Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Garden Gully United Quartz Mining Company (Registered) v. *Hugh McLister, from the Supreme Court of Victoria; delivered November* 9, 1875.

Present :

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Henry S. Keating.

THE Appellants are the Defendants, and the Respondent is the Plaintiff, in a suit instituted in the Supreme Court of Victoria.

The Plaintiff was the holder of 2,181 shares in the Garden Gully United Quartz Mining Company, registered under the provisions of the Colonial Act, 27th Vic., No. 228, intituled "An Act to limit the Liability of Mining Companies."

In the 11th paragraph of his Bill he alleged that the Defendants pretended that his, the Plaintiff's, shares in the Company were duly forfeited under and by virtue of a resolution passed by a Board of Directors on or about the 10th of July, 1869, for non-payment of calls; but he charged that, if any such resolution was passed, the persons passing the same were not a duly appointed Board of Directors of the same Company; that, even if they were a duly elected Board, the alleged calls, for non-payment of which such forfeiture was declared, were not lawfully made, and that he was not liable for payment of the same; that, in other respects, such declared forfeiture was invalid; and that the Defendant Company had no power to forfeit the said shares; and the Defendants were required to set forth and discover how they made out the alleged forfeiture of Plaintiff's shares, with full particulars of

the dates of the meeting or meetings at which the resolutions or resolution, declaring his shares forfeited, or empowering any Board of Directors to forfeit the same was or were passed; and he prayed that the forfeiture of the said shares should be declared void, that he might be restored to the rights of a shareholder, and that the Defendants might be ordered to pay to him the amount of dividends that had become due on his shares since the month of May, 1867; he, the Plaintiff, offering to pay all calls and other liabilities then due upon or in respect of the said shares.

The Defendants, in their answer, stated that on the 30th April, 1867, a fifth call of 1*s*. per share, payable on the 10th of May following, was duly made upon the shareholders by a quorum of directors duly elected (paragraph 7). They also alleged, in paragraph 11, that, in the month of April, 1869, five Directors were elected at a General Meeting of the Company,—no Directors having been elected during the previous January; and that, on the 21st day of May, 1869, at a meeting of Directors duly held, and at which a quorum was present, the Manager was directed to advertise the intended forfeiture of all shares in the Company on which the said fifth call had not been paid, unless the same and all calls in arrear were paid within twelve days from the date of the advertisement; that an advertisement to that effect, signed by the Manager, was inserted in the "Bendigo Advertiser" newspaper, published in Sandhurst, on the 28th, 29th, and 31st days of May, 1869, and the 2,181 shares of the Plaintiff were specified in the said advertisement by reference to his name, and their distinctive numbers; that, on the 18th day of June, 1869, at another Directors' meeting, duly held, and at which a quorum was present, a resolution was duly passed that all the shares on which the said fifth call had not been paid, standing in the names of the parties therein mentioned should be, and the same were thereby, absolutely forfeited to the Company, and that the Plaintiff's was one of the names mentioned in the said resolution, in which his shares were specified by their distinctive numbers; and the Defendants submitted the questions of law raised by the 11th paragraph of the Bill to the Judgment of the Court.

Thus it appears that the only forfeiture relied upon by the Defendants was one declared on the 18th June 1869, in consequence of the non-payment of the fifth call within twelve days from the date of the advertisement of which the last was published on the 31st May, 1869.

The cause was heard before the Honourable Mr. Justice Molesworth, who held, in accordance with the views of the full Court in the case of Schmidt *v.* The Garden Gully Company, reported in the 4 Australian Jurist, p. 63, and in the Judgment on appeal, in which he concurred, reported in the same volume, p. 137, that there must be properly appointed Directors to make a call and to declare a forfeiture; and that the election of five Directors, a full Board, at the quarterly meeting held on the 14th April, 1869 (the meeting referred to in the 11th paragraph of the Defendant's answer), was invalid under the rules; and that the case must follow that of Schmidt *v.* The Garden Gully Company, which was in effect that the forfeiture declared by a quorum of those directors on the 18th June, 1869, was invalid (Record, p. 66); and he gave a decree for the Plaintiff, declaring, amongst other things, that the alleged forfeitures *in the pleadings mentioned* of the 2,181 shares of the Plaintiff ought to be set aside, and that the Plaintiff was entitled to the said shares and to the dividends declared thereon in and since the month of July 1871, deducting thereout the 4th, 5th, and 6th calls made by the Company upon the said shares. The decree, it will be observed, was limited to the forfeiture mentioned in the pleadings, viz., the forfeiture declared at the meeting of the 18th June, 1869, upon which alone, notwithstanding the express requirement in the 11th paragraph of the Plaintiff's Bill, the Defendants relied in their answer.

Their Lordships concur in the opinion expressed by the learned Judge that there must be properly appointed Directors to make a call or to declare a forfeiture of shares; that the election of five Directors at the quarterly Meeting held on the 14th April, 1869, was invalid under the rules of the Company and the Colonial Act 27 Vict., No. 228; and consequently that the forfeiture declared by three of those Directors on the 18th June, 1869, was also invalid.

The Supreme Court held, in Schmidt's case, that the fifth call was duly made. It is unnecessary to express any decisive opinion upon that point as whether the call was legally made or not, the decree must be affirmed, if there was no valid forfeiture for the non-payment of the call.

Their Lordships will, therefore, proceed to state their reasons for considering that there was no valid forfeiture of the shares.

By the 39th Section of Act No. 228, to which reference has been made, the majority in number and value of the shareholders in any Company were authorized, from time to time, both before and after incorporation, to make and alter rules for prescribing the number and qualification of Directors, and fixing a quorum thereof, for holding and convening general and special, but not extraordinary, meetings of the shareholders and Directors respectively; for the election, removal, and *annual retirement of all, or some of the Directors;* for determining the mode of filling occasional vacancies in that body, &c.; for making calls; for the transfer and relinquishment of shares, and the conditions on which the same respectively might be effected; and for any other object not inconsistent with the Act: Provided that if any such rule should be made or altered after incorporation, it should be made or altered only at an extraordinary meeting of shareholders.

It is to be observed that no power was given by that section to make rules for the forfeiture of shares; but by an Act of the Colonial Legislature, No. 354, passed on the 29th December, 1869, it was enacted that any Company then incorporated under Act No. 228 should have, and should be deemed to have had power to make rules in the manner pointed out by the 39th section of the said Act to provide for the forfeiture of shares.

The Company Defendant was incorporated before the passing of that Act, and by rules passed before incorporation, and which were signed and sealed by the Plaintiff, provision was made for convening and holding general and extraordinary meetings of the shareholders; the number and qualification of directors; for fixing a quorum thereof; for the election, removal, and retirement (whether annual retirement or not, as required by the Act, will be pre-

sently considered) of all or some of the directors; for determining the mode of filling occasional vacancies in that body; and for the forfeiture of shares for the non-payment of calls.

Amongst others the following rules were made (Record p. 34):—

Rule 8 was as follows:—

"The first general meeting of the Company shall be held some time during the first fourteen days of the month of October, 1866, at such place in Sandhurst as the directors may appoint, and thereafter a general meeting of the shareholders shall be holden within the first fourteen days of the months of January, April, July, and October; such meetings shall be called general meetings, and shall have full power to regulate and control all the affairs of the Company, *and every such meeting shall be convened by the manager or by the directors, by giving notice according to the Act, Victoria* 27, *No.* 228."

By Rule 9 provision was made for calling extraordinary meetings; and by section 23, Act No. 228, it was enacted that fourteen days notice of every extraordinary meeting should be given to each shareholder, by inserting the same in six consecutive numbers of some newspaper published in Melbourne, and in six consecutive numbers of some newspaper in the neighbourhood of the place of operations of the Company; that such notice should be signed by the Manager, and should specify the place, the day, and the hour of meeting, and the nature of the business; otherwise that such meeting should not have power to transact any business, &c.

That section was the only one requiring notice of meetings.

Rule 9 was as follows:—

"The Board of Directors, or any twelve or more shareholders possessing collectively 6,000 shares, may at any time, by a requisition in writing addressed to the manager, require the manager to call an extraordinary meeting of the shareholders, and every such meeting shall be summoned or convened within sixteen days of such requisition being lodged with the manager or at the office of the Company."

By Rule 10 it was declared that at all meetings each shareholder should be entitled to one vote for every share held by him in the Company; that any shareholder might vote in person or by proxy; and that no law, resolution, or proceeding passed at any meeting should be impeached or invalidated on the ground that any person voting at any such

meeting was not entitled to vote thereat, or upon any other ground whatsoever, unless put forward at the time.

Rule 17 provided that a Board of Directors, consisting of five shareholders, should be elected at each general meeting of the Company, held in January and July in each year; that the Directors should continue in office until the next general meeting of the Company, when the three Directors receiving the lowest number of votes at the first general meeting should retire, but be eligible for re-election; and that the other Directors should retire at the next general meeting, but be subject to re-election. Provided that if, through any cause, the general meetings of the Company were not or could not be held at the time thereinbefore appointed for the holding of such meetings, then the Directors who would have retired if such meeting had been held should continue in office, and should in all respects be considered as re-elected.

The Rule also provided for any Director's vacating office, and for the appointment of a Director in his place.

By Rule 19 it was declared that the Board of Directors might make calls (subject to the limitations thereinafter provided) or declare dividends; that the powers of the Directors should not cease or be suspended so long as the Board of Directors should consist of a sufficient number of members to form a quorum.

By Rule 21 it was declared that three Directors shall form a quorum, and shall have and exercise all the powers and authorities vested in the Board of Directors generally, as fully and effectually as if all the Directors had concurred therein.

By section 5, Act No. 228, it was enacted that the amount of calls unpaid upon any share should be deemed a debt due from the holder of the share to the Company.

By Nos. 29 and 30 of the Company's rules it was declared that, if any shareholder should neglect or refuse to pay any such call for the space of one month from the day appointed for the payment of the same, the Directors should either proceed to enforce the payment thereof in manner prescribed by the Act 27 Vict., No. 228, or might proceed to declare the shares of such defaulting shareholder forfeited at any Board meeting to be held after the

expiration of six weeks from the day appointed for the payment of such call, and upon such declaration of forfeiture such defaulting shareholder should cease to be a shareholder in the Company in respect of the shares so forfeited, and such shares and all benefit or emolument arising therefrom should vest in and become the property of the Company absolutely. Provided that no such forfeiture should be declared until seven days' notice of the intention of the Directors to forfeit such shares should be given to the defaulting shareholder, by advertisement, to be inserted in three consecutive issues of one of the daily newspapers published in Sandhurst.

On the 14th January, 1867, a general meeting of shareholders which had been duly convened (Record, pp. 16 and 21), and at which the Respondent was present, was held (Record, p. 53).

At that meeting Messrs. Ladams, Bruce, Ashley, Hunter, and Fernley were duly elected directors, Ashley, Hunter, and Fernley being the three who received the lowest number of votes.

Assuming Rule 17 to be valid, notwithstanding section 39 of Act No. 228 expressly authorized the shareholders to make rules for the *annual retirement* of directors, and not for the quarterly retirement of some of them, Ashley, Hunter, and Fernley ought to have retired at the next general quarterly meeting of shareholders held on the 11th April, 1867. At that meeting, however, no retirement in express terms took place. All that is recorded is that Messrs. Hunter and McLevy were then nominated as directors, and no other candidates being proposed, were declared *duly elected for the next six months.* Nothing is recorded as to Ashley's having retired and been re-elected, but it was contended in argument that as no other candidates than Hunter and McLevy were proposed, it is to be assumed that Ashley virtually retired and was re-elected.

It is not very important, in the view which their Lordships take of the case, whether Ashley legally continued to be a Director after that meeting or not.

It was held by a full bench of the Supreme Court that the Company could not, under the provisions of section 39, Act No. 228, legally make a rule for the continuance of Directors in office beyond the period of a year, as the Act required an annual retirement. Mr. J. Molesworth, however, appears to have enter-

tained a different opinion in the case of rules made before incorporation. He says :—

"A question arose under section 39, Act 228, in The Barfold Estate Gold Mining Company *v.* Klingender, 6 W. W. and A. B. 23, as to the power of a Company by rules before incorporation to enable their directors to hold office until their successors were appointed, although that time might exceed a year, and the Court, having regard to the words of the section, 'rules for the election, removal, and annual retirement of some or all of the directors,' held that there was no such power. As to the Garden Gully Company, its rules were assented to before incorporation, and a reference to its rules was contained in the application for registration, so that, according to my opinion, a rule for the continuance of directors to hold office for more than a year, if no successors were appointed, would be valid; but I should consider myself bound by the case Barfold Estate v. Klingender. It is unnecessary to discuss the points in which the full Court differed from me as to the construction of the rules of the Garden Gully Company in Schmidt *v.* Garden Gully Company. Upon the following points we were agreed. That there must be properly appointed directors to make a call, and also to declare a forfeiture, and also that the election of five directors, a full board, at a quarterly meeting, April 14, 1869, was invalid under the rules. The rules contained no provision for their electing five; and I would say that those, if any, who legally held office before that election, taking as under the election, could not be deemed to act under their former title, but the full Court said as to the argument, that it was competent to any general meeting to elect a full board if there was no board in existence. 'We do not mean to say that the general meeting in question could not have elected a full board if proper notice had been given of the intention to do so.' Now in this case there is evidence which was not in Schmidt's case, that an advertisement was inserted in the 'Bendigo Advertiser,' 8th, 10th, and 13th April, that the half-yearly general meeting of shareholders would be held at the office on the 14th, for the purpose of receiving report and balance sheet, electing a full board of directors, and for general business, and it has been argued that this might be a proper notice according to the view of the full Court. I think that where all directors *de facto* are not legally appointed, there must necessarily be some way for a Company to supply the defect, and that I think might be an extraordinary meeting convened under 228, section 23, that is, by fourteen days' notice, advertised in town and country newspapers, or by a quarterly meeting regularly convened, and having express notice of the object under the 8th rule of the Company, which requires the giving of due notice under Act 228, that is, the same as is provided for an extraordinary meeting under it."

If the decision of the full bench in the Barfold Estate case was correct, the five Directors appointed in January 1867 ceased to exist in January 1868, in which month they ought to have retired, and a new election to have taken place. But assuming,

without expressing any opinion upon the subject, that Rule 17 was valid, and that the Company had power to provide for the retirement of some of the Directors at the general meetings to be held in April and October respectively, and to declare that in the event of any general meetings not being held, the Directors who ought to have retired at such meeting should continue in office, and in all respects be considered as re-elected; assuming, also, that by virtue of what took place at the meeting of the 11th April, 1867, Messrs. Ladams, Bruce, Ashley, Hunter, and Mc Levy, then constituted a legal Board of Directors, the question is, Did Messrs. Hunter, Bruce, and Ashley, who declared the forfeiture at the meeting held on the 18th June, 1869, at that time constitute a valid Board.

Of those three, Hunter, it must be borne in mind, had been elected at the meeting of the 11th April, 1867, expressly "*for the next* six *months*," and Ashley had continued to act as Director, as already pointed out, without having expressly retired or been re-elected at the meeting of the 11th April, 1867.

No general meeting was held between the 11th April, 1867, and the 14th April 1869. On the 8th, 10th, and 13th days of April, 1869, an advertisement was published in the "Bendigo Advertiser," stating that the half-yearly general meeting of shareholders would be held on Wednesday the 14th of April, 1869, *for the purpose of electing a full board of Directors*, and for general business; and at that meeting a full board, consisting of Messrs. Bruce, Glover, Hunter, Ashley, and Wormald were elected.

The entry is as follows (Record, p. 54):—

"Company's Office, 14th April, 1869.

"General Meeting of Shareholders.

"Present:—Mr. Bruce in the Chair, Messrs. Hunter, Ashley, Fernly, Phillipi, Pay, Saunders, and Schumacher.

"The minutes of meetings of 14th January, 1867, 11th April, 1867, and of special meeting of 23rd October, 1868, were read, and on the motion of Mr. Hunter, seconded by Mr. Ashley, were confirmed.

"The meeting then proceeded to the election of a full Board of Directors, when the following gentlemen were nominated, Messrs. Bruce, Glover, Hunter, Ashley, and Wormald.

"There being no other candidate, it was moved by Mr. Con-

nelly, seconded by Mr. Schumacher, that the above-named gentlemen be appointed directors. Carried.

"The chairman then declared Messrs. Bruce, Glover, Hunter, Ashley, and Wormald, duly elected directors of the Company.

"Moved by Mr. Connelly, seconded by Mr. Schumacher, that the matter of forfeiture of shares be left in the hands of the directors to do as they may think fit. Carried.

"That Resolution was confirmed on the 14th October, 1869."

It is clear that, according to Rule 17, the election of a fresh Board of Directors was not the proper or ordinary business to be held at the general quarterly meetings in April or October. That was the proper business for the general meetings in January and July. The proper business for the April and October meetings was the retirement of the three Directors who received the lowest number of votes at the January and July meetings respectively, and the election of others in their place. If the five persons who were directors on the 11th April, 1867, are to be deemed to have been re-elected prior to the meeting of the 14th April, 1869, they must, according to Rule 17, be deemed to have been re-elected at a general meeting in January, 1869, for they ought to have retired at that meeting if it had been held; and in that case, if they had been re-elected, the three who had received the lowest number of votes (and which were those three it is impossible to say) ought to have retired at the meeting of the 14th April, 1869.

It would be a strong measure under any circumstances to hold that Hunter, who, in April 1867, was in express terms elected for *six months only*, continued in office for two years. But the advertisement for the meeting in April, 1869, was express that the meeting would be held *for the election of a full board of Directors* (page 52), and at that meeting a full board was elected.

Their Lordships cannot treat the proceedings at the meeting of the 14th April, 1869, as having any other operation than that of an election of a full Board of five Directors. They concur in the opinion expressed by Mr. Justice Molesworth, that those, if any, of the five Directors who before that election legally held office, could not, after that election, act under their former title. The election of a full Board necessarily involved the retirement of those, if any, who, up to that time, legally held the office of Director.

If the meeting of the 14th of April, 1869, is to be considered as an extraordinary meeting, fourteen days' notice of the meeting, and of the nature of the business to be transacted at it was necessary, and ought to have been published according to the provisions of section 23 of Act No. 228. If it is to be considered as the quarterly general meeting directed by Rule 8 to be held in the month of April, a similar notice was necessary under the provisions of that rule and of section 23, Act No. 228 above quoted, especially as the business of electing a full Board of Directors was not any part of the business of a meeting held in the month of April.

In any view, the meeting of the 14th April, 1869, was held without due notice of the meeting and of the business to be transacted thereat; and their Lordships are of opinion that the election of a full Board of Directors at that meeting, upon which the Defendants relied in their answer, was invalid, and that the persons so elected had no power to declare a forfeiture. The forfeiture of the 18th June, 1869, was consequently invalid, whether Rule 17 was a valid rule or not; for if it was invalid, Hunter, Bruce, and Ashley ceased to be Directors after one year from the date of their appointments. Such forfeiture was, therefore, properly declared void by the Decree of the 8th October, 1874, from which this Appeal is preferred.

It was contended at the Bar, on behalf of the Appellants, that the Colonial Act of the 29th December, 1869, rendered all forfeitures valid. The object of that Act was to authorize any Company, registered under Act No. 228, to make rules, in the manner pointed out by the 39th section, for the forfeiture of shares, and to declare that any such Company should be deemed to have had such power. Section 2 rendered valid all forfeitures of shares made in conformity with such rules which would have been valid if the Company, at the time of declaring such forfeitures, had had the power, under any rules, of declaring forfeitures; and section 4 expressly enacted that nothing theretofore contained should be deemed to confer upon any person any right or remedy which he would not have possessed, if the power to make rules for

the forfeiture of shares had been contained in the said first-mentioned Act.

It is perfectly clear that a declaration of forfeiture invalid under the rules of the Company was not rendered valid by that Act.

It was further contended that, by virtue of Rule 10, the resolution passed at the meeting of Directors of the 18th June, 1869, by which the shares were declared forfeited, could not be impeached, upon any ground; but that rule applied to meetings of shareholders, and not to Meetings of the Directors, or to resolutions passed at a meeting of Directors; and it is evident that such rule could not have been and was not intended to extend to resolutions passed at invalid meetings, or to resolutions which were *ultra vires.* If it could by possibility apply to such meetings, it would itself be *ultra vires* as enabling the Directors to violate the provisions of Act No. 228.

The case was argued very elaborately and with great ability on both sides. Two points were raised on behalf of the Appellants which do not appear to have been even suggested in the Court below. They were certainly not set up by the answer, or even adverted to by the Court in the judgment or in the decree.

They are, 1st, That the Plaintiff's shares were forfeited by a resolution of a Board of Directors on the 23rd August, 1867.

2ndly. That the conduct of the Plaintiff amounted to a waiver or abandonment of his shares, and precluded him from contending that they had not been forfeited, or that he continued to be the proprietor of them.

It appears that on the 26th July, 1867, an extraordinary meeting of shareholders was advertised for the purpose, amongst other things, of considering what action was best to be taken with defaulting shareholders; that on the 16th August in that year an extraordinary meeting was held, at which the Plaintiff was present by proxy, and that it was there proposed and carried unanimously that the Directors should be, and were thereby empowered to forfeit any shares on which calls were owing within fourteen days from that date, if they should deem the same advisable; and that at a meeting of Directors

held on the 23rd August, 1867, it was proposed and carried that, in accordance with the resolution passed at the meeting of the 16th August, the shares of the Plaintiff and of certain other specified shareholders should be, and were thereby declared forfeited for non-payment of calls, and that their interest in the Company should cease. It was contended on behalf of the Plaintiff that, as by Rule 30, it was provided that no forfeiture should be declared until seven days' notice should have been given to the defaulting shareholder by advertisement to be published, as therein mentioned, of the intention of the Directors to forfeit such shares, an advertisement of the intention to forfeit the shares ought to have been issued before the forfeiture was declared: on the other hand, the Defendants contended that no such advertisement was necessary, at least so far as the Plaintiff's shares were concerned, inasmuch as he was present by proxy at the meeting at which power was given to the Directors. It is clear, however, that the meeting neither gave nor intended to give power to the Directors to forfeit shares in a manner contrary to the express provisions of the rules, and that the meeting had no power to do so. It was not the intention of the Plaintiff, voting by proxy, or of the other shareholders present, that the Plaintiff's shares, or those of any other shareholders present, should be forfeited in a manner different from that which would be binding upon other shareholders who were not present; and their Lordships are of opinion that, notwithstanding the resolution passed at the meeting of the 16th of August, every shareholder, including those present at that meeting, was entitled under Rule 30 to seven days' notice to enable him to pay his calls before a forfeiture of his shares could be declared; and that the forfeiture declared on the 23rd of August, 1867, was invalid.

As to the second point, it appears that at a meeting, held on the 21st May, 1869, at which Messrs. Hunter, Bruce, Ashley, and Wormald were present, and acted as Directors, and upon whose, or some of whose, proceedings the Appellants relied, both in their answer and at the hearing in the Court below, it was stated by the manager that the forfeiture of the shares already made, alluding to the

forfeiture of the 23rd August, 1867, was not legal, inasmuch as the clause in the Company's deed requiring the shares to be advertised had not been complied with, whereupon it was moved and carried that the manager should be instructed to advertise the forfeiture of all shares on which the shilling call (that is the fifth call) has not been paid, unless the same and all back calls should be paid within twelve days from the date of the advertisement; that an advertisement was accordingly published on the 28th, 29th, and 30th May, 1869, stating that, amongst others, the Plaintiff's shares would be forfeited, unless the calls were paid within twelve days from that date.

It is clear that as late as the 30th May, 1869, it was considered by the Manager and by a Board of persons acting as Directors, upon whose acts the Company rested their case, that the Plaintiff's shares had not been legally forfeited, and that twelve days were given him to pay his calls. Up to that time, therefore, he cannot be treated by the Appellants as having abandoned his shares, or as having done anything to preclude himself from contending that they had not been forfeited, and that he was not the legal proprietor of them.

There is no evidence sufficient to induce their Lordships to hold that the conduct of the Plaintiff did amount to an abandonment of his shares, or of his interest therein, or estop him from averring that he continued to be the proprietor of them. There certainly is no evidence to justify such a conclusion with regard to his conduct subsequent to the advertisement of the 30th May, 1869. In this case, as in that of Prendergast *v.* Turton (Young and Collyers' Chancery Cases, p. 98), the Plaintiff's interest was executed. In other words, he had a legal interest in his shares, and did not require a declaration of trust or the assistance of a Court of Equity to create in him an interest in them. Mere laches would not, therefore, disentitle him to equitable relief. (Clark and Chapman *v.* Hart, 6 House of Lords' Cases, 633.) It was upon the ground of abandonment, and not upon that of mere laches, that Prendergast *v.* Turton was decided. In March 1870 the Plaintiff claimed his shares, and tendered the amount of his calls. The delay after that date

in filing his bill was not evidence from which a waiver or abandonment of his right can be fairly inferred.

There was some evidence as to statements having been made by the Respondent to the effect that he would allow his shares to be forfeited, as he could buy them for less than his calls; that the Company might forfeit them, and that he did not see why they did not, and the like. The Respondent denied that he ever made the statements imputed to him. The Court below expressed no opinion upon that part of the case; nor was it necessary, as the point of abandonment, or estoppel, was not set up by the answer; nor, so far as it appears, at the hearing in that Court. Besides, the conversations in which the Plaintiff is alleged to have made those statements were long prior to the 30th May, 1869, when the advertisement appeared giving the Plaintiff twelve days to pay his calls.

Their Lordships are not disposed to hold parties too strictly to their pleadings in the Lower Courts; but they consider that it would be an act of great injustice to allow defences to be set up in Appeal which have not been suggested or alluded to in the pleadings, or called to the attention of the Courts below. They do not, therefore, wish it to be understood that by hearing the learned Counsel for the Appellant, and by expressing an opinion upon points which were not raised in the Court below, they would have felt themselves justified in reversing the decision of the Court below, if they had considered that the points thus raised constituted a defence to the Plaintiff's claim.

Upon the whole, their Lordships are of opinion that the Judgment and Decree of the Supreme Court were correct; and they will, therefore, humbly advise Her Majesty to affirm them, and to dismiss this Appeal with costs.

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