which there may be in the accounts that have been rendered.

My Lords, that being my view of the merits of the case, then the question arises as to the other Interlocutors, the Interlocutors of the *Lord Ordinary*, which never went to the Inner House. Upon that subject it is enough, perhaps, to say that it is a matter of discretion; but I do not think it would have been a wise exercise of discretion,—indeed, I think it would have been a very wrong exercise of discretion,—to order the production of documents upon a record in which it was obvious that the record *rebus sic stantibus* could lead to no result, because looking at the record, if I am right in the view which I take of it, the allegations do not amount to any relevant ground of complaint. Consequently the ordering a production of the documents would have been merely an officious interference on the part of the Court. Upon these grounds, therefore, I agree with my noble and learned friend in thinking that the Interlocutors ought to be affirmed.

Lord KINGSDOWN:

My Lords, I am not prepared to express to your Lordships any dissent from the opinions of my noble and learned friends. You have the unanimous opinion of the Court below; and two of your Lordships having expressed a decided opinion to the same effect, I do not see any ground of doubt sufficient to justify my asking for time for a further consideration of this case.

Interlocutors affirmed, and Appeal dismissed with Costs.

GRAHAME, WEEMS, & GRAHAME—CONNELL & HOPE.